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STATE OF WASHINGTON
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No. 97576-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE YOUNG, Petitioner,

vs.

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

ANSWER TO BRIEF OF AMICUS CURIAE OF THE
NORTHWEST CONSUMER LAW CENTER

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ANSWER TO AMICUS CURIAE BRIEF

Toyota is sympathetic to the consumer legal issues facing low income Washington families. However, the Northwest Consumer Law Center's ("NWCLC") attempt to jump into the current dispute between Petitioner and Respondent is misguided.

Petitioner is not a "low income" Washington resident. In fact, he is not a resident of Washington at all – he resides in Eugene, Oregon. Nor is this a case where a defendant pushed the limit of "human inventiveness" to perpetuate "consumer fraud and abuse." In fact, the opposite is true. This case involves, on the one hand, an innocent mistake by Toyota, which was corrected almost immediately, and the attempt by a shrewd consumer to take advantage of that mistake for his own gain. No consumer, let alone a low income consumer, was served by Petitioner's lawsuit and none will be served by reversing the Court of Appeals.

The amicus curiae brief of NWCLC focuses on three issues. Issue one (whether a one year or four year statute of limitations applies) is beyond the scope of Plaintiff's petition for review, and should not be considered by the Court pursuant to Washington Rules of Appellate Procedure ("RAP") 13.4 and 13.7. With respect to issue two (whether a materiality requirement inheres in an ADPA claim), and issue three (whether a per se violation satisfies the third element of a CPA claim), for the reasons set forth in Respondent's prior briefs to this Court and as further discussed below, the law in Washington

has been settled for more than two decades on these issues, and there is no reason to disturb these long standing precedents.

**THE STATUTE OF LIMITATIONS FOR A PER SE
VIOLATION OF THE CPA IS NOT BEFORE THIS COURT**

For at least two reasons, this Court should decline NWCLC's request to "confirm" the applicable limitations period of a per se violation of the CPA. AB at 2. First, the issue is not among the six issues presented for review by Petitioner or among the three issues presented by Respondent, and thus is outside the scope of appropriate review by this Court. RAP 13.7(b) ("If the Supreme Court accepts review of a Court of Appeals decision, the Supreme Court will review only the questions raised in ... the petition for review and the answer."); *see also Wood v. Postelthwaite*, 82 Wash.2d 387, 388–89, 510 P.2d 1109 (1973); *Koenig v. Thurston Cty.*, 175 Wash. 2d 837, 857, 287 P.3d 523, 532 (2012), as amended (Dec. 18, 2012).

Second, NWCLC's request does not meet any of the four grounds on which review will be accepted by the Supreme Court pursuant to RAP 13.4(b). First, the decision of the Court of Appeals is not in conflict with a decision of this Court, or any published decision of the Court of Appeals. RAP 13.4(b)(1) and (2). While the trial court, relying on two federal court decisions, found that Plaintiff's CPA claim based on a per se violation of the ADPA was barred by the one year limitations period of the ADPA, the Court of

Appeals noted that “[t]he only precedential Washington decision addressing the issues came to the opposite conclusion. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wash. App. 199, 209-10, 229 P.3d 871 (2010) (a per se CPA claim is governed by the CPA’s own four-year statute of limitations).” *Young v. Toyota Motor Sales, U.S.A.*, 442 P.3d 5, 11 (Wash. Ct. App. 2019). Thus, there is no conflict between or among the appellate court’s in this state and review is not appropriate. Similarly, the question of whether a one or four year limitations period applies to a per se violation of the CPA does not pose a significant question of law under the Constitution of the State of Washington or of the United States, and NWCLC does not suggest otherwise. RAP 14.2(b)(3). Finally, there is no “substantial public interest that should be determined by the Supreme Court” vis-à-vis the applicable statute of limitations as the issue is settled in this state.

For each of these reasons, Respondent requests that the Court deny NWCLC’s request to “confirm” existing law in this state.

**THE APPELLATE COURT CORRECTLY APPLIED
THE MATERIALITY REQUIREMENT OF THE CPA TO A
PER SE DECEPTIVE ACT UNDER THE ADPA**

As explained by the Court of Appeals, “[t]he CPA does not define ‘unfair or deceptive act or practice.’” *Young*, 442 P.3d at 9. Therefore, it looked to earlier decisions in the state, and “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.” *Id.* at 9-10. Based on its review of those earlier decisions, the court confirmed that “implicit in the definition of ‘deceptive’ [under Washington’s Consumer Protection Act (“CPA”)] is the understanding that the actor misrepresented something of material importance.” *Id.* at 9, citing *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wash. App. 722, 730, 959 P.2d 1158 (1998) (emphasis omitted), *rev’d in part on other grounds*, 138 Wash.2d 248, 978 P.2d 505 (1999).

Not only is the opinion of the Court of Appeals consistent with case law precedent, it is also consistent with the position of the Attorney General of this state who agrees that “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).

Because the “of material importance” requirement is “implicit” in the definition of deception itself, it follows that it is also implicit in a *per se* deceptive act. As the Court of Appeals explained, “immaterial errors are not frauds, impositions, or abuses” for which the ADPA was enacted. *Young*, 442 P.3d at 11. For this reason, “a materiality

requirement inheres in the [ADPA], just as it inheres in the CPA and in sections 5 and 12 of the FTC Act.” *Id.* As the Court of Appeals explained, the “[p]rovisions of chapter 46.70 RCW support this construction. Its declaration of purpose states that the chapter was enacted ‘in order to prevent frauds, impositions, and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.’ RCW 46.70.005.” *Id.*

Thus, the Court of Appeals correctly held that materiality applies to a per se deceptive act.

**THERE IS NO NEED TO “CLARIFY” THIS COURT’S
PRIOR HOLDING IN *HANGMAN* REGARDING PER SE
VIOLATIONS OF THE CPA**

NWCLC requests that this Court “clarify that a legislative declaration like the one found in the ADPA satisfies the first three elements of a CPA claim.” AB at 10. Notably, the NWCLC’s position is contrary to the position of Petitioner, who seeks a holding that a violation of the ADPA constitutes a per se violation of all elements of the CPA. Neither the NWCLC’s, nor Petitioner’s, position comports with the holding of this court in *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wash. 2d 778, 792, 719 P.2d 531, 538–39 (1986). In clarifying the scope and meaning of a “per se” violation, this Court first noted “a great deal of confusion in terminology.” *Id.* The Court then went on to explain the three different uses of per se:

First, there has been and continues to be a per se public interest impact, as outlined above, which establishes only the element of public interest. Second, as discussed earlier in this opinion, there is a legislatively declared per se unfair trade practice *which establishes only the first two elements of a CPA action*. Finally, the term “per se violation” has been broadly used to refer to actions in which either the public interest element or the “unfair or deceptive act” and “in trade or commerce” elements are met per se. The term “per se violation” is thus imprecise. It should be replaced by “per se public interest” or “per se unfair trade practice”, depending upon which element or elements are satisfied per se. *Id.* (emphasis added).

Thus, the meaning and scope of a per se violation depend on the context of the usage.

In this case, the Court of Appeals was using the term to refer to a “per se unfair trade practice,” which it correctly noted, if proven, establishes the first two elements of a CPA violation. 442 P.3d. at 11. The court’s usage is made clear in the heading found in the portion of the opinion explaining Petitioner’s ADPA claim (*i.e.*, “*Per se unfair or deceptive conduct*”). *Id.* (italics in original).

This Court has set forth a clear articulation of the types of “per se” violations and which elements are satisfied by each such

type. The Court of Appeal understood and followed this Court's guidance on this issue. As such, there is nothing to "clarify" in this matter, and NWCLC's request in this regard should be denied.

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

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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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/s/ Deborah Hillburn

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