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BY RONALD R. CARPENTER IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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MARTIN SCHNALL, a New Jersey resident; NATHAN RIENSCHKE, a
Washington resident; and KELLY LEMONS, a California resident,
individually and on behalf of all the members of the class of persons
similarly situated,

Plaintiffs/Respondents,

vs.

AT&T WIRELESS SERVICES, INC.,

Defendant/Petitioner.

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BRIEF OF AMICUS CURIAE
WASHINGTON STATE TRIAL LAWYERS ASSOCIATION
FOUNDATION

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Washington State Trial Lawyers Association Foundation

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I. IDENTITY AND INTEREST OF AMICUS CURIAE

The Washington State Trial Lawyers Association Foundation (WSTLA Foundation) is a not-for-profit corporation organized under the laws of Washington, and a supporting organization of the Washington State Trial Lawyers Association (WSTLA). WSTLA Foundation, which operates the amicus curiae program formerly operated by WSTLA, has an interest in the rights of injured persons under the civil justice system, including an interest in the right of consumers to pursue private actions under Washington's Consumer Protection Act (CPA), Ch. 19.86 RCW.

II. INTRODUCTION AND STATEMENT OF THE CASE

This amicus brief addresses the issue of the proper interpretation and application of the causation standard articulated in the Court's recent opinion in Indoor Billboard/Wash. v. Integra, 162 Wn.2d 59, 170 P.3d 10 (2007), for private CPA actions under RCW 19.86.090. It also discusses the impact of this standard on class certification determinations under CR 23, Civil Rules for Superior Court (2008 ed.).¹

The parties are plaintiffs/respondents Martin Schnall, et al., on behalf of themselves, and a class of similarly situated consumers (Schnall), and defendant/petitioner AT&T Wireless Services, Inc. (AT&T), a telecommunications business providing wireless cell phone service to subscribing consumers. The underlying facts are drawn from the Court of Appeals opinion, the briefing of the parties, and the superior

¹ Other issues on appeal regarding class certification of the breach of contract claim and application of the CPA to non-resident consumers are not addressed in this brief.

court's memorandum opinion denying class certification. See Schnall v. AT&T Wireless Servs., 139 Wn.App. 280, 161 P.3d 395 (2007), *review granted*, 163 Wn.2d.1022 (2008); AT&T Supp. Br. at 1-3; Schnall Supp. Br. at 1-5; AT&T Pet. for Rev. at 2-5; Schnall Ans. to Pet. for Rev. at 1-2; AT&T Ans. to Attorney General Am. Br. at 1-2; Schnall Br. at 1-3, 4-12; AT&T Br. at 1-14; Schnall Reply Br. at 1-5; CP 417-22 ("Memorandum Opinion Denying Motion For Class Certification").

For purposes of this amicus curiae brief, the following facts are relevant: This class action is against AT&T for violation of the CPA. Schnall contends that AT&T deceptively advertised a monthly service plan at a certain price without including in that price a "universal connectivity charge" (UCC), and then billed that charge to the consumer as if it constituted a governmental tax or surcharge. Schnall alleges the UCC charge was a form of AT&T overhead that it was recouping, and not a government-mandated tax or surcharge on consumers. AT&T challenges these allegations as oversimplified, and points to what it describes as a "substantial evidentiary record" to the contrary. See AT&T Br. at 1.²

² This amicus curiae brief assumes that Schnall's allegations are correct for purposes of argument regarding the impact of Indoor Billboard on the causation analysis in this case. Cf. Schnall, 139 Wn.App. at 292 (recognizing a trial court takes the substantive allegations of the complaint as true for purposes of the initial class certification determination); Smith v. Behr Process Corp., 113 Wn.App. 306, 320, 54 P.3d 665 (2002) (same); but cf. Oda v. State, 111 Wn.App. 79, 93-94, 44 P.3d 8 (upholding the right of the court to look beyond the pleadings and make a preliminary inquiry into the merits in ruling on class certification), *review denied*, 147 Wn.2d 1018 (2002).

The superior court denied class certification of the CPA claim. It viewed the CPA as requiring each class member to establish causation by demonstrating individual reliance on AT&T's deceptive acts in order to prove injury, thus rendering class certification inappropriate. See Schnall, 139 Wn.App. at 286.³

On appeal, the Court of Appeals, Division I, reversed, concluding the superior court erred in requiring proof of reliance to establish causation under the CPA. Id. at 287-92. The court held that for purposes of ruling on the motion for class certification:

[I]t is enough to establish causation that they [Schnall] purchased the service and AT&T charged them a fee that was not a tax or government surcharge. This is particularly true because deceptive acts or practices are unlawful whether or not they actually deceive anyone. It is sufficient to prove that a practice has the capacity to deceive a substantial portion of the public to prevail on a CPA claim. We hold that the trial court erred in denying class certification on the CPA claim. Plaintiffs are not required to prove that each individual class member relied on AT&T's nondisclosure because ... reliance is not the only means by which causation can be proven in CPA cases.

Id. at 292 (footnotes omitted). In concluding that the superior court erred in denying class certification of the CPA claim, the Court of Appeals appears to hold that Schnall's payment of the UCC would be enough to prove causation under the CPA. Id.

³ AT&T challenges the Court of Appeals' characterization of the superior court's ruling as requiring reliance. See AT&T Pet. for Rev. at 3-4. However, the superior court's memorandum opinion suggests it implicitly viewed reliance as a necessary requirement for proof of causation in a private CPA claim, particularly with its reference to Nuttall v. Dowell, 31 Wn.App. 98, 639 P.2d 832, *review denied*, 97 Wn.2d 1015 (1982). See CP 421-22. Prior to Indoor Billboard, AT&T argued in this case that Nuttall required proof of reliance in a private CPA action. See AT&T Br. at 28-31.

AT&T sought review in this Court regarding proper application of the causation standard under the CPA, apparently with respect to the class certification determination. See AT&T Pet. for Rev. at 1; Schnall Ans. to Pet. for Rev. at 3.

After AT&T's petition for review was filed, this Court decided Indoor Billboard, which clarified the causation standard as to private CPA claims. See 162 Wn.2d at 78-84.⁴

This Court granted review, and directed the parties to file supplemental briefing regarding the applicability of Indoor Billboard to this case. See Order (April 30, 2008).

III. ISSUES PRESENTED

- 1.) In light of Indoor Billboard/Wash. v. Integra, 162 Wn.2d 59, 170 P.3d 10 (2007), in a private CPA action involving alleged deceptive advertising and billing of a charge paid by the consumer, what proof is necessary for the consumer to establish a prima facie causal link between the deceptive act and injury?
- 2.) What impact does the proximate cause standard announced in Indoor Billboard have on evaluation of CR 23 class certification of this private CPA action?

IV. SUMMARY OF ARGUMENT

Re: Proximate Cause

Indoor Billboard categorically rejected the notion that a plaintiff in a private CPA action must prove reliance on the defendant's deceptive act or practice in order to establish a causal link to the claimed injury.

⁴ WSTLA Foundation appeared as amicus curiae in Indoor Billboard. See BRIEF OF AMICUS CURIAE WASHINGTON STATE TRIAL LAWYERS ASSOCIATION FOUNDATION (S.C. #79977-6).

Instead, the Court confirmed the plaintiff need only prove defendant's deceptive act or practice was a proximate cause of the injury.

Under Indoor Billboard, where the gravamen of the claim is based upon a defendant's deceptive advertising and billing of a particular charge, a prima facie showing that the deceptive act was a proximate cause of injury to the plaintiff is established by plaintiff's payment of the charge in question. It is then for the trier of fact to determine whether the payment, when considered with other relevant evidence, establishes the necessary causal link between defendant's deception and plaintiff's injury.

Re: CR 23 Class Certification

Application of the Indoor Billboard proximate cause standard should not adversely impact Schnall's effort to obtain CR 23 class certification. Where the gravamen of the CPA claim is alleged deceptive advertising and billing, payment of the suspect charge by class members is sufficient to demonstrate a prima facie causal link between the defendant's alleged deception and class members' injuries. The proximate cause standard is less demanding than the reliance requirement rejected in Indoor Billboard, and under Schnall's allegations does not dictate the same type of individualized analysis that proof of reliance would require.

V. ARGUMENT

Introduction

This amicus curiae brief addresses the recent opinion in Indoor Billboard, regarding the causation standard applicable to private CPA

actions, and the impact of the opinion on the class certification issue before the Court.

A. Under *Indoor Billboard*, In A CPA Private Claim Based Upon Deceptive Advertising And Billing Of A Particular Charge, A Plaintiff Establishes Prima Facie Causation By Proof Of Payment Of The Charge; Whether Proximate Cause Is Proven Is For The Trier Of Fact To Determine In Light Of All Relevant Evidence.

In Indoor Billboard, this Court clarified the proof required to establish causation in a private CPA action for deceptive acts or practices. See 162 Wn.2d at 78-85.⁵ Previously, in its landmark opinion in Hangman Ridge v. Safeco Title, 105 Wn.2d 778, 719 P.2d 531 (1986), the Court formulated the current test for establishing liability in private suits under the CPA:

We hold that to prevail in a private CPA action and therefore be entitled to attorney fees, a plaintiff must establish five distinct elements: (1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation.

105 Wn.2d at 780.⁶

Regarding the causation element, the Court later confirmed that this element requires a causal link between the deceptive act and the injury suffered by the plaintiff. See Schmidt v. Cornerstone Investments, 115 Wn.2d 148, 167, 795 P.2d 1143 (1990). However, uncertainty lingered

⁵ While Indoor Billboard was a class action, there is no indication the issue of certification was resolved at the time this Court decided the case. See 162 Wn.2d at 68-69.

⁶ Under the first element in Hangman Ridge the deceptive act or practice need only have the capacity to deceive in order to be actionable. See 105 Wn.2d at 785. It is in this sense that the term "deceptive" is used throughout this brief.

regarding the nature of proof necessary to establish the causal link. This issue was addressed in Indoor Billboard.

In Indoor Billboard, plaintiff Indoor Billboard alleged that defendant Integra, a telephone and data services business, had engaged in deceptive acts in violation of the CPA by improperly assessing Washington local exchange customers a surcharge known as a “presubscribed interexchange carrier charge (PICC).” Id., 162 Wn.2d at 64. Plaintiff Indoor Billboard argued that it established the causation element *as a matter of law* “merely by a showing that it paid the PICC.” Id. On the other hand, Integra asserted that Indoor Billboard “must establish that it relied on Integra’s actions to show causation.” Id. Integra contended that the facts showed Indoor Billboard paid the PICC surcharge knowing of its true nature, and thus Integra’s alleged deceptive act was not the cause of any injury. Id. at 85.

In a unanimous opinion, this Court held in Indoor Billboard that a plaintiff is not required to prove reliance on the defendant’s deceptive act in order to prove injury in a private CPA action. See id. at 78-85. Instead, the Court confirmed that the “proximate cause” standard of causation applies. See id. at 82-83. Under this standard, “plaintiff would have to establish that but for the defendant’s unfair or deceptive act or practice the plaintiff’s injury would not have occurred.” Id. at 82.

The Court then discussed application of this causation standard to the type of claim before it, holding:

We conclude where 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. Indoor Billboard urges us to adopt a per se rule and hold that payment of Integra's invoice is per se sufficient to establish the proximate cause of plaintiff's damages. We reject Indoor Billboard's per se rule because mere payment of an invoice may not establish a causal connection between the unfair or deceptive act or practice and plaintiff's damages. *Proximate cause is a factual question to be decided by the trier of fact. Payment of an invoice may or may not be sufficient to establish a causal connection between the misrepresentation of fact and damages, but payment of the invoice may be considered with all other relevant evidence on the issue of proximate cause.*

Id. at 83-84 (emphasis added).

Under this analysis, this Court concluded that while payment of an invoice is not sufficient to prove proximate cause as a matter of law, it is sufficient under the circumstances to establish prima facie a causal link between the deceptive act and injury. It is then for the trier of fact to consider this evidence, along with other relevant evidence, and resolve the proximate cause issue. See id. In considering the relevant evidence before the superior court on summary judgment, this Court concluded the record reflected genuine issues of material fact regarding whether there was a causal link between Integra's deceptive act and Indoor Billboard's injury. See id. at 84-85.

This Court reviews the superior court's denial of class certification in this case under an abuse of discretion standard of review. See Nelson v. Appleway Chevrolet, Inc., 160 Wn.2d 173, 188, 157 P.3d 847 (2007). To the extent the court below, without the benefit of Indoor Billboard, denied

class certification of the private CPA claim because of the perceived need for proof of reliance on the part of each affected consumer, it abused its discretion. See Washington State Physicians Ins. Exch. v. Fisons Corp., 122 Wn.2d 299, 339, 858 P.2d 1054 (1993) (holding error of law in analyzing legal question constitutes an abuse of discretion). The denial of class certification must be reversed, and class certification eligibility must be re-examined with the Indoor Billboard causation standard in mind. The question remains, what impact should the proximate cause standard have on determination of this issue.

B. The Proximate Cause Standard For Private CPA Claims Clarified In *Indoor Billboard* Should Not Adversely Impact Schnall's Effort To Obtain Class Certification Under CR 23.

Application of the proximate cause standard announced and applied in Indoor Billboard should not adversely impact Schnall's motion for CR 23 class certification. The gravamen of Schnall's CPA claim here is substantially similar to that involved in Indoor Billboard. In that case, defendant Integra allegedly mischaracterized a billing charge that plaintiff Indoor Billboard paid. See Indoor Billboard, 162 Wn.2d at 64. As indicated in §A, this Court concluded that under such circumstances a plaintiff presents a prima facie case of causation based upon payment of the charge in question. Id. at 83-84.

In this case, Schnall alleges that AT&T advertised a monthly cell phone service plan at a certain price without including a charge that was later inaccurately billed as a governmental tax or surcharge, and Schnall

paid the charge. See text supra at 1-2. More particularly, Schnall describes their theory under the private CPA action as follows:

Thus, but for Defendant's practice of billing Plaintiffs a universal connectivity charge that was not disclosed as part of the advertised price, Plaintiffs would not have been injured by paying more for service than was advertised.

* * *

Standing alone, Defendant's failure to disclose the additional charge at the time of sale did not cause any injury. It was only when the Defendant later billed Plaintiffs for this undisclosed additional charge, as though it were a tax or government-mandated charge, that Plaintiffs were caused to pay more for the service that advertised, and were thereby injured. The practice of *billing* Plaintiffs is a necessary part of the Defendant's deceptive practice, and must be included in the sequence that comprises the causal link.

See Schnall Supp. Br. at 9-10 (footnote omitted).

The Indoor Billboard determination that payment by the consumer establishes prima facie causation should be applied here in assessing CR 23 eligibility. See 162 Wn.2d at 83-85; cf. Smith v. Behr Process Corp., 113 Wn.App. 306, 319, 54 P.3d 665 (2002) (recognizing that a court should err in favor of allowing class certification).

AT&T's arguments to the contrary should be rejected. First, the proximate cause standard is not "precisely the standard the trial court applied." See AT&T Supp. Br. at 5. Influenced by Nuttall, supra, the superior court appears to have imposed a reliance requirement. See text supra at 3 n.3. "But for" causation is not akin to reliance. The causal connection is made if the act in question is a cause-in-fact of the injury; there may be more than one proximate cause. See generally 6 Wash.

Prac., Washington Pattern Jury Instructions - Civil, Ch. 15, WPI 15.01 et seq. and Comments (5th ed. 2005) (regarding common law causation standard); see also 6A Wash. Prac., Washington Pattern Jury Instructions - Civil, Ch. 310, WPI 310.07 (5th ed. 2005) (regarding CPA causation standard).

Second, AT&T does not read Indoor Billboard as holding that in proper circumstances payment of the questioned charge is prima facie proof of causation. See AT&T Supp. Br. at 4-7.

Lastly, it appears that AT&T's view of the injury alleged differs from that of Schnall, and that it misapprehends the nature of the injury claimed. AT&T argues:

Thus, as to each claimant, Plaintiffs must establish that, "but for" alleged deception in the way the UCC was represented to him, he would not have incurred the obligation to pay the UCC. *As the trial court found, this means that Plaintiffs have to show that their decision to choose [AT&T] as a wireless provider was affected by [AT&T's] alleged misrepresentation about the Plaintiffs' obligation to pay a UCC. CP 422.*

AT&T Supp. Br. at 15 (emphasis added); see CP 422.

This is not the injury for which Schnall seeks recovery. See Schnall Supp. Br. at 8-10; Schnall Br. at 33 n.17. Moreover, in order to state a claim for injury for a deceptively imposed charge under a consumer agreement, it should not be necessary for the consumer to repudiate the entire transaction, or demonstrate the deceptive act or practice impaired formation of the agreement itself.

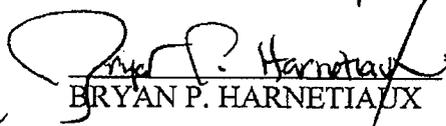
Under Indoor Billboard, AT&T's deceptive advertising and Schnall's payment of the mischaracterized UCC charge establishes prima facie causation for purposes of CPA liability. The CR 23 class certification issue should be resolved anew with this understanding in mind.

VI. CONCLUSION

The Court should consider the analysis advanced in this brief, and resolve the issue addressed accordingly.

DATED this 29th day of September, 2008.


_____*
KELBY D. FLETCHER
by Bryan P. Harnetiaux
with authority
On behalf of WSTLA Foundation


_____*
BRYAN P. HARNETIAUX

*Brief transmitted for filing by e-mail; signed original retained by counsel.

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