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No. 97576-1

IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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DUANE YOUNG, Petitioner,

vs.

TOYOTA MOTOR SALES, U.S.A., Inc., Respondent.

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ANSWER TO AMICUS CURIAE BRIEF OF THE ATTORNEY  
GENERAL OF THE STATE OF WASHINGTON

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## **ANSWER TO AMICUS CURIAE BRIEF**

Toyota acknowledges and appreciates the responsibility the Attorney General has for the State of Washington to protect consumers from unfair or deceptive acts or practices in trade or commerce. Toyota respectfully submits that nothing in existing case law, or the Court of Appeals' affirmation and restatement of that case law, interferes with the Attorney General's efforts to vindicate consumer rights.

Like Petitioner, the Attorney General complains that the Court of Appeals erred by holding that materiality is a separate element of a CPA claim. Amicus Brief of the Attorney General for the State of Washington ("AG AB") at 6. The Attorney General further takes issue with the Court of Appeals' purported use of a "financial materiality" as a predicate for establishing deception under the CPA. *Id.* at 12-15.

As set forth in Respondent's Answering Brief, and as further discussed below, neither of these concerns are well founded.

### **THE COURT OF APPEALS DID NOT TREAT MATERIALITY AS A SEPARATE ELEMENT OF A CPA CLAIM**

The Court of Appeals did not "treat[] materiality as a separate element" of a CPA claim. AG AB at 1. Rather, it confirmed, as many courts before have, that implicit in the first element of a CPA claim (*i.e.*, a deceptive act or practice) is the understanding that the actor misrepresented something "of material importance." *Young v. Toyota*

*Motor Sales, U.S.A.*, 442 P.3d 5, 9 (Wash. Ct. App. 2019). The Attorney General concurs with this view – “in cases where this Court has found deception under the CPA, it has looked for information that could be *of importance to a reasonable consumer – and hence material* – without focusing on any evidence of actual consumer reliance.” See October 21, 2020 Amicus Brief of the Attorney General for the State of Washington at p. 4 (emphasis added).

As the Court of Appeals recognized, the “CPA does not define ‘unfair or deceptive act or practice.’” *Young*, 442 P.3d at 9. However, since 1998, courts have repeatedly stated that “[i]mplicit in the definition of ‘deceptive’ is the understanding that the actor misrepresented something of material importance.” *Hiner*, 91 Wash.App. at 730. In fact, since the *Hiner* decision, literally dozens of courts in the state of Washington (in published and unpublished decisions) have cited *Hiner* as reflecting the law of the state; and not a single court has expressed a contrary view.<sup>1</sup> See, e.g., *Robinson v. Avis Rent A Car Sys., Inc.*, 106 Wash.App. 104, 116, 22 P.3d 818 (2001) (“[K]nowing failure to reveal something of material importance is ‘deceptive’ within the CPA.”); *Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.*,

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<sup>1</sup> Although this Court has not specifically addressed the “of material importance” standard, it has made clear that only a “[m]isrepresentation of the **material** terms of a transaction or the failure to disclose **material** terms violates the CPA.” *Bain v. Metro. Mortg. Grp., Inc.*, 175 Wash.2d 83, 116, 285 P.3d 34 (2012) (emphasis added).

162 Wash.2d 59, 78, 170 P.3d 10 (2007) (misleading *surcharge* “could be of material importance to a customer’s decision to purchase the company’s services.”); *State v. Kaiser*, 161 Wash.App. 705, 719, 254 P.3d 850 (2011) (“While the CPA does not define the term ‘deceptive,’ the implicit understanding is that ‘the actor misrepresented something of material importance.’”); *Brummett v. Washington’s Lottery*, 171 Wash.App. 664, 678, 288 P.3d 48, 55 (2012) (“Simply stated, Cole & Weber’s ‘going fast’ statements could not be categorized as ‘misrepresent[ing] something of material importance.’”).<sup>2</sup>

Federal courts applying Washington law are in accord. *Gordon v. Virtumundo, Inc.*, 575 F.3d 1040, 1065 (9th Cir. 2009) (CPA claims fail where plaintiff “failed to identify an act or practice that ‘misleads or misrepresents something of material importance.’”); *Vawter v. Qual. Loan Serv. Corp. of Wash.*, No. 08-1585, 2010 WL 5394893, at \*6 (W.D.Wash. 2010) (dismissing CPA claim where alleged DTA

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<sup>2</sup> See also, *Holiday Resort Comm. Ass’n*, 134 Wash.App. 210, 135 P.3d 499 (2006); *Nguyen v. Doak Homes, Inc.*, 140 Wash.App. 726, 734, 167 P.3d 1162, 1166 (2007); *Ramos v. Arnold*, 141 Wash.App. 11, 20, 169 P.3d 482, 486 (2007); *Stephens v. Omni Ins. Co.*, 138 Wash.App. 151, 166, 159 P.3d 10, 18 (2007), *aff’d sub nom. Panag v. Farmers Ins. Co. of Washington*, 166 Wash.2d 27, 204 P.3d 885 (2009); *Peterson v. Kitsap Cmty. Fed. Credit Union*, 171 Wash.App. 404, 430, 287 P.3d 27, 39 (2012); *Bavand v. OneWest Bank, FSB*, 196 Wash.App. 813, 842, 385 P.3d 233, 248 (2016), as modified (Dec. 15, 2016); *Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.*, 197 Wash.App. 875, 885, 391 P.3d 582, 587 (2017); *State v. Mandatory Poster Agency, Inc.*, 199 Wash.App. 506, 519, 398 P.3d 1271, 1277, *review denied*, 189 Wash.2d 1021, 404 P.3d 496 (2017).

violation “could not be said to be ‘of material importance,’” because to do otherwise would effect a “misguided elevation of form over substance”); *McDonald v. OneWest Bank, FSB*, 929 F. Supp. 2d 1079, 1097 (W.D.Wash. 2013) (“Washington courts have held that a deceptive act must have the capacity to deceive a substantial portion of the population and ‘misleads or misrepresents something of material importance.’”) (citations omitted); *Gordon v. First Premier Bank, Inc.*, No. CV-08-5035-LRS, 2009 WL 5195897, at \*2 (E.D. Wash. Dec. 21, 2009) (summary judgment proper where plaintiff failed to identify an act or practice that “misleads or misrepresents something of material importance.”).<sup>3</sup>

As the Court of Appeals also correctly noted, the “material importance” standard is “consistent with decisions of federal courts and final orders of the Federal Trade Commission (FTC) interpreting provisions of the Federal Trade Commission Act dealing with the same or similar matters, as intended by the Washington Legislature. *Young*, 442 P.3d at 9–10 (citing RCW 19.86.920.5); *Cliffdale Associates, Inc.*, 103 F.T.C. 110, app. 174-84 (1984); *Fed. Trade Comm’n v. Cyberspace.com LLC*, 453 F.3d 1196, 1199-1200 (9th Cir.

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<sup>3</sup> See also, *Robertson v. GMAC Mortg. LLC*, 982 F. Supp. 2d 1202, 1209 (W.D.Wash. 2013), *aff’d on other grounds*, 702 F. App’x 595 (9th Cir. 2017). Washington secondary sources similarly recognize the “of material importance” standard. See 25 *Wash. Prac., Contract Law And Practice* § 14:26 (3d ed.); 16 *Wash. Prac., Tort Law And Practice* § 8:4 (4th ed.).

2006) (*citing Fed. Trade Comm'n v. Gill*, 265 F.3d 944, 950 (9th Cir. 2001)) (*citing, in turn, Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)); *Corder v. Ford Motor Co.*, 285 F. App'x 226, 228 (6th Cir. 2008); *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 314 (7th Cir. 1992).

To read materiality out of what can constitute a deceptive act or practice would change the law and would lead to litigation or enforcement actions without any purpose; as an act that is immaterial or unimportant cannot, by definition, mislead or deceive a substantial portion of the population.

In short, nothing in the Court of Appeals' decision changes the law of the State of Washington, nor does it interfere with the Attorney General's enforcement authority.

**THE COURT OF APPEALS DID NOT WRITE INTO THE LAW A "FINANCIAL MATERIALITY" REQUIREMENT**

The Court of Appeals did not write into the law a "financial materiality" requirement, as the Attorney General postulates. AG AB at 12-15. Rather, the court noted that Mr. Young failed to present evidence to support his theory of the case that a \$10 part, that he was neither charged for nor paid for, could somehow be material (financially or otherwise) to him or anyone else. *Young*, 442 P.3d 5, 9-10. As noted by the Court of Appeals, the trial court made an unchallenged finding that "Mr. Young did not do anything about the missing temperature gauge until he received the December 2013 letter

from Toyota notifying him of its mistake and offering a \$100 cash reimbursement.” *Id.* at 12. The trial court made the further unchallenged finding that Petitioner’s conduct “[was] much more consistent with someone who learned that Toyota had made a mistake and wanted to take advantage of it, than someone who relied upon that item in good faith.” *Id.*, citing CP at 415.

Evaluating Petitioner’s claim through this lens, the Court of Appeals correctly held that it “will not *presume* that a \$10 part *for which the consumer was not charged* was material to [the] purchase of the \$7,525 model 2014 limited package. The trial court found that Mr. Young presented no credible evidence that the temperature gauge error *was material to him*, and no evidence whatsoever that it was *material to other consumers*.” *Young*, 442 P.3d 5, 12 (emphasis added). The Court of Appeals’ unwillingness to simply presume, in the absence of any credible evidentiary support, that Petitioner’s failure to receive a \$10 part that he did not pay for was material, does not change any precedent.

The Court of Appeals did not write into the law a “financial materiality” requirement as the Attorney General fears, but rather noted that Petitioner failed to present evidence that the \$10 part was financially material to him, anyone else, or “material for *any nonfinancial reason*.” *Id.* at 10 (emphasis added).

## CONCLUSION

Respondent respectfully requests that the Court affirm the decision of the Court of Appeals which is entirely consistent with the law of this state.

DATED this 11th day of May, 2020.

Respectfully Submitted,

By: /s/ Heather A. Hedeem  
Heather A. Hedeem, WSBA #50687  
Attorney for Defendant/Respondent

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the State of California that on May 11, 2020, at Los Angeles, California, I caused to be served the foregoing document:

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