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No. 97576-1

SUPREME COURT OF THE STATE OF WASHINGTON

DUANE YOUNG,

Petitioner,

v.

TOYOTA MOTOR SALES, USA,

Respondent.

AMICUS CURIAE BRIEF OF
NORTHWEST JUSTICE PROJECT

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I. INTRODUCTION

On May 23, 2019, Division III of the Washington Court of Appeals published *Young v. Toyota Motor Sales, U.S.A.*, 9 Wn. App.2d 26, 442 P.3d 5. The Opinion inserts a new element into the Consumer Protection Act, RCW 19.86 *et. seq.*, namely: that a consumer must prove that prohibited unfair or deceptive practices must be of “material importance” to lead to a recoverable injury. Particularly concerning, is the lower courts finding that an injury must also be “financially material”.

In the *Young* decision, the new “financial materiality” test was, in effect, applied as a novel affirmative defense, negating Mr. Young’s potential injury as too insignificant to render Toyota’s deception as actionable. Any test that judges the dollar value of an injury as a threshold to access the CPA as a remedy, contravenes the essential purpose of the CPA to redress low dollar injuries resulting from unfair or deceptive business practices. Requiring a showing of financial materiality will have a substantial negative impact on the low-income clients of the Northwest Justice Project (“NJP”). Low-income consumers are more likely to suffer low-dollar value injuries from predatory business practices. Small dollar losses have a greater impact on people who have less to begin with. As such, any test that discriminates against the dollar value of injuries, inherently and disproportionately negatively affects low-income

consumers. Indeed, this Court has long endorsed the good public policy of the CPA as a remedy for small dollar injuries caused by unfair or deceptive acts or practices. Division III's new "financially immaterial" defense risks reversing that long-standing public policy, replacing it with an outright endorsement that profitable but unfair or deceptive business practices are acceptable so long as each individual consumer is not harmed in a "financially material" way; a subjective test that has been left largely undefined.

NJP requests that this Court reverse Division III and restore the clarity and uniformity of this Court's prior and time-honored opinions that have declined to read an explicit materiality argument into the CPA; and specifically, reject any re-interpretation of the CPA that discriminates against small dollar losses resulting from unfair or deceptive acts or practices as "financially immaterial". *See e.g. Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 785, 719 P.2d 531, 535 (1986); *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 50, 204 P.3d 885, 896 (2009); *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 295 P.3d 1179 (2013). *See also Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 842 (2007).

II. INTEREST AND IDENTITY OF AMICI

NJP is a statewide not-for-profit organization that provides free civil legal services to low-income people throughout the state of Washington. In 2019, alone, the Northwest Justice Project provided legal assistance in 12,145 cases on behalf of low-income Washingtonians; 1,772 of those cases involved disputes related to consumer transactions. As a result, NJP has a significant interest in the outcome of this case, given the significant number of its clients, and an untold number of other low-income Washingtonians who will find relief under the CPA less assessible should Division III's published Opinion stand.

NJP submits this brief pursuant to RAP 10.1(e), 10.6, and 13.4(h).

III. STATEMENT OF THE CASE

NJP adopts the statement of the case of the Appellant, Mr. Young.

IV. ARGUMENT

A. THE CONSUMER PROTECTION ACT, UNFAIR OR DECEPTIVE ACTS INHERENTLY MATERIAL WHERE THEY CAUSE INJURY.

The purpose of the CPA is set out in RCW 19.86.920. That section reveals the Legislature's intent "to protect the public and foster fair and honest competition." In apparent response to the escalating need for additional enforcement capabilities, the State Legislature in 1971 amended the CPA to provide for a private right of

action whereby individual citizens would be encouraged to bring suit to enforce the CPA. RCW 19.86.090, as amended, first in 1971 and again in 1983, provides in relevant part:

Any person who is injured in his or her business or property by a violation of RCW 19.86.020 ... may bring a civil action ... to enjoin further violations, to recover ... actual damages ... or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may in its discretion ... award ... three times the actual damages ... not [to] exceed ten thousand dollars ...”

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 784, 719 P.2d 531, 534 (1986).

In *Hangman Ridge* this Court clarified that a private party seeking to enforce a CPA claim must establish five elements, drawn from RCW 19.86.090: the plaintiff must prove an “(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.”

Hangman Ridge, 105 Wn.2d 778.

The *Young* opinion assumes that this Court will adopt materiality, either as a sixth element or as an explicit consideration to either the first or fifth elements. But, as the concurrence points out, it is already true that “A lack of materiality will generally preclude recovery under the [CPA] because of the act’s fourth and fifth elements of injury and causation.” *Young*, 9 Wn.App.2d at 43 (Fearing, J. concurring).

In *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 83, 170 P.3d 10 (2007), this Court adopted the proximate cause standard in WPI 15.01 to establish the causation element. Thus, the plaintiff must establish that “but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered an injury.” *Indoor Billboard/Wash., Inc.*, 162 Wn.2d at 83.

Indeed, the majority opinion in *Young* also seems to recognize that the functional purpose of a materiality element is satisfied to the extent Mr. Young has proven injury and causation, where its reasoning relies on first negating Mr. Young’s injury as “financially immaterial.” *Young v. Toyota*, 9 Wn. App 26, 35-6, 442 P. 3d 5, 10 (“The trial court’s unchallenged finding was that the temperature gauge represented \$10 in value, as compared to the \$7,525 cost of the 2014 model limited package. This unchallenged evidence establishes that Toyota’s error was financially immaterial”). With this holding, the *Young* court applied the “financially immaterial” test as an affirmative defense to negate established elements of injury and causation and was then able to reintroduce considerations of materiality as a sub-element of deception.

“Financially material” appears to be a novel requirement that lacks precedent from other jurisdictions who have interpreted their statutes to have an explicit materiality element. NJP has grave concern that any

standard that objectively or subjectively measures the value of a dollar as an injury, as a prerequisite to relief under the CPA, will disproportionately close the courthouse doors for low-income people, who are also the most vulnerable class of consumers.

1. The Purpose of the Consumer Protection Act is Furthered by Ensuring Recovery for Small Dollar Claims, Inserting a “Financially Irrelevant” Element is Contrary to That Purpose.

The purpose of the consumer protection act is to “protect the public and foster fair and honest competition,” and the statute should be liberally interpreted to further those ends. RCW 19.86.92. Ensuring that consumers with small dollar injuries can hold predatory or dishonest businesses liable furthers that purpose. The CPA as enacted and as interpreted by this Court and others, has never required proof of any element to be screened through a financially material test. To the contrary, Washington Courts have repeatedly acknowledged that even losses of small sums are actionable. *See Panag*, 166 Wn.2d 27, 58–59, 204 P.3d 885 (2009); *see also Moritz v. Daniel N. Gordon*, P.C., 895 F. Supp. 2d 1097 (W.D. Wash. 2012) (injury to property satisfied by proof of \$7.75 charge to send a certified letter), *Banuelos v. TSA Washington, Inc.*, 134 Wash. App. 607, 608, 141 P.3d 652, 653 (2006) (interest of \$4.27 for loss of use of money constitutes injury to property).

The Opinion below does not cite authority, precedent, policy, or treatises from Washington or any other jurisdictions, to support a policy that CPA claims should be screened for financial materiality. The cases cited by Division III as authority to import a general materiality element, also do not suggest a threshold value for a claim to be “financially material”. See *F.T.C. v. Cyberspace.Com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006)(no discussion of financial materiality for unfairly charging consumer \$19.95 or \$29.95); *F.T.C. v. Gill*, 265 F.3d 944, 956 (9th Cir. 2001)(no discussion of financial materiality for deceptive advertising and unreasonable credit repair fees); *Kraft, Inc. v. F.T.C.*, 970 F.2d 311, 326 (7th Cir. 1992) (false advertising nutritional value of cheese like product *likely* result in some injury to consumers without discussion whether the likely injury was financially material); *Corder v. Ford Motor Co.*, 285 F. App'x 226, 233 (6th Cir. 2008) (dismissed for failure to prove any “ascertainable loss”; the CPA equivalent to an injury to business or property).

Division III’s Opinion in *Young*, where it factors the size of a potential injury as an element or sub-element of a CPA claim, is also in direct conflict with prior opinions of this Court which have repeatedly endorsed the CPA as a vehicle to address small dollar injuries of consumers caused by unfair or deceptive business practices. The CPA

may be the only means for consumers to redress small dollar injuries. This Court has already recognized that access to the courts to pursue small dollar claims is an important part of the CPA. In *Dix v. ICT*, this Court, in reviewing restrictive forum selection clauses, recognized that -

“[g]iven the importance of the private right of action to enforce the CPA for the protection of all the citizens of the state, we conclude that a forum selection clause that seriously impairs a plaintiff’s ability to bring suit to enforce the CPA violates the public policy of this state. It follows, therefore, that a forum selection clause that seriously impairs the plaintiff’s ability to go forward on a claim of small value by eliminating class suits in circumstances where there is no feasible alternative for seeking relief violates public policy and is unenforceable.”

Dix v. ICT Grp., Inc., 160 Wn.2d 826, 837, 161 P.3d 1016, 1022 (2007).

In *Dix*, overly restrictive contractual forum selection clauses threatened the recognized public policy of allowing small dollar claims to proceed unimpaired. The Opinion below directly attacks that good public policy by requiring that claims be “financially material.” This Court should recognize the public policy of ensuring access to the courts to pursue small dollar claims in this context and reject the financial materiality requirement imposed below.

Small dollar losses, suffered by a large class of people, can add up to significant profits for business. Subsequent to *Dix*, the U.S. Supreme Court significantly restricted consumers from pursuing class actions in the face of arbitration clauses commonly found in consumer adhesion

contracts. See *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 131 S. Ct. 1740, 179 L. Ed. 2d 742 (2011). As such, many consumers are left with injuries too small to justify a filing fee and contractually barred from pursuing collective class relief under CR 23.

A policy of dismissing CPA claims subjectively deemed “financially immaterial” risks leaving large numbers of consumers, each cheated small amounts of money by large corporations, without a viable remedy. Such a policy would also further encourage large corporations to maximize profits by engaging in unfair or deceptive conduct engineered to generate dishonest income at whatever acceptable level is established as “financially immaterial.” This is the opposite of the purpose of the CPA, and the important public policy of redressing low dollar consumer injuries.

2. “Financial Materiality” is Highly Impractical.

The Opinion below leaves trial court and litigants with no guidance about how to calculate financial materiality, if it survives. As Mr. Young’s case highlights, this is likely to be highly problematic. Mr. Young claimed an injury based on his lost time, expenses, and the cost of obtaining a conforming part. *Report of Proceedings*, p. 91, 110, 141, 352-3. Toyota calculated his potential injury by comparing their market analysis of what a consumer would pay for the advertised feature and what its competitors were charging for similar products. *Id.* at 316-318. The

Court of Appeals accepted Toyota's calculation of Mr. Young's potential dollar value loss as \$10 and calculated financial immateriality by weighing that sum against the dollar value of the overall transaction. *Young*, 9 Wn. App at 35-6.

But, the trial court does not appear to have actually made any findings salient to this test at all; it ruled very clearly that Mr. Young failed to prove that he *relied*¹ on the Monterey labels misrepresentation as the predominate factor in his purchasing decision. *Memorandum and Decision*, CP 377-423. The trial court's Trial Memorandum and Decision did not calculate loss, potential loss, or what dollar sum would be financially material to the transaction at all.²

¹ CP 409 (considering the weight of Mr. Young's testimony that he relied on the Monterey label and that the temperature gauge was a factor in his decision to purchase the Tacoma); CP 411-3 ("But the question I ask is, does the other evidence in this case support Mr. Young's assertion that [the temperature gauge] was any sort of a significant factor that induced him to buy this vehicle..."); CP 419 ("I would also restate, based upon my prior analysis, that I cannot conclude, more probably than not, that Mr. Young's reliance on a mistaken website is the proximate cause of his decision to purchase the Toyota Tacoma Limited Package, and, therefore, caused him damages. I am finding for Toyota regarding the CPA claim."); CP 423 (Order dismissing, Mr. Young did not prove by clear, cogent and convincing evidence that his reliance on the information was reasonable").

² Division III appears to have inferred the findings that Mr. Young's injury was \$10, and that a \$10 deceptive practice is "financially immaterial to justify CPA relief. But, the trial court did not reach either of these conclusions in its all-or-nothing dismissal for lack of reliance. Without these findings, a "financial immaterial" test cannot determine the outcome in this case. In its ordinary role as a reviewing court, an appellate court does not make findings of fact. CR 52(a), *see also King County Emp. Ass'n v. State Emp. Retirement Bd.*, 54 Wn.2d 1, 5, 336 P.2d 387 (1959) ("appellate court-not a trier of the facts ... has no power to enter any findings of fact.");

Nevertheless, a review of the trial transcript shows these were disputed issues. Toyota's employees testified that the temperature gauge was not actually a \$10 value, or a \$10 part. Report of Proceedings, p.352-3. But instead that sum represented the difference in the MSRP as calculated by Toyota's marketing team through a *confidential and proprietary process* reviewing studies of the new car sales marketplace and "primarily what the customer base is willing to pay and what other manufactures are charging" Report of Proceedings, p.352-3.

To the contrary, the trial court did not permit questioning of Mr. Young as to his understanding, from contacting aftermarket installers, of the cost of installing a conforming rear view mirror to what was advertised (\$500). *Id* at 110. Mr. Young also testified that in addition to substantial lost time, he incurred mileage from Burlington, Washington, to Eugene Oregon, airfare costs of \$300, travel meals of approximately \$20 and investigatory attorney fees of \$600. *Id.* at p. 91, 110, 141, CP 383. Further, for another customer and member of the putative class, Toyota provided an additional extended warranty valued by Toyota at \$1,300 to remedy the same false Monterey label. *Id.* at 316-318. Mr. Young was not offered similar compensation because he was apparently not as valuable a customer. *Transcript.* at 327, CP 403. Since the trial court

dismissed on reliance, it did not make findings regarding the scope of Mr. Young's recoverable injuries.

In addition, it is unclear whether the relative materiality of a financial injury is to be measured based on the benefit in any one case to the business or the harm in any one case to the consumer. Neither is the material difference of the value of money to different people discussed. For example, for a multi-billion-dollar international auto manufacturer like Toyota, \$10 might not be a material amount of money. For low-income consumers, that sum represents nearly an hour of work at minimum wage.

Should Toyota matter more in the eyes of this Court simply because it has more?

V. CONCLUSION

This Court never has recognized materiality as a specific element to the CPA. Adopting the unduly vague "financially material" threshold will ensure that low-income consumers lose the protection of the CPA against predatory business practices when defendants deem those consumer losses "minimal". Accordingly, this Court should reject Division III's "financially material" test to the CPA's injury element, or any other element.

RESPECTFULLY SUBMITTED this 10th day of April, 2020.

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CERTIFICATE OF SERVICE

I certify under penalty of perjury under the laws of the State of Washington that on the 10th day of April, 2020, I caused the foregoing document to be filed with the Supreme Court of Washington, and to be served on the Attorneys of Record, via the Washington State Court's Portal.

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