

80572-5

NO. 57523-6-I

**COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION I**

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,

Appellants

v.

AT&T WIRELESS SERVICES, INC.,

Respondent.

**BRIEF OF *AMICUS CURIAE*
ATTORNEY GENERAL OF WASHINGTON**

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FILED
COURT OF APPEALS DIV. #1
STATE OF WASHINGTON
2007 FEB 6 PM 3:27

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I. INTEREST OF AMICUS

Amicus Curiae is the Attorney General of Washington. The Attorney General's constitutional and statutory powers include the submission of amicus curiae briefs on matters that affect the public interest.¹ This case concerns whether consumers must prove actual reliance on a deceptive act or practice in order to prove that the deceptive act or practice caused the consumers injury under the Washington Consumer Protection Act (CPA), RCW 19.86. This question affects the public interest because it will influence the extent to which the CPA protects consumers from unfair or deceptive acts or practices in the market place.

The Attorney General is authorized to protect Washington consumers from unfair or deceptive acts or practices in trade or commerce.² As the state agency charged with directly enforcing the CPA, the Attorney General has an interest in the development of CPA case law in Washington. The Legislature intends that the Attorney General will have the opportunity to participate in such cases, as evidenced by the statutory requirements that the Attorney General be served with any complaint for injunctive relief under the CPA and with

¹ See *Young Americans for Freedom v. Gorton*, 91 Wn.2d 204, 212, 588 P.2d 195 (1978).

² RCW 19.86.080.

any appellate brief that addresses any provision of the CPA.³

II. ISSUE PRESENTED BY AMICUS

Whether consumers must prove actual reliance in order to prove causation under RCW 19.86.090 and *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 792-93, 719 P.2d 531 (1986) when bringing private actions under the CPA?

III. STATEMENT OF THE CASE

The plaintiff-appellants (Plaintiffs) are consumers who purchased wireless telephone service from defendant-respondent AT&T Wireless Services, Inc. (AWS).⁴ Typically, AWS sells its wireless service on monthly plans, and subscribers pay monthly fees for the service.⁵ AWS advertises its monthly rates in media and other marketing materials.⁶

In 1998, AWS started charging new subscribers a universal connectivity charge (UCC) in addition to its monthly fee and mandatory government taxes and fees.⁷ AWS did not disclose this fee to new subscribers at the time of purchase,⁸ nor did AWS disclose or explain this charge in its service contract.⁹ The UCC was included in the Plaintiffs' monthly bills under the heading "Taxes, Surcharges, and Regulatory

³ RCW 19.86.095.

⁴ CP 185.

⁵ CP 79.

⁶ *Id.*

⁷ CP 111.

⁸ CP 85.

⁹ CP 445-46.

Fees.”¹⁰ The UCC is not a government mandated charge, but instead is an element of AWS’s overhead.¹¹ The Plaintiffs paid AWS’s UCC.¹²

The Plaintiffs sued AWS for breach of contract and violation of the CPA, on their behalf and on behalf of all others similarly situated.¹³ The trial court denied the Plaintiffs’ motion to certify the class.¹⁴ With respect to the Plaintiffs’ CPA claim, the trial court determined that each individual plaintiff was required to prove that he or she relied on AWS’s representations (or omissions) regarding the UCC in choosing to purchase service from AWS.¹⁵ The trial court determined that the proof of reliance “must necessarily be individual for each potential class member. The result is that individual issues would predominate over class issues and a class action would be unmanageable.”¹⁶ The Plaintiffs appeal.

IV. ARGUMENT IN SUPPORT OF REVERSING

A. **Private Consumer Actions, and Consumer Class Actions, Under the CPA Further an Important Public Interest.**

The CPA’s purpose “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

¹⁰ CP 88.

¹¹ CP 88.

¹² CP 34.

¹³ CP 185-195.

¹⁴ CP 412-22.

¹⁵ CP 421-22.

¹⁶ CP 422.

and honest competition.”¹⁷ Washington courts shall liberally construe the CPA to serve its beneficial purposes.¹⁸

When the CPA was enacted in 1961, the Attorney General had sole authority to enforce its provisions.¹⁹ In 1971, the Legislature responded to the need for additional enforcement capabilities by providing for “a private right of action whereby individual citizens would be encouraged to bring suit to enforce the CPA.”²⁰ The Washington Supreme Court has held that the purpose of the private right of action is “to enlist the aid of private individuals to assist in the enforcement of the [CPA].”²¹ In order to prevail in a private right of action under the CPA, consumers must show that the acts or practices complained of affect the public interest.²² Thus, the CPA is not a vehicle for resolving purely private disputes.²³ When consumers bring a private CPA action, they represent the public interest.

The Supreme Court has held that a private consumer may obtain injunctive relief in addition to recovering damages in a private CPA action, even if the injunction would not directly affect the consumer’s

¹⁷ RCW 19.86.920; *see also Fisher v. World Wide Trophy*, 15 Wn. App. 742, 747, 551 P.2d 1398 (1976)(purpose of the CPA is to protect the public by prohibiting and eliminating injurious acts or practices).

¹⁸ RCW 19.86.920.

¹⁹ *See Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 783-84, 719 P.2d 531 (1986).

²⁰ *Id.* at 784.

²¹ *Lightfoot v. MacDonald*, 86 Wn.2d 331, 335-36, 544 P.2d 88 (1976).

²² *Hangman Ridge*, 105 Wn.2d at 788.

²³ *Id.* at 790.

private interests.²⁴ The court also held that allowing private consumers to enjoin future violations of the CPA served the public interest by preventing fraudulent practices from continuing unchecked.²⁵

The private consumer action is a vital feature of the CPA. Therefore, Washington courts should refrain from interpreting the CPA in ways that would impair Washington consumers' ability to bring private CPA actions because doing so would undermine the dual enforcement scheme the Legislature intended and the efficacy of the CPA as a means to foster a fair and honest market place.

Where properly certified, consumer class actions under the CPA promote judicial economy because they resolve individual claims in a single action and they avoid repetitious and possibly inconsistent results.²⁶ Class actions also improve access to justice because they "establish effective procedures for redress of injuries for those whose economic position would not allow individual lawsuits."²⁷ Where, as here, consumers have small or nominal individual damages, a class action may be their only effective redress.²⁸ Otherwise, consumers "might not

²⁴ *Hockley v. Hargitt*, 82 Wn.2d 337, 349-50, 510 P.2d 1123 (1973).

²⁵ *Id.* at 350.

²⁶ See *Darling v. Champion Home Builders Co.*, 96 Wn.2d 706, 638 P.2d 1249 (1982).

²⁷ *Id.* (citing 7 C. WRIGHT & A. MILLER, FEDERAL PRACTICE § 1754, at 543 (1972)).

²⁸ *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 339, 100 S. Ct. 1166, 63 L. Ed. 2d 427 (1980).

consider it worth the candle” to pursue their claims.²⁹

B. Consumers Are Not Required to Prove Actual Reliance to Satisfy the Causation Element of a Private CPA Action.

The CPA provides for private actions in RCW 19.86.090, which allows any person whose property or business is injured by an unfair or deceptive practice in violation of RCW 19.86.020 to bring a civil action for damages or injunctive relief. In *Hangman Ridge*, the Washington Supreme Court interpreted RCW 19.86.020 and 19.86.090 to require that consumers must establish five elements in order to prevail on a private CPA claim.³⁰ The five elements are: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) that affects the public interest; (4) injures the plaintiff or property; and (5) a causal link between the unfair or deceptive act and the injury suffered.³¹

In this case, the plaintiffs must prove a causal link between AWS’s alleged deceptive acts (*e.g.* false advertisement as to price; inducing consumers to purchase service at a rate it would not honor; labeling the UCC as a tax that consumers were obligated to pay; failure to disclose the UCC) and the consumers’ alleged injury (*e.g.* paying money disguised as a government fee or tax when no such fee or tax was owed).³² The trial

²⁹ *Id.* at 338.

³⁰ 105 Wn.2d at 784-85.

³¹ *Id.*

³² CP 191-93.

court held that the plaintiffs must establish this causal link by proving that each individual plaintiff actually relied on AWS's deceptive acts.³³ The trial court further held that because actual reliance is individual to each plaintiff, individual issues would predominate over class issues making a class action unmanageable.³⁴

The trial court erred because reliance is not required to prove the causation element under the CPA.³⁵ Causation is broader than reliance; reliance is one way—but not the only way—to prove causation. To prove causation in a private CPA case, a consumer must prove that the defendant's deceptive act or practice caused the consumer's injury.³⁶ In this case, the plaintiffs should have the opportunity to prove that AWS's deceptive act or practice (its failure to disclose the UCC to consumers and including it in their bills under heading "Taxes, Surcharges, and Regulatory Fees") caused the plaintiffs' injury (paying money to AWS that AWS misrepresented as "taxes," "surcharges" or "regulatory fees"

³³ CP 421-22.

³⁴ CP 422.

³⁵ See, e.g., *Hangman Ridge*, 105 Wn.2d 792-93; *Pickett v. Holland America Line-Westours, Inc.*, 101 Wn. App. 901, 916-20, 6 P.3d 63 (2000), reversed on other grounds *Pickett v. Holland America Line-Westours, Inc.*, 145 Wn.2d 178, 35 P.3d 351, cert. denied sub nom. *Bebchick v. Holland America Line-Westours, Inc.*, 536 U.S. 941, 122 S. Ct. 2624, 153 L. Ed. 2d 806 (2002).

³⁶ *Hangman Ridge*, 105 Wn.2d at 792-93; *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 741, 733 P.2d 208 (1987); *Washington State Physicians Ins. Exch. & Ass'n v. Fisons Corp.*, 122 Wn.2d 299, 314, 858 P.2d 1054 (1993) ("the jury was properly instructed that it had to find '[t]hat Fisons Corporation's unfair or deceptive act or practice was a proximate cause of the injury to plaintiff[s] . . . business or property.'").

when no such charges were imposed).

By requiring the plaintiffs to prove reliance, the trial court interpreted the causation requirement narrowly, not liberally, as directed by RCW 19.86.920. The courts consistently have rejected overly narrow interpretations of the CPA and have instead interpreted it liberally, as the Legislature intended. For example, actual deception is not required; rather, the CPA requires only that the act or practice has a capacity to deceive.³⁷ Likewise, the CPA does not require a plaintiff to prove monetary damages in order to satisfy the injury element; rather, a plaintiff may prevail on a more broadly defined injury, however minimal.³⁸

Requiring consumers to prove actual reliance on deceptive acts or practices in private CPA actions would frustrate the purpose of the CPA. This is particularly true, where, as here, the deceptive acts were omissions, rather than affirmative misrepresentations.³⁹

1. Washington Courts Do Not Require Consumers to Prove Reliance.

While causation is a required element of a private CPA action,

³⁷ *Nelson v. Nat'l Fund Raising Consultants, Inc.*, 120 Wn.2d 382, 392, 842 P.2d 473 (1992).

³⁸ *Hangman Ridge*, 105 Wn.2d at 792; see *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)(loss of title to real property); *Nordstrom*, 107 Wn.2d at 740 (1987)(loss of goodwill); *Sorrell v. Eagle Healthcare*, 110 Wn. App. 290, 298-99, 38 P.3d 1024, review denied 147 Wn.2d 1016, 56 P.3d 992 (2002)(loss of possession of funds for two weeks).

³⁹ See, e.g., *Morris v. International Yogurt Co.*, 107 Wn.2d 314, 328, 729 P.2d 33 (1986).

reliance is not.⁴⁰ In *Hangman Ridge*, the Supreme Court confirmed what had been foreshadowed in earlier decisions—that a private plaintiff must show some degree of causation between the defendant’s unlawful act and the plaintiff’s injury.⁴¹ The court, however, did not further define how plaintiffs must prove causation.

Prior to *Hangman Ridge*, courts had reasoned that some showing of causation was necessary for a private plaintiff to recover under the CPA.⁴² In one of the pre-*Hangman Ridge* cases, *Nuttall v. Dowell*, , the Court of Appeals determined that a plaintiff must show causation by proving reliance by holding that a plaintiff “has not established a causal relationship with a misrepresentation of fact where he does not convince the trier of fact that he relied on it.”⁴³ Rather than adopt the *Nuttall* court’s reliance requirement for proving causation, the Washington Supreme Court in *Hangman Ridge* required only a “causal link.”⁴⁴

Despite the fact that the Supreme Court has not held that causation must be proved by reliance, the trial court in the instant case relied on *Nuttall* for the determination that the class plaintiffs must prove that they

⁴⁰ The Attorney General is not required to prove causation or injury in bringing CPA cases pursuant to RCW 19.86.080. See *Nuttall v. Dowell*, *infra* note 43, at 110-11.

⁴¹ *Hangman Ridge*, 105 Wn.2d at 793.

⁴² See *id.*

⁴³ *Nuttall v. Dowell*, 31 Wn. App. 98, 111, 639 P.2d 832, review denied 97 Wn.2d 1015 (1982).

⁴⁴ *Hangman Ridge*, 105 Wn.2d at 793 (requiring a causal link and noting *Nuttall* as a prior case that had required a causal link between the deceptive acts and the injury).

relied on AWS's conduct.⁴⁵ The trial court erred in relying on *Nuttall*.

Contrary to the trial court's ruling, the *Nuttall* case is not persuasive authority for requiring that the plaintiffs prove they relied on AWS's conduct. First, the facts of *Nuttall* are distinguishable from the facts of this case; and second, applying the *Nuttall* reasoning in the consumer transaction context⁴⁶ is contrary to the public policies underpinning the CPA.

Nuttall involved a private real estate transaction between a single purchaser and seller. The real estate broker and the sellers had represented that the two parcels of land were five acres each, and they had staked out what they believed to be the correct boundary line of the parcels.⁴⁷ Prior to purchasing the parcels, the plaintiff had questioned the broker about the accuracy of the boundaries, and the broker told the plaintiff that the property had not been surveyed, but that he believed the boundaries to be

⁴⁵ CP 421-22.

⁴⁶ The CPA applies to both "consumer transactions" and "private disputes." In *Hangman Ridge*, the Supreme Court held that whether a deceptive act or practice was committed in the context of a consumer transaction or a private dispute affects the analysis of whether the consumer has satisfied the public interest element in a private CPA action. 105 Wn.2d at 789-90. The court did not define either of the terms, but gave examples of each. The court said that purchases of defective seed, mobile homes, and automobiles are consumer transactions; and characterized private disputes as those between an attorney and client, an insurer and its insured, a realtor and a purchaser, and an escrow agent and its client. *Id.* The transactions at issue in this appeal are consumer transactions.

Although the *Nuttall* decision predated the *Hangman Ridge* decision, it is plain that the plaintiff in *Nuttall* would not have satisfied the public interest element because there was little likelihood that the defendant's conduct would injure other consumers. See *Hangman Ridge*, 105 Wn.2d at 790.

⁴⁷ *Nuttall*, 31 Wn. App. 100-02.

correctly staked out.⁴⁸ The broker further suggested that the plaintiff inquire of the prior owners about the accuracy of the boundaries, which the plaintiff did before purchasing the parcels.⁴⁹ The property was later surveyed and it was determined that plaintiff's total acreage for the two parcels was nine acres rather than 10 acres, and the western boundary of the property was approximately 130 feet to the east of how it was presented prior to sale.⁵⁰ As a result of the boundary change, the plaintiff's well and proposed home site were located on his neighbor's property.⁵¹

The plaintiff sued the broker and the sellers, and included a CPA claim based on the defendants' misrepresentations about the location of the western boundary. In affirming the trial court's dismissal of this claim, the Court of Appeals determined that because the plaintiff had investigated the boundary on his own, he did not rely on the misrepresentation so there was no causal relationship between the misrepresentation and the plaintiff's injury.⁵²

In its decision, the *Nuttall* court acknowledged that it had reached its conclusion, in part, because the case involved a single land transaction

⁴⁸ *Id.* at 102.

⁴⁹ *Id.*

⁵⁰ *Id.* at 103-04.

⁵¹ *Id.* at 103.

⁵² *Id.* at 111.

where the location of the boundary was misrepresented, but the plaintiff had independently investigated the boundary location before buying the property.⁵³ These facts distinguish *Nuttall* from the case at bar, where the plaintiffs have alleged that AWS repeatedly misrepresented or omitted facts about its UCC charge to millions of consumers.⁵⁴

Rather than rely on *Nuttall*, the trial court should have looked to this Court's decision in *Pickett v. Holland America Line*. Like the instant case, the *Pickett* case involved multiple consumer transactions, rather than a single private transaction.⁵⁵ In both *Pickett* and the instant case, the plaintiffs alleged that the defendants misrepresented the nature of a fee that was imposed in addition to the advertised price.⁵⁶ *Pickett* also involved issues of class certification. In addition, unlike *Nuttall*, the *Pickett* decision was decided after *Hangman Ridge*, and this Court applied the *Hangman Ridge* factors to the facts of that case.⁵⁷

In *Pickett*, this Court analyzed what private consumers must establish to prove the necessary causal link between the deceptive acts and injury. In *Pickett*, the deceptive act was that the cruise line had informed passengers that they were responsible for government fees and taxes

⁵³ *Id.* at 106.

⁵⁴ CP at 185, 190-93.

⁵⁵ 101 Wn. App at 906 (sale of cruise tickets).

⁵⁶ *Id.* at 906; CP 190-91.

⁵⁷ *Pickett*, 101 Wn. App. at 916.

imposed on the cruise line, which the cruise line passed through to the consumers, but the cruise line retained a portion of these charges instead of remitting the entire amount to the port.⁵⁸ The cruise line “collected millions of dollars per year in revenue for port charges and taxes, in excess of what it actually paid in port charges and taxes.”⁵⁹ The defendant cruise line, like Defendant AWS in this case, had argued that because consumers had little or no knowledge about the port charges, they were not induced by the misrepresentation in purchasing their tickets, and therefore they could not prevail on a CPA claim.⁶⁰ This Court rejected that argument.

Instead, this Court held that causation was shown by the fact that the consumers had purchased the tickets and the cruise line retained a portion of the charges it had represented as port charges or taxes, and not by reliance on the representations.⁶¹ This Court explained:

We need not engage in an inquiry whether each plaintiff would have purchased a cruise ticket had they known about the port charges and taxes. We simply hold that Holland America cannot impose on passengers fees, which are not port charges and taxes, and yet call them government charges, taxes, and fees – pass-through charges – when they are not.⁶²

The cruise line’s misrepresentation that charges were pass-through port

⁵⁸*Id.* at 905, 917.

⁵⁹*Id.* at 917.

⁶⁰*Id.*

⁶¹*Id.* at 920.

⁶²*Id.*

charges when they were not, caused the consumers to pay “port charges” or “taxes” they were not required to pay.

This Court’s analysis of the causation requirement in *Pickett* is a better fit with the CPA’s intent to protect the public and foster fair and honest competition, than the reliance test applied by the *Nuttall* court in a single, private transaction case. Therefore, the trial court should have analyzed the instant claims under *Pickett* rather than *Nuttall*.

Further, it makes little sense to require actual reliance on a deceptive act or practice because the act or practice does not have to actually deceive anyone in order to be unlawful; all that is required is that the act or practice has capacity to deceive a substantial portion of the public.⁶³ The purpose of the capacity-to-deceive test is to deter deceptive conduct before anyone is injured.⁶⁴ Requiring consumers to prove they actually relied on a deceptive act or practice is tantamount to requiring that they prove actual deception.

While reliance is one method of proving causation, it is not the exclusive method. Consumers are not required to prove that they relied on a deceptive act in order to establish the causation element of a private CPA claim. Such a requirement would frustrate the purpose of the CPA.

⁶³ *Nelson*, 120 Wn.2d at 382.

⁶⁴ *Hangman Ridge*, 105 Wn.2d at 785.

2. The Trial Court's Decision Requiring Consumers to Prove Reliance on an Omission Is Contrary to the CPA.

In this case, the trial court held that the plaintiffs must prove that if AWS had disclosed to them that they would be charged the UCC (even though it was not a government tax or fee), they would not have purchased service from AWS.⁶⁵ This ruling puts the plaintiffs in the impossible position of having to prove that they believed the opposite of the omitted fact when they made the purchase.⁶⁶ Omissions of fact can be unfair or deceptive practices and consumers bringing private CPA actions should not be required to prove reliance on undisclosed facts.

IV. CONCLUSION

Consumers bringing private actions for enforcement of the CPA are not required to prove actual reliance in order to establish causation.

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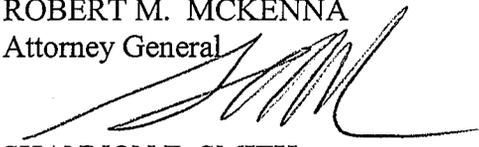
⁶⁵ CP 422.

⁶⁶ See *Morris*, 107 Wn.2d at 328.

This is particularly true in situations where a defendant has failed to disclose or omitted facts regarding the transaction. For these reasons, this Court should reverse the trial court's decision that the individual plaintiffs must prove they relied on AWS's misrepresentations and omissions.

Respectfully submitted on this 5th day of February, 2007,

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