

No. 80572-5

IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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.

WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION AMICUS CURIAE MEMORANDUM ON RECONSIDERATION REGARDING CPA CAUSATION STANDARD

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On Behalf of Washington State Association for Justice Foundation

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## I. IDENTITY AND INTEREST OF AMICUS CURIAE, AND INTRODUCTION

The Washington State Association for Justice Foundation (WSAJ Foundation) is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), which filed an amicus curiae brief in this case.<sup>1</sup> On January 21, 2010, the Court issued its 5-4 opinion in this case, and thereafter modified the opinion in certain respects. See Schnall Slip Opinion; 2/9/10 Order Changing Opinion.<sup>2</sup>

Respondents Martin Schnall, et al. (Schnall) have moved for reconsideration of this Court's opinion, specifically requesting that the Court "reconsider and vacate its decision." See Respondents' Motion for Reconsideration at 2.<sup>3</sup> Pursuant to RAP 12.4(i), WSAJ Foundation has been granted permission to file this amicus curiae memorandum to address the soundness of the legal analysis of the majority opinion regarding the causation standard for private actions under the Consumer Protection Act, Ch. 19.86 RCW (CPA), and proper interpretation of Indoor Billboard/Wash. v. Integra, 162 Wn.2d 59, 170 P.3d 10 (2007).

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<sup>1</sup> By letter dated February 27, 2009, the WSAJ Foundation notified the Court of the name change from WSTLA Foundation to WSAJ Foundation, and requested WSAJ Foundation be listed as the amicus curiae in this case. The amicus brief filed in this case by WSTLA Foundation is cited as "WSAJ Fdn. Am. Br."

<sup>2</sup> References to the Court's opinion in this case are to the Slip Opinion, as amended by the Order Changing Opinion (Slip Op.).

<sup>3</sup> Schnall urges the Court to withdraw its opinion as moot, based upon settlements reached in related class actions that apparently have the effect of resolving the claims involved in this case. The Court was notified of these settlements before issuing its opinion in this case, and was asked to withhold dismissing this appeal until final court approval of the settlements. See Schnall Motion for Reconsideration at 2-3 and attachments. Under RAP 18.2, dismissal of review on stipulation of the parties is discretionary when made before oral argument. When a post-argument settlement occurs, the Court also asks if an otherwise advisory opinion is justified. See Satomi Owners Ass'n v. Satomi LLC, 2009 WL 4985689, at \*4 (Wn. Sup. Ct., Dec. 24, 2009).

## II. ISSUE PRESENTED

Whether the majority opinion misinterprets Indoor Billboard, erroneously requiring proof of reliance to establish causation in certain private CPA actions?

## III. SUMMARY OF ARGUMENT

The majority opinion misapprehends the holding in Indoor Billboard, which rejected imposing a reliance requirement in private CPA actions in favor of the "proximate cause" causation standard. In so doing, the majority relies upon misguided dicta in Panag v. Farmers Ins. Co., 166 Wn.2d 27, 59 n.15, 204 P.3d 885 (2009). As a consequence of imposing a reliance requirement in certain private CPA actions based on misrepresentation, the efficacy of these actions is profoundly impaired. The erroneous imposition of a reliance requirement also adversely impacts the majority opinion's CR 23 class certification analysis.

## IV. THE MAJORITY OPINION'S CPA CAUSATION ANALYSIS IS UNSOUND, AND PROFOUNDLY IMPACTS THE EFFICACY OF PRIVATE CPA ACTIONS AND RELATED CLASS ACTIONS

### *Introduction*

The Court's opinion in this case involves much more than a technical refinement of the CPA causation standard. The efficacy of the CPA itself is at stake. Imposing a reliance requirement in order to establish causation undermines the CPA's remedial purposes, and is inimical to the liberal construction of the act mandated by the Legislature. See RCW 19.86.920; Indoor Billboard, 162 Wn.2d at 74. The crucial nature of this type of causation analysis has been recognized by the Court

in settling the appropriate causation standard in other contexts involving remedial legislation. See e.g. Allison v. Housing Authority, 118 Wn.2d 79, 93-96, 821 P.2d 34 (1991) (rejecting "proximate cause" standard in favor of less exacting "substantial factor" standard in Ch. 49.60 RCW retaliatory discrimination claims).<sup>4</sup>

**A. The Majority Opinion Misapprehends *Indoor Billboard*, Which Rejected A CPA Reliance Requirement In Favor Of A Less Exacting "Proximate Cause" Causation Standard.**

The majority opinion misapprehends Washington law in concluding that in private CPA actions based upon misrepresentation the plaintiff may be required to prove reliance on the misrepresentation to establish causation. See Schnall Slip Op. at 18-23. The dissent correctly explains that the majority analysis is a misreading of Indoor Billboard, which adopted the tort law "proximate cause" standard for CPA cases. See Schnall Slip Op. Dissent at 12-16 (Sanders, J., dissenting); see also Schnall WSAJ Fdn. Am. Br. at 6-8; Indoor Billboard, 162 Wn.2d at 82-85. Classically, this formulation requires a cause which in direct sequence produces the injury complained of and without which the injury would not have happened. Under this standard, as applied in CPA misrepresentation cases, reliance may be sufficient to establish causation, but it is not necessary, and there may be more than one proximate cause. See Indoor

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<sup>4</sup> In Allison, 118 Wn.2d at 86, in turning to the substantial factor causation standard, the Court held that a "'but for' causation requirement" is "too harsh a burden to place upon a plaintiff in a [Ch. 49.60 RCW] retaliation case." Similarly, here the proximate cause standard is much less exacting than the reliance requirement now resurrected by the majority after it was rejected by the Court in Indoor Billboard. See main text, §A.

Billboard at 82; WPI 15.01 & cmt.<sup>5</sup> In most cases, causation is a question of fact for the jury. See Indoor Billboard at 84-85.

In addition to the flaws discussed in the dissent, the majority's analysis is based primarily upon statements in Panag, which it cites as determinative. See Schnall Slip Op. at 19-21. As explained below, these statements mischaracterize the holding in Indoor Billboard, and are not precedential.

**B. The Majority Opinion's Misreading Of *Indoor Billboard* Is Based Upon The Flawed Analysis In *Panag* Footnote 15.**

The principal citation for the majority opinion in reading Indoor Billboard as imposing a reliance requirement is a footnote in Panag, 166 Wn.2d at 59 n.15. See Schnall Slip Op. at 19. When the Panag opinion was issued, WSAJ Foundation filed an amicus curiae memorandum on reconsideration calling to the Court's attention that it had misapprehended the holding in Indoor Billboard, when it stated in footnote 15:

It is less clear whether this court rejected the defendant's position that proof of reliance is always necessary to establish causation. Depending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*.

Panag at 59 n.15.

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<sup>5</sup> The majority overlooks the complex nature of the "proximate cause" concept under Washington law, and the notion that there may be multiple concurring causes. Instead, it seems to focus on the "but for" aspect of this rule as if it were the equivalent of a reliance requirement, which it is not. See Schnall Slip Op. at 18 (describing test as "proximate, 'but for' causation"); 19 (referring to "but for proximate cause"); 21 (citing out-of-state case equating reliance with "but for" causation). See WPI 15.01 cmt. (regarding multiple proximate causes); Indoor Billboard at 82, 84. This view also seems at odds with Indoor Billboard's rejection of the voluntary payment doctrine in the CPA context. See 162 Wn.2d at 85-87.

This passage in Panag misreads Indoor Billboard. A copy of WSAJ Foundation's Panag amicus curiae memorandum on reconsideration is attached here, and the argument explaining why the Panag analysis is inaccurate is incorporated by reference. In short, Panag is a faulty foundation for the majority's causation analysis.

**C. The Panag Footnote Relied Upon By The Majority Is *Dicta*, And Not Binding On The Court.**

The question of whether Panag is binding precedent is crucial here because footnote 15 in Panag is *the* key Washington authority supporting the majority's reliance analysis:

We recently affirmed that reliance is not a dead letter in our law: "[d]epending on the deceptive practice at issue and the relationship between the parties, the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*." Panag, 166 Wn.2d at 59 n.15.

Schnall Slip Op. at 19. This statement in Panag is not a holding regarding the proper interpretation of Indoor Billboard.<sup>6</sup>

Panag involved two consolidated cases. In the lead case, Panag, the question was whether Panag alleged sufficient proof to meet the "injury" element for a private CPA claim. See 166 Wn.2d at 57-65. The Court held that, unlike Indoor Billboard, Panag had alleged as injury expenses incurred as a result of the misrepresentation. See Panag at 62-63. The Court further rejected the insurer's argument, based on Indoor Billboard, that injury could not be shown because Panag had not paid the

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<sup>6</sup> Aside from Panag, the majority's causation analysis relies upon pre-Indoor Billboard Court of Appeals cases, out-of-state cases, and a Washington federal district court opinion. See Schnall Slip Op. at 18-22.

allegedly deceptive charge, a subrogation demand portrayed as a debt. See Panag at 58-59. The Court held that Indoor Billboard "does not hold that remanding payment is the only legally cognizable injury in a deceptive billing practice case." Panag at 59. There was no causation issue in the companion case, Stephens, requiring explication of Indoor Billboard. See Panag at 57.

The above-described holding in Panag disposed of the CPA injury element issue. Yet, the Court engaged in a lengthy and unnecessary discussion of Indoor Billboard and the CPA causation element, culminating in footnote 15. This is dicta. See generally Ruse v. Dep't of Labor & Indus., 138 Wn.2d 1, 8-9, 977 P.2d 570 (1999) (holding language in an opinion unnecessary to a court's decision is dicta and without precedential value); State ex. rel. Johnson v. Funkhouser, 52 Wn.2d 370, 373-74, 325 P.2d 297 (1958) (explaining that statements made during the course of a court's reasoning, but unrelated to the issue on appeal, are not essential to the opinion and are dicta). On reconsideration, the Court is not bound to give stare decisis effect to Panag n.15, and related commentary. See Panag WSAJ Fdn. Am. Curiae Memo. at 2-4. Instead, the Court should question the majority's reliance on Panag's flawed analysis.

**D. The Majority's Flawed CPA Causation Analysis Adversely Affects Its CR 23 Class Certification Analysis.**

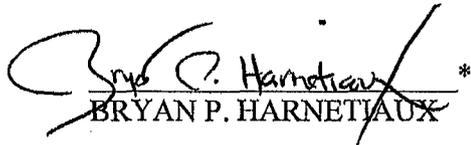
If indeed the majority opinion represents a flawed analysis of the Indoor Billboard holding on CPA causation, then that analysis also

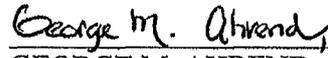
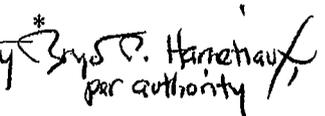
adversely impacts the majority's assessment of the CR 23 class certification issue. See e.g. Schnall Slip Op. at 22 (noting "proving a plaintiff relied on an affirmative representation is necessarily individualized"). Reconsideration of the majority's causation analysis also requires revisiting the CR 23 class certification analysis.

## V. CONCLUSION

WSAJ Foundation respectfully requests the Court reevaluate the soundness of the majority opinion's CPA causation analysis, and its impact on resolution of the CR 23 class certification issue. The Court should grant reconsideration and - if it does not withdraw its opinion - set the case for re-briefing and re-argument on the CPA causation standard and its impact on CR 23 class certification.

DATED this 23rd day of February, 2010.

  
BRYAN P. HARNETIAUX \*

  
GEORGE M. AHREND \*  
by   
per authority

On behalf of WSAJ Foundation

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

No. 80357-9 (Consolidated with No. 80366-8)

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IN THE SUPREME COURT OF THE STATE OF WASHINGTON

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RAJVIR PANAG, on behalf of herself and all others similarly situated,  
Plaintiff/Respondent,

v.

FARMERS INSURANCE COMPANY OF WASHINGTON, a domestic  
insurance company, and CREDIT CONTROL SERVICES, INC. d/b/a  
Credit Collection Services,  
Defendants/Petitioners.

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MICHAEL STEPHENS, on behalf of himself and all others similarly  
situated,  
Plaintiff/Respondent,

v.

OMNI INSURANCE COMPANY, a foreign insurance company,  
Defendant,  
and  
CREDIT CONTROL SERVICES, INC. d/b/a Credit Collection Services,  
Defendant/Petitioner.

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WASHINGTON STATE ASSOCIATION FOR JUSTICE FOUNDATION  
AMICUS CURIAE MEMORANDUM ON RECONSIDERATION  
REGARDING CPA CAUSATION STANDARD

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On behalf of  
Washington State Association for Justice Foundation

## **I. IDENTITY AND INTEREST OF AMICUS CURIAE**

The Washington State Association for Justice Foundation (WSAJ Foundation) is the new name of the Washington State Trial Lawyers Association Foundation (WSTLA Foundation), which filed an amicus curiae brief in these consolidated cases.<sup>1</sup> WSAJ Foundation has been granted permission to file this amicus curiae memorandum addressing the soundness of the analysis in the Court's opinion in this case regarding the causation standard for private actions under the Consumer Protection Act, Ch. 19.86 RCW (CPA), and proper interpretation of Indoor Billboard v. Integra, 162 Wn.2d 59, 170 P.3d 10 (2007). See RAP 12.4(i).

## **II. ARGUMENT REGARDING SOUNDNESS OF THE LEGAL ANALYSIS BEARING ON THE PRIVATE CPA ACTION CAUSATION REQUIREMENT**

There are three key passages in the Court's majority opinion which relate to the holding in Indoor Billboard, regarding the nature of proof required to establish causation in private CPA actions. WSAJ Foundation questions the analysis in these three passages, insofar as it suggests the opinion in Indoor Billboard requires proof of reliance in establishing causation in private CPA actions. Properly interpreted, Indoor Billboard does not impose an absolute reliance requirement, but instead adopts the proximate cause standard used in tort cases. See 162 Wn.2d at 78-85. In Indoor Billboard, after noting and discussing defendant/respondent

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<sup>1</sup> The WSTLA Foundation amicus curiae brief did not address the CPA causation element issue, and focused on the relevance of Washington's Insurance Code, Title 48 RCW, to the viability of the CPA claims in these consolidated cases.

Integra's argument that proof of reliance remained a necessary requirement after this Court's opinion in Hangman Ridge v. Safeco Title, 105 Wn.2d 778, 719 P.2d 531 (1978), see 162 Wn.2d at 81-83, the Court concluded:

We hold that the proximate cause standard embodied in WPI 15.01 is required to establish the causation element in a CPA claim. A plaintiff must establish that, but for the defendant's unfair or deceptive practice, the plaintiff would not have suffered an injury.

Id. at 84.

Under Indoor Billboard, reliance is sufficient to establish but for causation, but it is not necessary. At the same time, evidence the CPA plaintiff affirmatively relied on factors unrelated to the defendant's deceptive act or practice may be relevant in finding a lack of but for causation regarding injury. See id. at 84-85.

The three passages, along with brief commentary regarding each passage, are:

**Passage 1:**

Farmers reads *Indoor Billboard* as holding a CPA plaintiff cannot establish injury unless he or she remanded payment in reliance on a deceptive demand letter. But *Indoor Billboard* merely holds that when the alleged injury is payment of an amount not actually owed, a plaintiff must prove the deceptive billing practice induced the payment to establish causation. It does not hold that remanding payment is the only legally cognizable injury in a deceptive billing practice case.

Panag Slip. Op. at 32 (bold added).

**Comment:**

"Induced" is contrasted with "reliance," which appears in the preceding sentence of the quotation. At one level, it is unclear whether

there is any distinction between inducement and reliance. Necessarily, it seems that a defendant induces, and a plaintiff relies. Further, the notion of "inducement" is associated with the reliance concept that held forth before Hangman Ridge. See Indoor Billboard, 162 Wn.2d at 80. In the Indoor Billboard analysis, the Court appears to use inducement and reliance interchangeably. See 162 Wn.2d at 81-82. Lastly, neither WPI 15.01 nor WPI 310.07 use the word "induce" or any variation thereof in defining "proximate cause."

The second sentence of the above-quoted passage does not apply the proximate cause standard. It should. Otherwise, practitioners and lower courts will question whether the Court is resurrecting the inducement/reliance aspect of pre-Hangman Ridge private CPA claims that was replaced by the but for causation standard. See Indoor Billboard, 162 Wn.2d at 84.

**Passage 2:**

It is less clear whether this court rejected the defendant's position that proof of **reliance** is always necessary to establish causation. Depending on the deceptive practice at issue and the relationship between the parties, **the plaintiff may need to prove reliance to establish causation, as in *Indoor Billboard*.**

Id. at 31-32, n.15 (in part; bold added).

**Comment:**

This passage is inconsistent with the but for causation standard adopted in Indoor Billboard, and its rejection of an absolute reliance requirement under the CPA. The second sentence of this passage

categorically states that there are instances where a CPA plaintiff "may need to prove reliance to establish causation, as in *Indoor Billboard*." Id. Indoor Billboard did not require reliance, but instead said causation was a question of fact, in light of the totality of the circumstances, under the but for causation standard. See Indoor Billboard at 84-85.

**Passage 3:**

*Crane* [*& Crane, Inc. v. C&D Elec., Inc.*, 37 Wn.App. 560, 683 P.2d 1103 (1984)] is a pre-*Hangman Ridge* case. A business brought a CPA claim against an electrician who made faulty repairs, resulting in a fire. The plaintiff alleged the electrician misrepresented his qualifications. The court held the evidence was insufficient to establish a CPA violation because there was no evidence of a causal relationship between the misrepresentations and the defendant's injury, as the evidence showed the business routinely hired the electrician. "Absent evidence of inducements, the false representations cannot be the basis for allowing a recovery under the CPA." *Crane*, 37 Wash.App. at 563, 683 P.2d 1103. *Crane* is consistent with *Indoor Billboard*. As in that case, the CPA plaintiff was required to prove a causal connection between the deceptive act and the alleged injury.

Id. at 33-34 (bold added).

**Comment:**

As the Court notes, Crane is a pre-Hangman Ridge case. Its statement regarding the need to prove "inducements" is not consistent with the proximate cause standard announced in Indoor Billboard. The notions of inducement and reliance are not a necessary part of a proximate cause analysis. The continued use of these terms may well cause confusion among bench and bar.

**III. CONCLUSION**

WSAJ Foundation respectfully requests the Court to reevaluate the above passages with regard to whether they properly characterize the holding in Indoor Billboard, and what is required to prove causation in a private CPA action.

DATED this 29th day of April, 2009.

*Kelby D. Fletcher* by \_\_\_\_\_ \*  
KELBY D. FLETCHER  
*Bryan P. Harnetiaux, per authority*  
On behalf of WSAJ Foundation

*Bryan P. Harnetiaux* \*  
BRYAN P. HARNETIAUX

\*Transmitted for filing by email; signed original retained by counsel.