

FILED  
SUPREME COURT  
STATE OF WASHINGTON  
5/11/2020 2:18 PM  
BY SUSAN L. CARLSON  
CLERK

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 WASHINGTON  
STATE ASSOCIATION FOR JUSTICE FOUNDATION

HEATHER A. HEDEEN, WSBA  
#50687  
Shook Hardy & Bacon L.L.P.  
701 Fifth Avenue, Suite 6800  
Seattle, WA 98104  
TEL: 206.344.7600  
FAX: 206.344.3113  
*Counsel of Record for Respondents*

MICHAEL L. MALLOW  
MARK D. CAMPBELL  
RACHEL A. STRAUS  
Shook Hardy & Bacon L.L.P.  
2049 Century Park East, Suite  
3000  
Los Angeles, CA 90067  
TEL. 424.285.8330  
FAX: 424.204.9093  
*Pro hac vice*

**TABLE OF CONTENTS**

ANSWER TO AMICUS CURIAE BRIEF.....II

THE COURT OF APPEALS DID NOT TREAT MATERIALITY AS  
A SEPARATE REQUIREMENT OF A CPA CLAIM..... 1

THE COURT OF APPEALS APPLIED A RELIANCE STANDARD  
CONSISTENT WITH YOUNG’S THEORY OF THE CASE..... 5

CONCLUSION ..... 8

## TABLE OF AUTHORITIES

	<b>Page(s)</b>
<b>CASES</b>	
<i>Bain v. Metro. Mortg. Grp., Inc.</i> , 175 Wash.2d 83, 285 P.3d 34 (2012) .....	2
<i>Bavand v. OneWest Bank, FSB</i> , 196 Wash.App. 813, 842, 385 P.3d 233, 248 (2016), as modified (Dec. 15, 2016) .....	3
<i>Brummett v. Washington’s Lottery</i> , 171 Wash.App. 664, 288 P.3d 48 (2012) .....	3
<i>Cliffdale Associates, Inc.</i> , 103 F.T.C. 110, app. 174-84 (1984) .....	4
<i>Corder v. Ford Motor Co.</i> , 285 F. App’x 226 (6th Cir. 2008) .....	5
<i>Deegan v. Windermere Real Estate/Ctr.-Isle, Inc.</i> , 197 Wash.App. 875, 391 P.3d 582 (2017) .....	3, 5
<i>Fed. Trade Comm’n v. Cyberspace.com LLC</i> , 453 F.3d 1196 (9th Cir. 2006) .....	4
<i>Fed. Trade Comm’n v. Gill</i> , 265 F.3d 944 (9th Cir. 2001) .....	4
<i>Fed. Trade Comm’n v. Pantron I Corp.</i> , 33 F.3d 1088 (9th Cir. 1994) .....	4
<i>Gordon v. First Premier Bank, Inc.</i> , No. CV-08-5035-LRS, 2009 WL 5195897 (E.D. Wash. Dec. 21, 2009) .....	4
<i>Gordon v. Virtumundo, Inc.</i> , 575 F.3d 1040 (9th Cir. 2009) .....	3

<i>Holiday Resort Comm. Ass’n</i> , 134 Wash.App. 210, 135 P.3d 499 (2006) .....	3
<i>Indoor Billboard/Washington, Inc. v. Integra Telecom of Washington, Inc.</i> , 162 Wash.2d 59, 170 P.3d 10 (2007) .....	2
<i>Kraft, Inc. v. Fed. Trade Comm’n</i> , 970 F.2d 311 (7th Cir. 1992) .....	5
<i>Maple v. Costco Wholesale Corp.</i> , 649 F. App’x 570, 572 (9th Cir. 2016).....	5
<i>McDonald v. OneWest Bank, FSB</i> , 929 F. Supp. 2d 1079, 1097 (W.D.Wash. 2013) .....	4
<i>Nguyen v. Doak Homes, Inc.</i> , 140 Wash.App. 726, 167 P.3d 1162 (2007) .....	3
<i>Peterson v. Kitsap Cmty. Fed. Credit Union</i> , 171 Wash.App. 404, 287 P.3d 27 (2012) .....	3
<i>Ramos v. Arnold</i> , 141 Wash.App. 11, 169 P.3d 482 (2007) .....	3
<i>Robertson v. GMAC Mortg. LLC</i> , 982 F. Supp. 2d 1202 (W.D.Wash. 2013), <i>aff’d on other grounds</i> , 702 F. App’x 595 (9th Cir. 2017) .....	4
<i>Robinson v. Avis Rent A Car Sys., Inc.</i> , 106 Wash.App. 104, 22 P.3d 818 (2001) .....	2
<i>State v. Kaiser</i> , 161 Wash.App. 705, 254 P.3d 850 (2011) .....	3
<i>State v. Mandatory Poster Agency, Inc.</i> , 199 Wash.App. 506, 398 P.3d 1271, <i>review denied</i> , 189 Wash.2d 1021, 404 P.3d 496 (2017) .....	3

*Stephens v. Omni Ins. Co.*,  
138 Wash.App. 151, 159 P.3d 10 (2007), *aff'd sub*  
*nom. Panag v. Farmers Ins. Co. of Washington*,  
166 Wash.2d 27, 204 P.3d 885 (2009) ..... 3

*Vawter v. Qual. Loan Serv. Corp. of Wash.*,  
No. 08-1585, 2010 WL 5394893 (W.D.Wash.  
2010) ..... 3

*Young v. Toyota Motor Sales*,  
U.S.A., 442 P.3d 5 (Wash. Ct. App. 2019) ..... 1, 2, 4, 7

## **ANSWER TO AMICUS CURIAE BRIEF**

Like Petitioner, the Washington State Association for Justice Foundation (“WSAJ Foundation”) suggests that the Court of Appeals erred by holding that Petitioner “failed to prove a sixth requirement [of a CPA violation], *i.e.*, that Toyota’s misrepresentation concerned a matter of ‘material importance.’” WSAJ Foundation Amicus Brief (“AB”) at 15. The WSAJ Foundation further takes issue with the Court of Appeals’ purported holding that “reliance is necessary to prove causation.” *Id.* at 20.

As set forth in Respondent’s prior briefs to this Court, and as further discussed below, neither of these concerns are well founded.

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

The Court of Appeals did not, as WSAJ Foundation suggests, create a “sixth requirement” of the CPA, by holding that Petitioner failed to prove that the alleged deceptive conduct of Toyota concerned a matter of “material importance.” WSJA Foundation AB at 15. Rather, it confirmed, as many courts before it 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). In fact, the Attorney General of this State 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.*, 162 Wash.2d 59, 78, 170 P.3d 10 (2007) (misleading surcharge “could be of material importance to a customer’s decision to purchase

---

<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).

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 violation "could not be said to be 'of material importance,'" because to do otherwise would effect a "misguided elevation of form over

---

<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).

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. 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

---

<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.).

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.

**THE COURT OF APPEALS APPLIED A RELIANCE  
STANDARD CONSISTENT WITH YOUNG'S THEORY OF  
THE CASE**

WSJA Foundation raises the concern that the Court of Appeals “suggests reliance is necessary to prove causation.” WSJA Foundation AB at 20. This concern is unfounded. Both the trial court and the Court of Appeals expressly recognized that in the abstract, reliance is not a requirement for an unfair or deceptive act. But existing law provides that establishing reliance on an unfair or deceptive act or practice is one way to establish a causal link between the alleged misrepresentation and the plaintiff's injury. *Deegan*, 197 Wash.App. at 885–86.<sup>4</sup> As explained by the court in *Deegan*:

---

<sup>4</sup> See also *Maple v. Costco Wholesale Corp.*, 649 F. App'x 570, 572 (9th Cir. 2016) (Washington CPA claim fails where plaintiff fails to allege that he read the allegedly offending product labels).

Causation under the CPA is a factual question to be decided by the trier of fact. “[W]here a defendant has engaged in an unfair or deceptive act or practice, and there has been an affirmative misrepresentation of fact, our case law establishes that there must be some demonstration of a causal link between the misrepresentation and the plaintiff’s injury.” The plaintiff must establish that, but for the defendant’s affirmative misrepresentation, the plaintiff would not have suffered an injury. **Reliance is one way to establish this causal link.** *Id.* (emphasis added) (citations omitted).

In this case, Petitioner consistently presented his CPA claim as one founded on his exposure to and reliance on Respondent’s erroneous representations. For example, in his motion for partial summary judgment on his CPA claim, Petitioner asserted that “[b]ased on the specifications advertised on Defendant Toyota’s website, including the premium rearview mirror, **Mr. Young decided to buy** a 2014 Tacoma equipped with the ‘Limited Package.’” (CP 239) (emphasis added). Similarly, Petitioner argued on summary judgment that:

the undisputed facts of this case establish that Mr. Young, like countless other purchasers, **bought a deficient “Limited Package” option based on**

**Defendant Toyota’s false advertising**, which actually injured him and all similarly situated individuals by advertising and selling products and features that did not exist and were never delivered. [Citation omitted.] Defendant Toyota disseminated its false advertising through its nationwide website, print and point-of-sale materials at individual dealerships, and in some cases, the window stickers attached to the vehicles themselves, **which had the capacity to injure anyone who was exposed to these communications.** (CP 244) (emphasis added).

In his trial brief, Petitioner continued to advance his exposure and reliance theories: “Mr. Young, like other purchasers, bought a deficient ‘Limited Package’ option **based on** Toyota’s false advertising, which **actually injured** him and dozens of other purchasers by advertising and selling products and features that did not exist and were never delivered.” (CP 345) (emphasis added); *see, also*, CP337).

Having presented a case based on a theory of exposure and reliance, the Court of Appeals correctly noted that the “causation element is satisfied if the plaintiff demonstrates that the misrepresentation of fact led him to choose the defendant’s product” and “Mr. Young argues that this was the nature of his injury.” *Young*, 442 P.3d at 12.

Under the circumstances of this case and the arguments he advanced, Petitioner had to establish that he was exposed to and purchased his Tacoma based on Toyota's misstatement because otherwise, he could not establish causation. Had Young been charged for the outside temperature gauge, he may have been able to establish an injury (*de minimis* as it may be) that was causally linked to Toyota's mistaken representation that the rearview mirror contained such a feature. But the unchallenged factual finding by the trial court was that Petitioner was not charged for this feature. (CP 459).

Thus, there is no contradiction in the Court of Appeals' application of the reliance requirement in affirming the trial court's decision.

### 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:

**ANSWER TO AMICUS CURIAE BRIEF OF WASHINGTON**

**STATE ASSOCIATION FOR JUSTICE FOUNDATION** on the

following persons or entities in the matter indicated:

Brian G. Cameron  
Cameron Sutherland, PLLC  
421 W. Riverside Ave., Suite 660  
Spokane, WA 99201  
Email:  
bcameron@cameronsutherland.com

Kirk D. Miller  
Kirk D. Miller, P.S.  
421 W. Riverside Ave., Suite 660  
Spokane, WA 99201  
Email:  
kmiller@millerlawspokane.com

Robert W. Ferguson  
Attorney General  
Amy C. Teng  
Assistant Attorney General  
Matthew Geyman  
Assistant Attorney General  
800 Fifth Avenue, Suite 2000  
Seattle, WA 98104  
Attorneys for the State of  
Washington  
Email: amy.teng@atg.wa.gov  
matt.geyman@atg.wa.gov  
cprreader@atg.wa.gov

Scott M. Kinkley  
NORTHWEST JUSTICE  
PROJECT  
1702 West Broadway  
Spokane, WA 99201  
Email: scottk@nwjustice.org

Valerie D. McOmie  
4549 NW Aspen Street  
Camas, WA 98607  
Email: valeriemcomie@gmail.com

Beth E. Terrell  
Blythe H. Chandler  
Maria Hoisington-Bingham  
TERRELL MARSHALL LAW  
GROUP PLLC  
936 North 34th Street, Suite 300  
Seattle, Washington 98103  
Email:  
beth@terrellmarshall.com  
bhandler@terrellmarshall.com  
mhoisington@terrellmarshall.com

Daniel E. Huntington  
422 Riverside, Suite 1300

Spokane, WA 99201  
Email:  
danhuntington@richter-  
wimberley.com

(VIA E-MAIL OR ELECTRONIC TRANSMISSION) Based on a court order or an agreement of the parties to accept service by e-mail or electronic transmission, I caused the documents to be sent to the person(s) at the e-mail address(es) listed above. I did not receive, within a reasonable time after the transmission, any electronic message or other indication that the transmission was unsuccessful.

Executed on May 11, 2020 at Los Angeles, California.

*/s/ Deborah Hillburn*

---

Deborah Hillburn

# SHOOK HARDY & BACON

May 11, 2020 - 2:18 PM

## Transmittal Information

**Filed with Court:** Supreme Court  
**Appellate Court Case Number:** 97576-1  
**Appellate Court Case Title:** Duane Young v. Toyota Motor Sales, USA  
**Superior Court Case Number:** 15-2-01859-5

### The following documents have been uploaded:

- 975761\_Briefs\_20200511141716SC461363\_5727.pdf  
This File Contains:  
Briefs - Answer to Amicus Curiae  
*The Original File Name was 2. Answer to amicus brief of WSAJF .pdf*

### A copy of the uploaded files will be sent to:

- CBORN@CAMERONSUTHERLAND.COM
- Mmallow@shb.com
- amy.teng@atg.wa.gov
- bcameron@cameronsutherland.com
- bhandler@terrellmarshall.com
- beth@terrellmarshall.com
- cprreader@atg.wa.gov
- danhuntington@richter-wimberley.com
- dhillburn@shb.com
- jsingleton@cameronsutherland.com
- kmiller@millerlawspokane.com
- matt.geyman@ATG.WA.GOV
- mdcampbell@shb.com
- mhoisington@terrellmarshall.com
- rstrauss@shb.com
- scottk@nwjustice.org
- valeriamcomie@gmail.com

### Comments:

ANSWER TO BRIEF OF AMICUS CURIAE WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION

---

Sender Name: Heather Hedeem - Email: hhedeem@shb.com  
Address:  
701 5TH AVE STE 6800  
SEATTLE, WA, 98104-7066  
Phone: 206-344-7606

**Note: The Filing Id is 20200511141716SC461363**