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No. 97576-1

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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DUANE YOUNG,

Plaintiff/Petitioner,

vs.

TOYOTA MOTOR SALES, INC.,

Defendant/Respondent.

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BRIEF OF AMICUS CURIAE  
WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

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## TABLE OF CONTENTS

	<b>Page</b>
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	1
III. ISSUES PRESENTED	4
IV. SUMMARY OF ARGUMENT	4
V. ARGUMENT	5
A. Overview: The CPA And The Public Interest Requirement.	6
1. A brief overview of the Washington CPA.	
2. The unique role of the public interest requirement under the Washington CPA.	10
B. The Court Should Reject The Court Of Appeals Materiality Requirement Because It Is Unsupported By The Text Of The CPA And Is Incompatible With The <i>Hangman Ridge</i> Test.	14
C. The Court Should Clarify That Causation Under The CPA Does Not Require Proof Of Reliance, And That A Plaintiff May Establish The Requisite Causal Link Under The CPA By Proof That But For The Defendant's Deceptive Conduct, The Plaintiff Would Not Have Sustained The Injury.	19
VI. CONCLUSION	20

## TABLE OF AUTHORITIES

	Page(s)
<b>Cases</b>	
<i>Ambach v French</i> , 167 Wn.2d 167, 216 P.3d 405 (2009).....	8
<i>Anhold v. Daniels</i> , 94 Wn.2d 40, 614 P.2d 184 (1980).....	11, 12
<i>Department of Ecology v. Campbell &amp; Gwinn, LLC</i> , 146 Wn.2d 1, 43 P.3d 4 (2002).....	14
<i>Five Corners Family Farmers v. State</i> , 173 Wn.2d 296, 268 P.3d 892 (2011).....	14
<i>Frias v. Asset Foreclosure Services, Inc.</i> , 181 Wn.2d 412, 431, 334 P.3d 529 (2014).....	10, 18
<i>FTC v. Indiana Fed’n of Dentists</i> , 476 U.S. 447, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986).....	17
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778, 719 P.2d 531 (1986).....	passim
<i>Hiner v. Bridgestone/Firestone, Inc.</i> , 91 Wn. App. 722, 959 P.2d 1158 (1998), <i>rev’d on other grounds</i> , 138 Wn.2d 248, 978 P.2d 505 (1999).....	15, 16
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wn.2d 59, 170 P.3d 10 (2007).....	7, 10, 19
<i>Klem v. Washington Mutual Bank</i> , 176 Wn.2d 771, 295 P.3d 1179 (2013).....	8
<i>Lightfoot v. MacDonald</i> , 86 Wn.2d 331, 544 P.2d 88 (1976).....	10, 11
<i>Medcalf v. State, Dep’t of Licensing</i> , 133 Wn.2d 290, 944 P.2d 1014 (1997).....	18
<i>Panag v. Farmers Ins. Co.</i> , 166 Wn.2d 27, 204 P.3d 885.....	passim

<i>Potter v. Wilbur-Ellis Co.</i> , 62 Wn. App. 318, 814 P.2d 670 (1991).....	16
<i>Schnall v. AT&amp;T Wireless Services, Inc.</i> , 171 Wn.2d 260, 259 P.3d 129 (2011).....	10, 19
<i>Scott v. Cingular Wireless</i> , 160 Wn.2d 843, 161 P.3d 1000 (2007).....	7, 18
<i>Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.</i> , 64 Wn. App. 553, 825 P.2d 714 (1992).....	19
<i>Standard Distributors v. Federal Trade Commission</i> , 211 F.2d 7 (2nd Cir. 1954).....	17
<i>State v. Ervin</i> , 169 Wn.2d 815, 239 P.3d 354 (2010).....	14
<i>State v. LA Investors, LLC</i> , 2 Wn. App. 2d 524, 410 P.3d 1183 (2018).....	7
<i>State v. LG Electronics</i> , 186 Wn.2d 1, 375 P.3d 636 (2016).....	6, 16
<i>State v. Reader's Digest Ass'n</i> , 81 Wn.2d 259, 501 P.2d 290 (1972).....	8
<i>Testo v. Russ Dunmire Oldsmobile, Inc.</i> , 16 Wn. App. 398, 554 P.2d 349 (1976).....	16
<i>Trujillo v. Northwest Trustee Services, Inc.</i> , 183 Wn.2d 820, 355 P.3d 1100 (2015).....	9
<i>Young v. Toyota Motor Sales, Inc.</i> , 194 Wn.2d 1023, 455 P.3d 141 (2020).....	4
<i>Young v. Toyota Motor Sales, U.S.A.</i> , 9 Wn. App. 2d 26, 442 P.3d 5 (2019).....	passim

**Statutes**

15 U.S.C. § 45 (FTCA).....	10, 17
15 U.S.C. § 45(a)(4)(A)(ii).....	17

Chapter 19.86 RCW .....	1
Laws of 1961, ch. 216, § 8.....	6
Laws of 1961, ch. 216, § 20.....	10
RCW 7.70.050(1)(a) .....	19
RCW 9A.72.020(1).....	19
RCW 19.100.170(2).....	19
RCW 19.86.010(2).....	9
RCW 19.86.020 .....	passim
RCW 19.86.090 .....	passim
RCW 19.86.093 .....	13, 15, 18
RCW 19.86.920 .....	passim
RCW 21.20.010 .....	19
RCW 46.70.180 .....	2, 3

### Other Authorities

Carol Safron Gown, <i>Private Suits Under Washington’s Consumer Protection Act: The Public Interest Requirement</i> , 54 Wash. L. Rev. 795 (1979).....	18
Jonathan A. Mark, <i>Dispensing with the Public Interest Requirement in Private Causes of Action under the Washington Consumer Protection Act</i> , 29 Seattle U. L. Rev. 205 (2005) .....	13, 17
Note, <i>On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act</i> , 144 U. Puget Sound L. Rev. 143 (1986).....	13
WPI 15.01 .....	10, 20
WPI 310.07 .....	20

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is a not-for-profit corporation organized under Washington law, and a supporting organization to Washington State Association for Justice. WSAJ Foundation operates an amicus curiae program and has an interest in the proof requirements under Washington’s Consumer Protection Act, Chapter 19.86 RCW (CPA).

## **II. INTRODUCTION AND STATEMENT OF THE CASE**

Plaintiff Duane Young (Young) brings this CPA action for alleged misrepresentations made by Toyota Motor Sales, Inc. (Toyota) regarding the features included with one of its vehicles. The facts are drawn from the Court of Appeals opinion and the briefing of the parties. *See Young v. Toyota Motor Sales, U.S.A.*, 9 Wn. App. 2d 26, 442 P.3d 5 (2019), *review granted*, 194 Wn.2d 1023 (2020); Young Pet. for Rev. at 5-7; Toyota Ans. to Pet. for Rev. at 4-10; Young Supp. Br. at 6-7; Toyota Supp. Br. at 5.

For purposes of this amicus brief, the following facts are relevant. In 2013, Young was in the market for a mid-sized pickup truck. While shopping online, he learned of an options package that could be purchased with the 2014 Toyota “Tacoma.” The “Limited” package cost \$7,660 and included an “auto dimming rearview mirror with outside temperature gauge.” Young Pet. for Rev. at 5. Young, who resided in Eugene, Oregon, eventually found the vehicle he wanted at Foothills Auto Center in

Burlington, Washington. Young purchased the truck over the phone, flew to Burlington and drove the truck back home to Eugene.

Young subsequently received a letter from Toyota, informing him that his truck did not contain the temperature gauge. In addition to the inaccurate information contained in online advertising, the truck's "Monroney label," a sticker detailing specified vehicle information that must be placed on all new vehicles, incorrectly stated that the vehicle's rearview mirror included the outside temperature gauge. In the letter, Toyota stated that this feature was not available for the model Young purchased. The feature had apparently been included in the 2013 model, but removed from the package for the 2014 model. While the information for the 2014 model incorrectly indicated the gauge was included, the price for the 2014 package did not include the \$10 cost for the gauge.

Toyota offered Young \$100. Young rejected Toyota's offer and contacted a customer service representative at Toyota. The representative offered to have the mirror installed, but indicated that it would not include the same warranty applicable to other components of the vehicle that had been installed at the factory. Young rejected the offer and hired an attorney, and Toyota offered to settle the matter for \$500. Young declined.

Young thereafter filed this action, asserting fraud, negligent misrepresentation, a direct CPA claim and a *per se* CPA claim based on violation of RCW 46.70.180 (unfair or deceptive acts or practices of vehicle dealers and manufacturers). He also sought class certification, which the

trial court denied. Toyota filed a motion for summary judgment, and Young filed a cross-motion for partial summary judgment as to the CPA claim. The court granted Toyota's summary judgment motion as to the fraud claim, but otherwise denied the motions. The case proceeded to a bench trial.

At trial, Young testified that in choosing his truck, he relied upon and was motivated by the online advertisements indicating the temperature gauge would be included with the package he purchased. Toyota offered testimony generally stating that it acted reasonably to correct its error once it was discovered. The trial court subsequently issued findings of fact and conclusions of law, ruling in favor of Toyota. With respect to the CPA, the court held that Young's claim had failed to meet all five of the elements of a CPA claim as established in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986).

Young appealed and the Court of Appeals affirmed. Regarding the CPA claim, the court addressed only the first and fifth elements of a CPA claim: an unfair or deceptive act or practice, and causation. Regarding the first element, the appellate court focused on what constitutes a "deceptive act or practice," and held that Young had failed to meet this element because he "failed to prove Toyota's error was of material importance." *See Young*, 9 Wn. App. 2d at 36. The Court of Appeals relied on the same "materiality" reasoning to also reject Young's *per se* CPA claim based on violation of RCW 46.70.180. *See id.*, 9 Wn. App. 2d at 38. Regarding causation, the court accepted the trial court's findings that Young did not act in reliance

on Toyota's misrepresentation. It also agreed that Young's injuries were caused by Toyota's letter informing him of the omission, not by its original deceptive representations. *See id.* at 38-40.

Young petitioned for review, which this Court granted. *See Young v. Toyota Motor Sales, Inc.*, 194 Wn.2d 1023, 455 P.3d 141 (2020) (Table).

### **III. ISSUE PRESENTED**

- (1) Whether a plaintiff asserting a CPA claim based on a deceptive act or practice who has otherwise satisfied the five *Hangman Ridge* elements must separately prove the misrepresentation involved a matter of "material importance."
- (2) In a private CPA action involving alleged affirmative misrepresentations, what proof is necessary to establish the requisite causal link between the deceptive act and the injury?

### **IV. SUMMARY OF ARGUMENT**

The Washington CPA was enacted in 1961 to protect the public and foster fair and honest competition, and is to be liberally construed to effectuate this purpose. In 1971, the Legislature added a private right of action, empowering plaintiffs to act as private attorneys general to aid in enforcement of the CPA. In its seminal decision in *Hangman Ridge*, this Court held that to establish a violation of the CPA, a private plaintiff must prove 1) an unfair or deceptive act or practice, 2) occurring in trade or commerce, 3) that impacts the public interest, 4) injury to the plaintiff's business or property, and 5) causation. A plaintiff asserting a deceptive act or practice need not prove intent to deceive; capacity to deceive a substantial portion of the public is sufficient.

Washington's requirement that private plaintiffs prove public interest impact is unique, and has at times been subject to criticism. Despite this, the Legislature in 2009 amended the CPA to codify the public interest requirement and to establish the ways this element may be satisfied. Unless public interest is established *per se* by reference to a statute, a private plaintiff must prove that the defendant's conduct actually injured other persons, had the capacity to injure other persons, or has the capacity to injure other persons. This requirement captures the Legislature's intent that plaintiffs function as private attorneys general to protect the public and to aid in fostering fair and honest competition. If a plaintiff who has been injured by a defendant's deceptive act is able to prove that the defendant's deception also had the capacity to deceive a substantial portion of the public, and that this deception actually injured, or has the capacity to injure, the public, such conduct necessarily constitutes a matter of material importance within the meaning of the CPA.

Finally, to the extent the Court of Appeals suggested reliance is necessary to establish causation, it misstated the law and threatens to create confusion. This Court should reaffirm that under the CPA, proximate cause may be shown by proof that but for the defendant's deceptive conduct, the plaintiff would not have suffered injury, and that reliance is not required.

## **V. ARGUMENT**

### Introduction:

The central question presented in this case is whether the five elements announced in *Hangman Ridge* are sufficient to state a claim under Washington’s CPA, or whether this Court should adopt a sixth “materiality” prong to the *Hangman Ridge* test. In a related vein, the Court of Appeals suggests that reliance may be necessary in establishing causation under the CPA. According to the Court of Appeals’ analysis, a plaintiff asserting a deceptive act or practice who has otherwise satisfied the elements of a CPA claim must also establish that the defendant’s misrepresentation concerned something of “material importance.” This holding ignores that the existing elements of a CPA claim as announced in *Hangman Ridge* capture the Legislature’s intent in defining conduct that violates the CPA, and neither the language of the CPA nor this Court’s jurisprudence interpreting its application provide support for the recognition of an additional “materiality” element.

**A. Overview Of Governing Law.**

**1. A brief overview of the Washington CPA.**

The CPA was enacted in 1961, to protect the public from “unfair or deceptive acts or practices in the conduct of any trade or commerce.” RCW 19.86.020. It is to be liberally construed to further its purpose of protecting the public. *See* RCW 19.86.920. Originally, the CPA was enforceable only by the attorney general. *See* Laws of 1961, ch. 216, § 8; *see also State v. LG Electronics*, 186 Wn.2d 1, 22, 375 P.3d 636 (2016). A CPA action by the attorney general requires proof of an 1) unfair or deceptive act or practice,

2) occurring in trade or commerce, 3) that impacts the public interest. *See* RCW 19.86.020; *see also State v. LA Investors, LLC*, 2 Wn. App. 2d 524, 537-38, 410 P.3d 1183 (2018) (citation omitted).

In 1971, the Legislature created a private right of action, to “enlist the aid of private individuals in enforcing the CPA.” *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*, 162 Wn.2d 59, 74, 170 P.3d 10 (2007); RCW 19.86.090. Section .090 provides: “Any person who is injured in his or her business or property by a violation of [this chapter] may bring a civil action in superior court.” (Brackets added). By authorizing a private right of action, the Legislature ensured that “[p]rivate citizens [would] act as private attorneys general in protecting the public’s interest against unfair and deceptive acts and practices in trade and commerce.” *Scott v. Cingular Wireless*, 160 Wn.2d 843, 853, 161 P.3d 1000 (2007) (brackets added). Private plaintiffs may seek injunctive relief, actual damages, fees and costs, and treble damages up to \$25,000. *See* § .090.

In its seminal opinion in *Hangman Ridge*, this Court examined § .090 and enumerated the five conjunctive elements necessary to state a CPA claim. These elements, which remain the proof requirements for a private CPA action today, are:

- (1) an unfair or deceptive act or practice;
- (2) in trade or commerce;
- (3) which affects the public interest;
- (4) injury to plaintiff in his or her business or property;

(5) causal link between the unfair or deceptive act and the injury suffered. *See Hangman Ridge*, 105 Wn.2d at 784–85. This Court has recognized the nexus among the elements of a CPA claim, and cautioned that “[t]he individual *Hangman Ridge* factors should not be read in isolation so as to render absurd conclusions.” *Ambach v French*, 167 Wn.2d 167, 178, 216 P.3d 405 (2009) (brackets added).

*Re: Unfair or Deceptive Acts or Practices*

To establish that an act or practice is unfair or deceptive, a plaintiff may either show that the conduct is a *per se* unfair or deceptive act or practice, in that it violates a statute declaring the conduct unfair or deceptive, or alternatively may establish the unfair or deceptive nature of conduct in a case specific analysis. *See Klem v. Washington Mutual Bank*, 176 Wn.2d 771, 785-87, 295 P.3d 1179 (2013). This element is disjunctive, and may be satisfied by proof that the conduct is either unfair or deceptive. *See Klem*, 176 Wn.2d at 787. Because the statute itself does not define unfair acts or practices, interpretation of these terms has evolved through “a gradual process of judicial inclusion and exclusion.” *State v. Reader’s Digest Ass’n*, 81 Wn.2d 259, 275, 501 P.2d 290 (1972).

This Court has held that “[d]eception exists if there is a representation, omission or practice that is likely to mislead a reasonable customer.” *Panag v. Farmers Ins. Co.*, 166 Wn.2d 27, 50, 204 P.3d 885 (2009 (citation omitted; brackets added)). A plaintiff need not prove *intent* to deceive, but only that the conduct had the “capacity to deceive a

substantial portion of the public.” See *Panag*, 166 Wn.2d at 47. The “capacity to deceive” test recognizes the enforcement role of the private plaintiff, which is to aid in deterring deceptive conduct *before* injury occurs. See *Hangman Ridge*, 105 Wn.2d at 785. Whether conduct qualifies as unfair or deceptive is a question of law. See *Trujillo v. Northwest Trustee Services, Inc.*, 183 Wn.2d 820, 835, 355 P.3d 1100 (2015) (citation omitted).

*Re: Trade or Commerce*

The express language of the CPA provides that trade and commerce “shall include the sale of assets or services, and any commerce directly or indirectly affecting the people of the state of Washington.” RCW 19.86.010(2). The terms “trade or commerce” are broadly construed, as this Court has interpreted the language of the CPA to evidence a “carefully drafted attempt to bring within its reaches *every* person who conducts unfair or deceptive acts or practices in *any* trade or commerce.” *Hangman Ridge*, 105 Wn.2d at 785 (citation omitted).

*Re: Public Interest*

The third element of the *Hangman Ridge* test is public interest impact. This element is examined in detail in § A.2, *infra*.

*Re: Injury*

A private litigant must also prove “injury to business or property” to establish a claim under the CPA. See RCW 19.86.090; *Hangman Ridge*, 105 Wn.2d at 792. The alleged “injury” need not be significant, and indeed does not even require monetary damage; “unquantifiable” damages may suffice.

*See Panag*, 166 Wn.2d at 58. Injury may be demonstrated even where it is “minimal and temporary.” *Frias v. Asset Foreclosure Services, Inc.*, 181 Wn.2d 412, 431, 334 P.3d 529 (2014). Whether a plaintiff has suffered injury raises a question of fact. *See Panag*, 166 Wn.2d at 65.

*Re: Causation*

Finally, a plaintiff must prove a causal link between the deceptive act and the injury. *See Hangman Ridge*, 105 Wn.2d at 784-85. Reliance need not be shown; a plaintiff must only establish that but for the deceptive conduct, the plaintiff would not have suffered injury. *See Indoor Billboard*, 162 Wn.2d at 83; *see also Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d 260, 279-80, 259 P.3d 129 (2011). An injury may have more than one proximate cause. *See Indoor Billboard*, 162 Wn.2d at 83 (citing WPI 15.01). Factual cause is a question of fact. *See id.*, 162 Wn.2d at 83.

**2. The unique role of the “public interest” requirement under Washington’s CPA.**

The language of the CPA did not originally include a “public interest” requirement. It did state, however, that the statute’s purpose was “to protect the public” and that the CPA should not be construed to prohibit conduct not “injurious to the public interest.” Laws of 1961, ch. 216, § 20 (codified at RCW 19.86.920). This Court subsequently construed the CPA to require that plaintiffs prove that a defendant’s unfair or deceptive act impacts the public interest. *See Lightfoot v. MacDonald*, 86 Wn.2d 331, 333, 544 P.2d 88 (1976). In *Lightfoot*, the plaintiff retained an attorney to defend her in foreclosure proceedings, and when she later lost her home,

she sued the attorney under the CPA. This Court held that the attorney's conduct "was not an unfair or deceptive act or practice in the conduct of any trade or commerce as those terms are employed in the Consumer Protection Act." *Lightfoot*, 86 Wn.2d at 333. Drawing from the Legislature's declaration of purpose in RCW 19.86.920, the Court reasoned: "It is the obvious purpose of the Consumer Protection Act to protect the public from acts or practices which are injurious to consumers and not to provide an additional remedy for private wrongs which do not affect the public generally." *Id.*, 86 Wn.2d at 333. It noted that the CPA had historically been enforceable only by the attorney general. Because the attorney general generally acts for the benefit of the public, and "the purpose of the act is to protect the public interest," the Court concluded "it is natural to assume that the legislature, in granting a remedy in RCW 19.86.090, intended to further implement the protection of that interest." *Id.* at 334. The Court later refined its public interest analysis in *Anhold v. Daniels*, 94 Wn.2d 40, 46, 614 P.2d 184 (1980), setting out three elements necessary to establish public interest impact: (1) the defendant's conduct induced the plaintiff to act or refrain from acting, (2) the plaintiff suffered damage, and (3) the defendant's acts have the potential for repetition.

In *Hangman Ridge*, the Court examined the scope and application of the CPA and chose to retain the public interest requirement, but in a modified form. It recognized this element had been subject to "harsh criticism," as being "unnecessarily restrictive as to private plaintiffs." 105

Wn.2d at 787-88. However, it observed that the Washington Legislature declared that the act “shall not be construed to prohibit acts or practices which . . . are not injurious to the public interest.” *Id.*, 105 Wn.2d at 788 (quoting RCW 19.86.920). Thus, while it acknowledged that Washington was “very clearly in the minority in requiring a public interest showing of a private plaintiff,” *id.* at 787, the Court included public interest as one of the five necessary elements of a CPA claim.

The Court in *Hangman Ridge* declared that public interest can be established *per se*, where a separate statute indicates violation of its provisions implicates the public interest, or alternatively, can be established as a matter of fact. For the latter category, the Court acknowledged its prior “inducement-damage-repetition” test set out in *Ahnold*, but concluded that this test “is not the best vehicle for showing that the public was or will be affected.” *Hangman Ridge*, 105 Wn.2d at 789. The Court established two separate tests for examining public interest impact, depending on whether the underlying transaction is better characterized as a consumer transaction or a private dispute. *See id.* at 789-91.<sup>1</sup> Public interest impact is a question of fact that must be evaluated in context. *See id.* at 789.

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<sup>1</sup> The court listed five factors that measure public interest impact in a consumer transaction:

- (1) Were the alleged acts committed in the course of defendant's business?
- (2) Are the acts part of a pattern or generalized course of conduct?
- (3) Were repeated acts committed prior to the act involving plaintiff?
- (4) Is there a real and substantial potential for repetition of defendant's conduct?
- (5) If the act involved a single transaction, were many consumers affected?

*See Hangman Ridge*, 105 Wn.2d at 790. Separate factors apply to private transactions:

- (1) Whether the alleged acts were committed in the course of the defendant's business?
- (2) Whether the defendant advertised to the public in general?
- (3) Whether the defendant actively solicited this particular plaintiff?
- (4) Whether the plaintiff and defendant occupied unequal bargaining positions?

The public interest requirement continued to suffer criticism, with some scholars calling for legislative action to eliminate this additional hurdle. *See, e.g.,* Jonathan A. Mark, *Dispensing with the Public Interest Requirement in Private Causes of Action under the Washington Consumer Protection Act*, 29 Seattle U. L. Rev. 205 (2005); Note, *On the Propriety of the Public Interest Requirement in the Washington Consumer Protection Act*, 144 U. Puget Sound L. Rev. 143 (1986). Instead of eliminating the public interest element, however, the Legislature did the opposite. In 2009, the Legislature codified the public interest requirement as one of the requisite elements of proof under the CPA. *See* RCW 19.86.093. Section .093 provides:

In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

Subsections .093(1) & (2) address *per se* violations by reference to a statute. Subsection (3) elucidates the ways a CPA plaintiff may demonstrate as a matter of fact that violative conduct impacts the public interest: 1) the conduct *actually* injured other persons, 2) the conduct *had* the capacity to injure others, or 3) the conduct *has* the capacity to injure others. Notably, in keeping with the purpose of the CPA, which is to “protect the public and foster fair and honest competition,” RCW 19.86.920, all three methods of

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*See* 105 Wn.2d at 790-91.

satisfying the public interest prong require a private plaintiff to prove actual or potential injury to members of the public.

**B. The Court Should Reject The Court Of Appeals Materiality Requirement Because It Is Unsupported By The Text Of The CPA And It Is Incompatible With The *Hangman Ridge* Test.**

The fundamental inquiry in statutory construction is determining legislative intent. *See State v. Ervin*, 169 Wn.2d 815, 820, 239 P.3d 354 (2010). To that end, the Court begins with an examination of the statutory text, as the “surest indication of legislative intent is the language enacted by the legislature.” *Ervin*, 169 Wn.2d at 820. Washington law applies the “plain meaning” rule of statutory construction, whereby meaning is gleaned from the context of the statute in which that provision is found, related provisions, and the statutory scheme as a whole. *Department of Ecology v. Campbell & Gwinn, LLC*, 146 Wn.2d 1, 9-12, 43 P.3d 4 (2002). The “plain meaning” inquiry includes “all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.” *Five Corners Family Farmers v. State*, 173 Wn.2d 296, 305, 268 P.3d 892 (2011) (quoting *Dep’t of Ecology*, 146 Wn.2d at 11).

In *Hangman Ridge*, this Court construed the language of the CPA and enumerated the five elements necessary to state a claim under the act. Tellingly, all five elements are grounded in the text of the CPA. *See* RCW 19.86.020 (declaring unlawful “unfair or deceptive acts or practices in the conduct of any trade or commerce”); RCW 19.86.090 (permitting an action by any person “injured in his or her business or property by a violation” of

the CPA); RCW 19.86.093 (requisite public interest showing).<sup>2</sup> This Court has resisted attempts to impose additional elements, holding that “a successful plaintiff is one who establishes all five elements of a CPA action.” *Panag*, 166 Wn.2d at 38 (citation omitted). The *Hangman Ridge* elements capture the acts that the Legislature contemplates as violative of the CPA, without reading language into the statute that is not there.

Yet the Court of Appeals upheld the dismissal of Young’s CPA claim, in part because it concluded that he failed to prove a sixth requirement, *i.e.*, that Toyota’s misrepresentation concerned a matter of “material importance.” *Young*, 9 Wn. App. 2d at 36. No reference to materiality can be found anywhere in the text of chapter 19.86, but the court held that it is “implicit” in the definition of deceptive. *See id.* at 33. In support of this proposition, the court relied on *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev’d on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999), as well as federal law interpreting the Federal Trade Commission Act (FTCA), 15 U.S.C. § 45. Neither supports a materiality requirement under the CPA.

In *Hiner*, the plaintiff was injured in an accident caused when she lost control of her car that was outfitted with Bridgestone tires. The court examined whether the plaintiff could assert a CPA claim against Bridgestone for failing to warn of the dangers related to improper

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<sup>2</sup> RCW 19.86.020, RCW 19.86.090, RCW 19.86.093 and RCW 19.86.920 are reproduced in the Appendix to this amicus brief.

installation. The issue in *Hiner* was *not* whether the failure to warn would be material, but whether there was evidence Bridgestone had knowledge of the danger. Emphasizing the word “misrepresented,” the court held that “[i]mplicit in the definition of ‘deceptive’ is the understanding that the actor *misrepresented* something of material importance.” *Hiner*, 91 Wn. App. at 730 (brackets added). *Hiner* did not directly examine or even address the propriety of a materiality requirement under the CPA.<sup>3</sup>

Nor was the appellate court’s reliance on federal law proper here. It is true that courts interpreting the CPA are to “be guided by final decisions of the federal courts. . . interpreting the various federal statutes dealing with the same or similar matters.” RCW 19.86.920. However, the CPA was intended to “complement” federal law, not duplicate it. *See id.* Federal decisions may offer guidance, but they are not binding, and courts decline to follow federal case law “where the language and the structure of the CPA departs from otherwise analogous federal provisions.” *LG Electronics*, 186 Wn.2d at 10.

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<sup>3</sup> Moreover, the reference to materiality in *Hiner* was drawn from *Potter v. Wilbur-Ellis Co.*, 62 Wn. App. 318, 814 P.2d 670 (1991), which also did not require a showing of materiality. In *Potter*, the plaintiff owned a yard services company and purchased pesticides from the defendant, a retailer of pesticide products. The plaintiff’s customers’ lawns were damaged as a result, and the plaintiff sued the defendant under the CPA. The trial court granted summary judgment to the defendant, holding the defendant’s conduct was not “deceptive” under the CPA because it did not have the capacity to deceive a substantial portion of the public. The court of appeals reversed. It cited a test for “unfair and deceptive” referencing “material fact” that was used in *Testo v. Russ Dunmire Oldsmobile, Inc.*, 16 Wn. App. 398, 51, 554 P.2d 349 (1976), a case that pre-dated *Hangman Ridge*. However, the court in *Potter* did not actually apply the test from *Testo*, but instead applied the “capacity to deceive” test announced in *Hangman Ridge*.

The materiality requirement applied under the FTCA, 15 U.S.C. § 45, should not be imported into Washington CPA jurisprudence for at least three reasons. First, the FTCA lacks the mandate of liberal construction found in the CPA. *See* RCW 19.86.920. Second, the language of the FTCA and the CPA differ; while the FTCA expressly references materiality, *see* 15 U.S.C. § 45(a)(4)(A)(ii), no variation of the term “material” can be found in the CPA. And third, the federal courts have tended to defer to the judgment of the Federal Trade Commission (FTC) regarding public interest impact, and FTCA analysis thus lacks the emphasis on public interest that is central to CPA analysis. *See* Mark, 29 Seattle U. L. Rev. at 229 (observing “the public interest requirement in FTC actions is no longer viewed as a strict restriction on the Commission’s ability to initiate action,” and “federal courts now assume that actions brought by the Commission are automatically in the public interest when it is seeking to prevent practices that have the *tendency or capacity to mislead*”); *FTC v. Indiana Fed’n of Dentists*, 476 U.S. 447, 454, 106 S.Ct. 2009, 90 L.Ed.2d 445 (1986) (“unfairness” under the FTCA encompasses practices “that the Commission determines are against public policy”); *Standard Distributors v. Federal Trade Commission*, 211 F.2d 7, 13 (2<sup>nd</sup> Cir. 1954) (noting “the matter of public interest is one in which the discretion of the Commission is broad”). The *Hangman Ridge* elements were formulated to capture the CPA’s unique language and purpose. Federal law should not distract from this analysis.

The main purpose of the private right of action under Washington's CPA is not to obtain compensation for injured plaintiffs, but to secure citizens' assistance in enforcing CPA provisions for the benefit of the public. *See Scott*, 160 Wn.2d at 853 (describing CPA plaintiffs as private attorneys general charged with protecting public interest); *see also* Carol Safron Gown, *Private Suits Under Washington's Consumer Protection Act: The Public Interest Requirement*, 54 Wash. L. Rev. 795, 805-06 (1979) (arguing public interest emphasizes "not individual compensation but rather enlistment of private efforts in the enforcement of the Act's broader purposes"). To that end, the Legislature has mandated that a CPA plaintiff establish that the defendant's deceptive act had the capacity to deceive a substantial portion of the public, that the deceptive conduct resulted in injury to the plaintiff, and that the conduct actually injured or has the capacity to injure the public. "Injury" in § .093 may be presumed to have the same meaning as it does in § .090. *See Medcalf v. State, Dep't of Licensing*, 133 Wn.2d 290, 300-01, 944 P.2d 1014 (1997) (a term appearing in different locations in the same statutory scheme is presumed to have the same meaning). Thus, the reference to "injury" under § .093 should require a showing of actual or potential injury to the public, even if "minimal and temporary." *See Frias*, 181 Wn.2d at 431. "Given that the clear purpose of the CPA is to deter and protect against unfair or deceptive acts or practices," even injuries that are not quantifiable are recognized under the CPA. *See*

*Panag*, 166 Wn.2d at 60 (quoting *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists, Inc.*, 64 Wn. App. 553, 564, 825 P.2d 714 (1992)).

The appellate court’s requirement that a deceptive act or practice involves a matter of “material importance” ignores that the term “material” is found nowhere in the language of the CPA.<sup>4</sup> This Court’s case law has construed the text of the CPA, and has captured and refined what constitutes an “important” act of deception under the CPA. These requirements are embodied in the *Hangman Ridge* test. A plaintiff who is able to establish that an act occurring in trade or commerce had the capacity to deceive a substantial portion of the public, actually injured or had the capacity to injure the public, and actually caused injury to the plaintiff, has established a CPA violation. These inquiries themselves capture what the Legislature considers “important” for purposes of Washington’s CPA. The Court should reject an additional “materiality” requirement.

**C. The Court Should Reaffirm That Causation Under The CPA Does Not Require Proof Of Reliance, And That A Plaintiff May Establish The Requisite Causal Link Under The CPA By Proof That But For The Defendant’s Deceptive Conduct, The Plaintiff Would Not Have Sustained The Injury.**

It is well-established that a CPA plaintiff can satisfy the causation requirement by proof that but for deceptive conduct, the plaintiff would not

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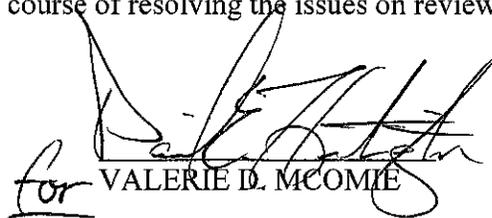
<sup>4</sup> The Legislature often includes a “materiality” element in the text of its enactments. *See, e.g.*, RCW 9A.72.020(1) (“materially false statement” in perjury statute); RCW 7.70.050(1)(a) (informed consent claim requires proof that provider “failed to inform the patient of a material fact”); RCW 21.20.010 (unlawful to “make any untrue statement of a material fact” regarding sale of securities); RCW 19.100.170(2) (prohibiting false statements of “material fact” concerning the sale of franchises).

have sustained the injury. *See Indoor Billboard*, 162 Wn.2d at 83; *see also Schnall*, 171 Wn.2d at 277-81. This Court has rejected the argument that reliance is a necessary component of causation in a CPA claim. *See Indoor Billboard*, 162 Wn.2d at 83; *Schnall*, 171 Wn.2d at 280. Toyota does not argue otherwise. *See Ans. to Pet. for Rev.* at 14; *see also* Toyota Answer to Amicus Curiae Brief of the Attorney General at 2.

To the extent the Court of Appeals suggests reliance is necessary to prove causation, *see Young*, 9 Wn. App. 2d at 36, 38-39, it misconstrues this Court's teachings and mischaracterizes the law. *See Indoor Billboard*, 162 Wn.2d at 82-83; *Schnall*, 171 Wn.2d at 277-81; *see also* WPI 15.01; WPI 310.07.<sup>5</sup> This Court should clarify and reaffirm that reliance is not necessary to satisfy causation under the CPA, and that causation may be satisfied by proof that the defendant's conduct is a but for cause of the plaintiff's injury.

## VI. CONCLUSION

The Court should adopt the analysis advanced in this brief in the course of resolving the issues on review.

  
for VALERIE D. MCOMIE

  
DANIEL E. HUNTINGTON

On behalf of  
Washington State Association for Justice Foundation

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<sup>5</sup> WPI 15.01 & WPI 310.07 are reproduced in the Appendix to this amicus brief.

# Appendix

**RCW 19.86.020**

**RCW 19.86.090**

**RCW 19.86.093**

**RCW 19.86.920**

**WPI 15.01**

**WPI 310.07**

## **RCW 19.86.020**

### **Unfair competition, practices, declared unlawful.**

Unfair methods of competition and unfair or deceptive acts or practices in the conduct of any trade or commerce are hereby declared unlawful.

[ **1961 c 216 § 2.**]

#### **NOTES:**

*Hearing instrument dispensing, advertising, etc.—Application: RCW **18.35.180.***

## RCW 19.86.090

### Civil action for damages—Treble damages authorized—Action by governmental entities.

Any person who is injured in his or her business or property by a violation of RCW **19.86.020**, **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, or any person so injured because he or she refuses to accede to a proposal for an arrangement which, if consummated, would be in violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, may bring a civil action in superior court to enjoin further violations, to recover the actual damages sustained by him or her, or both, together with the costs of the suit, including a reasonable attorney's fee. In addition, the court may, in its discretion, increase the award of damages up to an amount not to exceed three times the actual damages sustained: PROVIDED, That such increased damage award for violation of RCW **19.86.020** may not exceed twenty-five thousand dollars: PROVIDED FURTHER, That such person may bring a civil action in the district court to recover his or her actual damages, except for damages which exceed the amount specified in RCW **3.66.020**, and the costs of the suit, including reasonable attorney's fees. The district court may, in its discretion, increase the award of damages to an amount not more than three times the actual damages sustained, but such increased damage award shall not exceed twenty-five thousand dollars. For the purpose of this section, "person" includes the counties, municipalities, and all political subdivisions of this state.

Whenever the state of Washington is injured, directly or indirectly, by reason of a violation of RCW **19.86.030**, **19.86.040**, **19.86.050**, or **19.86.060**, it may sue therefor in superior court to recover the actual damages sustained by it, whether direct or indirect, and to recover the costs of the suit including a reasonable attorney's fee.

[ **2009 c 371 § 1**; **2007 c 66 § 2**; **1987 c 202 § 187**; **1983 c 288 § 3**; **1970 ex.s. c 26 § 2**; **1961 c 216 § 9**.]

### NOTES:

**Application—2009 c 371:** "This act applies to all causes of action that accrue on or after July 26, 2009." [ **2009 c 371 § 3**.]

**Effective date—2007 c 66:** See note following RCW **19.86.080**.

**Intent—1987 c 202:** See note following RCW [2.04.190](#).

**Short title—Purposes—1983 c 288:** "This act may be cited as the antitrust/consumer protection improvements act. Its purposes are to strengthen public and private enforcement of the unfair business practices-consumer protection act, chapter [19.86](#) RCW, and to repeal the unfair practices act, chapter [19.90](#) RCW, in order to eliminate a statute which is unnecessary in light of the provisions and remedies of chapter [19.86](#) RCW. In repealing chapter [19.90](#) RCW, it is the intent of the legislature that chapter [19.86](#) RCW should continue to provide appropriate remedies for predatory pricing and other pricing practices which constitute violations of federal antitrust law." [[1983 c 288 § 1](#).]

## **RCW 19.86.093**

### **Civil action—Unfair or deceptive act or practice—Claim elements.**

In a private action in which an unfair or deceptive act or practice is alleged under RCW **19.86.020**, a claimant may establish that the act or practice is injurious to the public interest because it:

- (1) Violates a statute that incorporates this chapter;
- (2) Violates a statute that contains a specific legislative declaration of public interest impact; or
- (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.

[ **2009 c 371 § 2.**]

### **NOTES:**

**Application—2009 c 371:** See note following RCW **19.86.090**.

## **RCW 19.86.920**

**Purpose—Interpretation—Liberal construction—Saving—1985 c 401; 1983 c 288; 1983 c 3; 1961 c 216.**

The legislature hereby declares that the purpose of this act is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition. It is the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters and that in deciding whether conduct restrains or monopolizes trade or commerce or may substantially lessen competition, determination of the relevant market or effective area of competition shall not be limited by the boundaries of the state of Washington. To this end this act shall be liberally construed that its beneficial purposes may be served.

It 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.

[ **1985 c 401 § 1; 1983 c 288 § 4; 1983 c 3 § 25; 1961 c 216 § 20.**]

### **NOTES:**

**Reviser's note:** "This act" originally appears in 1961 c 216.

**Short title—Purposes—1983 c 288:** See note following RCW **19.86.090.**

**6 Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 15.01 (7th ed.)**

Washington Practice Series TM | July 2019 Update

Washington Pattern Jury Instructions—Civil  
Washington State Supreme Court Committee on Jury Instructions

Part II. Negligence—Risk—Misconduct—Proximate Cause

Chapter 15. Proximate Cause

WPI 15.01 Proximate Cause—Definition

**The term “proximate cause” means a cause which in a direct sequence *[unbroken by any superseding cause,]* produces the *[injury] [event]* complained of and without which such *[injury] [event]* would not have happened.**

***[There may be more than one proximate cause of an *[injury] [event].]****

**NOTE ON USE**

This instruction is the standard definition of proximate cause. For alternative wording, see [WPI 15.01.01](#) (Proximate Cause—Definition—Alternative).

When the substantial factor test of proximate causation applies, use [WPI 15.02](#) (Proximate Cause—Substantial Factor Test) instead of [WPI 15.01](#) or [WPI 15.01.01](#) (Proximate Cause—Definition—Alternative).

Use bracketed material as applicable. Use the bracketed phrase about a superseding cause when it is supported by the evidence. If this bracketed phrase is used, then [WPI 15.05](#) (Negligence—Superseding Cause) must also be used.

The last sentence in brackets should be given only when there is evidence of a concurring cause. If the last sentence is used, it may also be necessary to give [WPI 15.04](#) (Negligence of Defendant Concurring with Other Causes).

**COMMENT**

This instruction was cited with approval in [Schnall v. AT & T Wireless Services, Inc.](#), 171 Wn.2d 260, 278, 259 P.3d 129 (2011).

**Elements of proximate cause.** Proximate cause under Washington law recognizes two elements: cause in fact and legal causation. See [Christen v. Lee](#), 113 Wn.2d 479, 507, 780 P.2d 1307 (1989); [Hartley v. State](#), 103 Wn.2d 768, 777, 698 P.2d 77 (1985), and cases cited therein. Cause in fact refers to the “but for” consequences of an act—the physical connection between an act and an injury. [WPI 15.01](#) describes proximate cause in this factual sense. [Hartley v. State](#), 103 Wn.2d at 778. The question of proximate cause in this context is ordinarily for the jury unless the facts are undisputed and do not admit reasonable differences of opinion, in which case cause in fact is a question of law for the court. [Baughn v. Honda Motor Co., Ltd.](#), 107 Wn.2d 127, 142, 727 P.2d 655 (1986); [Estate of Bordon v. Dep’t. of Corr.](#), 122 Wn.App. 227, 239, 95 P.3d 764 (2004) (estate could not show that, but for negligent supervision, parolee would have been in jail and unable to kill plaintiff decedent); [Estate of Jones v. State](#), 107 Wn.App. 510, 523, 15 P.3d 180 (2000) (jury question whether had juvenile offender’s score been non-negligently calculated, he would have been in prison and unable to murder plaintiff decedent).

Legal causation involves a determination of whether liability should attach as a matter of law given the existence of cause in fact. It is a much more fluid concept, grounded in policy determinations as to how far the consequences of a defendant's acts should extend. *Colbert v. Moomba Sports, Inc.*, 163 Wn.2d 43, 51, 176 P.3d 497 (2008); *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d 468, 951 P.2d 749 (1998). The focus is on “whether, as a matter of policy, the connection between the ultimate result and the act of the defendant is too remote or insubstantial to impose liability.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 478–79. This inquiry depends on “mixed considerations of logic, common sense, justice, policy, and precedent.” *Tyner v. Dept. of Social and Health Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000); *Hartley v. State*, 103 Wn.2d 768, 777, 698 P.2d 77 (1985).

The existence of a duty does not necessarily imply legal causation. Although duty and legal causation are intertwined issues, see *Taggart v. State*, 118 Wn.2d 195, 226, 822 P.2d 243, 258 (1992), “[l]egal causation is, among other things, a concept that permits a court for sound policy reasons to limit liability where duty and foreseeability concepts alone indicate liability can arise. Thus, legal causation should not be assumed to exist every time a duty of care has been established.” *Schooley v. Pinch's Deli Market, Inc.*, 134 Wn.2d at 479–80.

There have been many attempts to define “proximate cause.” In Washington it has been defined both as a cause which is “natural and proximate,” *Lewis v. Scott*, 54 Wn.2d 851, 857, 341 P.2d 488 (1959), and as a cause which in a “natural and continuous sequence” produces the event, *Cook v. Seidenverg*, 36 Wn.2d 256, 217 P.2d 799 (1950). Some authorities, in an effort to simplify the concept of proximate cause for jurors, have substituted the term “legal cause.” See, e.g., *Restatement (Second) of Torts § 9* (1965). However, the “direct sequence” and “but for” definition adopted in this instruction is firmly entrenched in Washington law. See *Tyner v. Dept. of Social and Health Services*, 141 Wn.2d 68, 82, 1 P.3d 1148 (2000) (“but for”); *Alger v. City of Mukilteo*, 107 Wn.2d 541, 545, 730 P.2d 1333 (1987) (“direct sequence”).

**Superseding cause.** The pattern instruction includes the bracketed phrase “unbroken by any superseding cause.” Prior to 2009, this phrase was worded as “unbroken by any new independent cause.” The WPI Committee rewrote this phrase so that the instruction better integrates with the wording of *WPI 15.05* (Proximate Cause—Superseding Cause). No change in meaning is intended—the phrase “unbroken by any new independent cause” is an expression of the doctrine of superseding cause. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. 477, 499, 105 P.3d 1000 (2005). The bracketed phrase should be used only when there is evidence of the doctrine's applicability. See *Humes v. Fritz Companies, Inc.*, 125 Wn.App. at 499 n.5.

**Negligence concurring with other causes.** An instruction combining parts of *WPI 15.01* and *15.04* (Negligence of Defendant Concurring with Other Causes) was approved in *Stevens v. Gordon*, 118 Wn.App. 43, 52–54, 74 P.3d 653 (2003) (*WPI 15.04* was previously numbered as *WPI 12.04*).

**Substantial factor test.** Section 431 of the Restatement (Second) of Torts (1965) sets forth the substantial factor test of proximate cause, under which a defendant's conduct is a proximate cause of harm to another if that conduct is a substantial factor in bringing about the harm. In *Blasick v. City of Yakima*, 45 Wn.2d 309, 274 P.2d 122 (1954), the Washington Supreme Court rejected this approach in favor of the “but for” definition contained in *WPI 15.01* for general negligence actions. Courts continue to reject the substantial factor test except in limited circumstances. *Fabrique v. ChoiceHotels Int'l, Inc.*, 144 Wn.App. 675, 685, 183 P.3d 1118 (2008) (salmonella exposure); *Gausvik v. Abbey*, 126 Wn.App. 868, 886–87, 107 P.3d 98 (2005) (negligent investigation of child abuse). For a more detailed discussion of the substantial factor test and the types of cases to which it applies, see *WPI 15.02* (Proximate Cause—Substantial Factor Test).

**Multiple proximate causes.** Using *WPI 15.01* without the last paragraph is error if there is evidence of more than one proximate cause. *Jonson v. Chicago, M., St. P., and P. R. R.*, 24 Wn.App. 377, 379–80, 601 P.2d 951 (1979).

An instruction setting forth the legal effect of multiple proximate causes is necessary when both sides raise complex theories of multiple causation. *Goucher v. J.R. Simplot Co.*, 104 Wn.2d 662, 676–77, 709 P.2d 774 (1985); *Brashear v. Puget Sound Power & Light Co., Inc.*, 100 Wn.2d 204, 207, 667 P.2d 78 (1983). Failure to give *WPI 15.04* (Negligence of Defendant Concurring with Other Causes) may be reversible error even though *WPI 15.01* is given including the bracketed last paragraph. *WPI 15.01*

does not inform the jury that the act of another person does not excuse the defendant's negligence unless the other person's negligence was the sole proximate cause of the plaintiff's injuries. *Brashear v. Puget Sound Power and Light Co., Inc.*, 100 Wn.2d 204 (failure to give WPI 15.04 was reversible error); *Jones v. Robert E. Bayley Const. Co., Inc.*, 36 Wn.App. 357, 361–62, 674 P.2d 679 (1984) (failure to give WPI 15.04 was error, but harmless given the jury's special verdict findings), overruled on other grounds *Brown v. Prime Const. Co., Inc.*, 102 Wn.2d 235, 684 P.2d 73 (1984). In *Torno v. Hayek*, 133 Wn.App. 244, 251–52, 135 P.3d 536 (2006), it was not error to refuse WPI 15.04 when both defendants admitted liability (successive car accidents) but disagreed on which defendant caused particular medical expenses.

**Foreseeability.** It is error to add to WPI 15.01 the words “even if such injury is unusual or unexpected.” *Blodgett v. Olympic Sav. and Loan Assoc'n*, 32 Wn.App. 116, 118–19, 646 P.2d 139 (1982). It is improper to inject the issues of foreseeability into the definition of proximate cause. *State v. Giedd*, 43 Wn.App. 787, 719 P.2d 946 (1986); *Blodgett v. Olympic Sav. and Loan Association*, 32 Wn.App. 116.

**Whether to supplement the pattern instructions on proximate cause.** The preferred practice is to use the proximate cause language from the applicable pattern instruction or instructions. See *Stevens v. Gordon*, 118 Wn.App. 43, 53, 74 P.3d 653 (2003); *Humes v. Fritz Companies, Inc.*, 125 Wn.App. 477, 498, 105 P.3d 1000 (2005). Washington case law has occasionally approved instructions that supplement WPI 15.01 with more specific language as to what does, or does not, constitute proximate cause. See, e.g., *Young v. Group Health Co-op. of Puget Sound*, 85 Wn.2d 332, 340, 534 P.2d 1349 (1975); *Vanderhoff v. Fitzgerald*, 72 Wn.2d 103, 107–08, 431 P.2d 969 (1967); *Safeway, Inc. v. Martin*, 76 Wn.App. 329, 334–35, 885 P.2d 842 (1994); *Richards v. Overlake Hosp. Medical Center*, 59 Wn.App. 266, 277–78, 796 P.2d 737 (1990).

Practitioners should use care in deciding whether to expand upon the standards in the pattern instructions. Such modifications are not always necessary, and they need to be written neutrally so as to avoid unduly emphasizing one party's theory of the case. See *Ford v. Chaplin*, 61 Wn.App. 896, 899–901, 812 P.2d 532 (1991).

*[Current as of September 2018.]*

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**6A Wash. Prac., Wash. Pattern Jury Instr. Civ. WPI 310.07 (7th ed.)**

Washington Practice Series TM | July 2019 Update

Washington Pattern Jury Instructions--Civil  
Washington State Supreme Court Committee on Jury Instructions

**Part XIV. Consumer Protection**

**Chapter 310. Consumer Protection Actions**

WPI 310.07 Causation in Consumer Protection Act Claim

(Insert name of plaintiff) **has the burden of proving that** (name of defendant)'s **unfair or deceptive act or practice was a proximate cause of** (name of plaintiff)'s **injury**.

**“Proximate cause” means a cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.**

**[There may be one or more proximate causes of an injury.]**

**NOTE ON USE**

Use this instruction to explain causation. If multiple causation is an issue, see the Comment below. Use bracketed material as applicable.

Use with [WPI 24.05](#) (Presumptions—Rebuttable Mandatory—Which Affect the Burden of Proof (When Presumed Fact Constitutes a Jury Question)) if applicable. See Comment below for further discussion.

**COMMENT**

The Washington Supreme Court has approved of [WPI 15.01](#) (Proximate Cause—Definition) and [WPI 310.07](#) as accurate proximate cause instructions for use in CPA cases. [Schnall v. AT&T Wireless Servs., Inc.](#), 171 Wn.2d 260, 277–80, 259 P.3d 129 (2011), relying on [Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.](#), 162 Wn.2d 59, 83–84, 170 P.3d 10 (2007); see also [Wash. State Physicians Ins. Exch. & Ass'n v. Fisons Corp.](#), 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) (upholding a jury instruction that required proof that the defendant's unfair or deceptive act proximately caused injury to the plaintiff's business or property).

The traditional definition of “proximate cause” in [WPI 15.01](#) (Proximate Cause—Definition) is incorporated in this instruction. For alternative definitions of “proximate cause,” see WPI Chapter 15 (Proximate Cause).

**Substantial factor test.** The Court of Appeals rejected a jury instruction using the “substantial factor” test for causation in a CPA trial when there was no showing of two inseparable causes. See [Sharbono v. Universal Underwriters Ins. Co.](#), 139 Wn.App. 383, 161 P.3d 406 (2007).

**Causal link.** The required causal link is between the defendant's deceptive act and the plaintiff's injury. [Schnall v. AT&T Wireless Srvcs., Inc.](#), 171 Wn.2d 260, 277, 259 P.3d 129 (2011); [Panag v. Farmers Ins. Co.](#), 166 Wn.2d 27, 61, 204 P.3d 885

(2009); *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d 148, 167, 795 P.2d 1143 (1990). This causal link is not necessarily broken by the existence of an intermediary between the plaintiff and the defendant. See *Schmidt v. Cornerstone Investments, Inc.*, 115 Wn.2d at 167–68 (holding that the necessary causal link between a defendant's inflated property appraisal and the plaintiff's injury may still exist even if the defendant had no direct contact with the plaintiff).

**Causation in cases involving affirmative misrepresentations.** In cases involving affirmative misrepresentations of facts, the plaintiff is not required to show that he or she relied on the misrepresentations. The Supreme Court has “firmly rejected the principle that reliance is necessarily an element of the plaintiff's [CPA] case.” *Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 277, 259 P.3d 129 (2011); see *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 78–84, 170 P.3d 10 (2007) (rejecting the former test of reliance/inducement, holding that the former test did not survive the *Hangman Ridge* case). Instead, the plaintiff is required to meet the general requirements of proximate causation: “We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim.” *Schnall v. AT&T Wireless Services, Inc.*, 171 Wn.2d at 278; *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d at 83–84.

According to both *Schnall* and *Indoor Billboard*, a plaintiff does not meet the test of proximate causation merely by showing that the defendant made an affirmative misrepresentation and that the plaintiff thereafter purchased the defendant's product or services. *Schnall v. AT & T Servs.*, 171 Wn.2d at 277; *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d at 83–84. Rather, the plaintiff must show that the plaintiff's injury would not have occurred but for the defendant's misrepresentation, and that the injury occurred in a direct causal sequence with the misrepresentation.

**Causation in cases involving failure to disclose facts.** In *Indoor Billboard*, the Supreme Court in several instances distinguished affirmative misrepresentations from failures to disclose facts, apparently limiting its holding to cases involving affirmative misrepresentations. Likewise, *Schnall* involved affirmative misrepresentations. Because of the difficulty in proving reliance in a failure to disclose case, the Court of Appeals adopted a rebuttable presumption of reliance under the CPA for omissions of material facts claims, citing rebuttable presumptions of reliance applied by federal courts in CPA failure to disclose cases and adopted by the Washington Supreme Court in franchise fraud and security fraud cases. *Deegan v. Windemere Real Estate/Center-Isle, Inc.*, 197 Wn.App. 875, 885–86, 890, 391 P.3d 582 (2017).

No case has clearly addressed whether the rebuttable presumption of reliance is resolved by the trial court as a matter of law, or by the jury through an instruction, thereby shifting the burden of production and persuasion to the defendant as a question of fact. Cf. *Spivey v. City of Bellevue*, 187 Wn.2d 716, 734–35, 389 P.3d (2017) (holding jury properly instructed on rebuttable presumption shifting burden of production and persuasion to defendant where plaintiff otherwise had “impossible burden” of demonstrating occupation actually caused disease); *Mut. of Enumclaw Ins. Co. v. Dan Paulson Constr., Inc.*, 161 Wn.2d 903, 921, 169 P.3d 1 (2007) (holding defendant insurers bear the burden of proof on disproving harm once an insured plaintiff proves bad faith where insured otherwise would bear impossible burden of proving harm); *Moratti v. Farmers Ins. Co. of Wash.*, 162 Wn.App. 495, 511, 254 P.3d 939 (2011) (jury instructed on rebuttable presumption of harm shifting burden of proof to defendant in insurance bad faith case).

**Questions of fact/law.** Usually, causation is a question of fact. See *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d at 83–84; *Carlile v. Harbour Homes*, 147 Wn.App. 193, 214–15, 194 P.3d 280 (2008); *Shah v. Allstate Ins. Co.*, 130 Wn.App. 74, 85–86, 121 P.3d 1204 (2005). If the links in the chain of causation show that the connection between defendant's act or practice and plaintiff's alleged injury is too remote, then lack of causation may be decided by the trial court as a matter of law. *Fidelity Mortgage Corp. v. Seattle Times Co.*, 131 Wn.App. 462, 470–71, 128 P.3d 621 (2005). The test for remoteness is:

- (1) [W]hether there are more direct victims of the alleged wrongful conduct who can be counted on to vindicate the law as private attorneys general;
- (2) whether it will be difficult to ascertain the amount of the plaintiff's damages attributable to defendant's wrongful conduct, and
- (3) whether the

courts will have to adopt complicated rules apportioning damages to obviate the risk of multiple recoveries.

[Fidelity Mortgage Corp. v. Seattle Times Co.](#), 131 Wn.App. at 470–71; see also [Browne v. Avvo, Inc.](#), 525 F. Supp.2d 1249, 1255 (W.D. Wash. 2007).

**Multiple proximate causes.** In negligence cases, when there is evidence of more than one proximate cause, use of the article “a” is insufficient to inform the jury on the law of concurring negligence and multiple proximate causes, and it is error to use [WPI 15.01](#) (Proximate Cause—Definition) without the bracketed sentence stating that an event may have one or more proximate causes. [Jonson v. Chicago, Milwaukee, St. Paul and Pac. R.R. Co.](#), 24 Wn.App. 377, 380, 601 P.2d 951 (1979).

See the Comment to [WPI 15.01](#) (Proximate Cause—Definition). In particular, note that an instruction setting forth the legal effect of multiple proximate causes has been held to be necessary when both sides raise complex theories of multiple causation. [Goucher v. J.R. Simplot Co.](#), 104 Wn.2d 662, 709 P.2d 774 (1985); [Brashear v. Puget Sound Power and Light Co.](#), 100 Wn.2d 204, 667 P.2d 78 (1983). See also [WPI 15.04](#) (Negligence of Defendant Concurring with Other Causes) for suggestions regarding the wording of an instruction on multiple causation.

*[Current as of September 2018.]*

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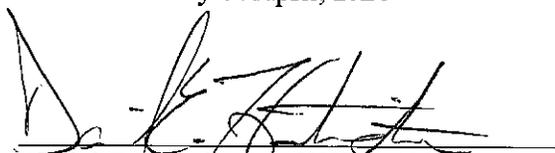
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