No. 97576-1

IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

DUANE YOUNG,

Petitioner,

v.

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

Respondent.

BRIEF OF AMICUS CURIAE THE NORTHWEST CONSUMER LAW CENTER

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On behalf of The Northwest Consumer Law Center

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I. INTEREST OF AMICUS CURIAE

The Northwest Consumer Law Center (NWCLC) is a Washington nonprofit organization dedicated to advancing economic justice. Since opening its doors in January 2013, NWCLC has served over 3,500 low and moderate income Washington consumers. NWCLC regularly brings claims on behalf of consumers under Washington's Consumer Protection Act (CPA), chapter 19.86 RCW. NWCLC has an interest in preserving the CPA's broad protections and ensuring the continued ability of Washington consumers to vindicate their rights under the statute.

II. INTRODUCTION AND SUMMARY OF ARGUMENT

The Washington legislature adopted the CPA "in order to protect the public and foster fair and honest competition." RCW 19.86.920. Corporate defendants—like Toyota here—have consistently tried to avoid the CPA's reach by asking this Court to add new elements or to narrow the CPA's statutory scope. This Court has steadfastly refused to so, instead adhering to the statute's plain language, which requires that the CPA be "liberally construed that its beneficial purposes may be served." RCW 19.86.920. The Northwest Consumer Law Center joins Mr. Young and the Attorney General in asking this Court to once again protect the CPA's scope by rejecting Toyota's bid to graft a sixth element of materiality onto

the familiar *Hangman Ridge* test. Because those legal arguments are ably addressed in other briefing, however, NWCLC does not repeat them here.

Instead, NWCLC will focus on three legal issues presented by the lower courts' decisions and the policy arguments Toyota makes to this Court. First, this Court should confirm that when a plaintiff predicates a CPA claim on a violation of another statute—a per se violation of the CPA—the CPA's four-year statute of limitations governs and not any shorter statute of limitations applicable to the predicate statute. Second, this Court should reject the new materiality requirement the Court of Appeals created for per se claims based on the ADPA because it has no basis in the statutory text. Third, while the Court of Appeals correctly found that a violation of the Auto Dealers Practices Act (ADPA) establishes the first two elements of a CPA claim—the unfair or deceptive act or practice and trade or commerce elements—it did not recognize that the ADPA also contains a legislative declaration of public interest impact: "Any violation of this chapter is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW." RCW 46.70.310. NWCLC urges this Court to clarify that such a legislative declaration establishes the first three elements of a CPA claim per se.

Fourth, Toyota seeks to construct a narrative that simply does not exist, warning this Court about a scourge of uninjured plaintiffs filing

CPA claims that generate only attorneys' fees, without any benefits to consumers. But these Chamber of Commerce talking points are inconsistent with the language of the statute, the public policy of this state, and the realities of access to civil justice. Injury to business or property is a required element of a CPA claim. A truly "uninjured plaintiff" simply won't be able to prove his or her case. In addition, the public policy of this state favors the use of class actions under the CPA "in circumstances where it is otherwise economically unfeasible for individual consumers to bring their small-value claims." *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 840–41, 161 P.3d 1016 (2007). The Court of Appeals' ruling that Mr. Young's claim failed because the component Toyota promised but failed to deliver was "financially immaterial" is directly contrary to this purpose.

There is no glut of lawyers filing consumer cases to line their pockets. In fact, more than one-third of low-income Americans experience at least one consumer legal issue every year and most of them cannot find a lawyer to help. The need is so great that civil legal aid organizations like NWCLC and private plaintiffs' lawyers cannot come close to meeting it. NWCLC urges this Court to reject Toyota's bid to strip consumers of one of the only tools they have to hold corporations accountable based on a non-existent threat of absolute liability. The five elements this Court established in *Hangman Ridge* strike the appropriate balance between

protecting consumers from unfair, deceptive, and fraudulent practices without prohibiting practices that are reasonable in relation to the development and preservation of business as required by the CPA's plain language. RCW 19.86.920.

III. ARGUMENT & AUTHORITY

NWCLC begins by discussing the trial court's error in shortening the CPA's four-year statute of limitations based on the ADPA's shorter limitations period. NWCLC then explains why the Court of Appeals' holding that a separate materiality requirement "inheres" in the ADPA when it forms the predicate for a per se CPA claim is wrong. NWCLC next requests that this Court clarify the broad scope of the legislative declaration in the ADPA. Finally, NWCLC exposes Toyota's overblown claim about "absolute liability" as a thinly veiled plea for functional corporate immunity when companies affirmatively misrepresent their products.

A. The CPA's four-year statute of limitations applies when a plaintiff asserts a per se violation of the CPA.

The trial court rejected Mr. Young's per se CPA claim based on violation of the ADPA because a claim under the ADPA would be time-barred by its one-year statute of limitations. In other words, the trial court held that when a plaintiff brings a per se CPA claim based on violations of another statute, the CPA's statute of limitations is shortened to that of the

predicate statute. The Court of Appeals did not directly address this issue, but noted that the only binding authority it found did not support the trial court's holding. *Young v. Toyota Motor Sales, U.S.A.*, 9 Wn. App. 2d 26, 37 n.8, 442 P.3d 5 (2019) (citing *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 210, 229 P.3d 871 (2010)).

In *Walker*, the plaintiffs brought a CPA action against an auto dealership based on alleged deceptive advertising. 155 Wn. App. at 205. The trial court dismissed the CPA claims on summary judgment, finding that the claims were time-barred because the complaint was filed after the one-year statute of limitations under the ADPA. *Id.* at 206. Division III of the Court of Appeals reversed, rejecting the argument that the ADPA, as a more specific statute, supersedes the CPA. The court examined two provisions of the ADPA: (1) the legislature's statement that "[t]he provisions of this chapter shall be cumulative to existing laws…," *id.* at 209 (quoting RCW 46.70.270); and (2) that "[a]ny violation of this chapter is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW." *Id.* (quoting RCW 46.70.310). The court held that this language demonstrates that "the Legislature expressly intended that the ADPA supplement other legislation, including the CPA" and that nothing in the ADPA "suggests the Legislature intended that the ADPA be the exclusive remedy in this case." *Id.* at 209–10. "[B]oth acts can be applied

to the same conduct and . . . each act is governed by its own statute of limitations." *Id.* at 210. As a result, the plaintiffs' CPA claims were timely filed within the CPA's four-year statute of limitations period. *Id.*

Division III has also concluded that a plaintiff is not precluded from establishing the CPA's elements per se where the underlying common law usury or a statutory usury claims are time-barred. *See Mackey v. Maurer*, 153 Wn. App. 107, 114, 220 P.3d 1235 (2009) (reversing trial court's dismissal of CPA claim based because the statutory usury claim was time-barred and explaining that "the CPA contains its own statute of limitations for claims").

NWCLC urges the Court to hold that a plaintiff who brings a CPA claim within the CPA's four-year statute of limitation is not limited by a shorter statute of limitations applicable to the statute that is the basis for the plaintiff's per se claim. The legislature established a four-year statute of limitations on private claims for damages under the CPA, without exceptions for per se violations. RCW 19.86.120. And nothing in *Hangman Ridge* or any of this Court's decisions suggests that the CPA's statute of limitations may be disregarded. Doing so would be contrary to the legislative command that the CPA be liberally construed "in order to protect the public and foster fair and honest competition." RCW 19.86.920.

Consistent with the statute's purpose, this Court has rejected other attempts to shorten the CPA's four-year statute of limitations. In *McKee v. AT&T Corp.*, , this Court considered a challenge to AT&T's services agreement requiring that any claim against the company be brought within two years. 164 Wn.2d 372, 380, 191 P.3d 845 (2008). The Court held that AT&T's attempt to shorten the statute of limitations for a customer's CPA claim by contract was substantively unconscionable as against public policy. *Id.* at 399. Although it recognized the general rule that parties may shorten the applicable statute of limitations by contract, this Court observed that "such a limitation is harsh and one-sided when imposed on a consumer in a contract of adhesion" because "[i]t is for these consumer service agreements that Washington's Consumer Protection Act is designed to provide protection." *Id.* The Court emphasized the importance of the CPA's four-year statute of limitation that "permits adequate time for consumers to vindicate rights violated by unfair business practices." *Id.* The CPA "would be meaningless if consumer contracts of adhesion routinely stripped consumers of their remedies" because "'consumers would have far less ability to vindicate' their rights under the act." *Id.* at 399 (quoting *Scott v. Cingular Wireless*, 160 Wn.2d 843, 854, 161 P.3d 1000 (2007)).

Toyota relies on federal district court decisions concluding that the CPA's elements cannot be established per se where claims under the predicate statutes are time-barred. Resp. Br. at 21. The trial court found those decisions persuasive and adopted them. But the reasoning in those decisions has since been rejected by the Ninth Circuit. *Hoffman v. Transworld Sys., Inc.*, No. 19-35058, 2020 WL 1314399, at *1 (9th Cir. Mar. 19, 2020) (unpublished) ("[E]ven though the Plaintiffs' [Fair Debt Collection Practices Act] claims have become 'stale,' … the Plaintiffs' per se CPA claims based on violations of the FDCPA are governed by the CPA's four-year statute of limitations ... and are not time-barred."). This Court should clarify that the CPA's four-year statute of limitations is not shortened when a consumer asserts a per se claim based on violations of another statute with a shorter limitations period.

B. There is no separate materiality requirement when a plaintiff establishes a per se violation of the CPA.

The Court of Appeals questioned whether Mr. Young had shown a violation of the ADPA that would give rise to a per se CPA violation. But instead of addressing that issue directly, the court held that "the materiality requirement inheres" in section 46.70.180(1), "just as it inheres in the CPA and in sections 5 and 12 of the FTC Act." *Young*, 9 Wn. App. 2d at 37. There is no basis for this conclusion in the text of ADPA. Instead, the

statute provides that each of the more than 17 acts or practices set forth in section 46.70.180 "is unlawful." The language of subsection 1 is particularly broad, prohibiting advertising, printing, displaying or disseminating "*in any manner whatsoever*, *any* statement or representation" regarding the sale of a vehicle that is "false, deceptive, *or* misleading." RCW 46.70.180(1). There is no language in the statute suggesting that any unwritten materiality requirement that narrows its scope. Judge Fearing's concurrence is correct on this point. *Young*, 9 Wn. App. 2d at 43 (Fearing, J. concurring) (explaining that "none of the language in RCW 46.70.180 requires that a false statement by an auto dealer be material to be actionable").

For the reasons articulated by Mr. Young and the Attorney General, this Court should reject the view that establishing a deceptive act or practice requires a separate showing of materiality. Grafting a separate materiality requirement onto the CPA elements makes even less sense when the plaintiff alleges the unfair or deceptive act or practice element is satisfied per se. When the Legislature has looked at an industry and decided that its conduct must be specifically regulated, and then gone on to declare that violation of those regulations is unfair or deceptive for purposes of the CPA, it would be improper for courts to narrow the scope of those determinations with requirements not found in the text of the CPA

or predicate statutes themselves. As this Court said in *Hangman Ridge*, it is "clear" that "the Legislature" is "the appropriate body" to define the relationship between the CPA and other statutes "by declaring a statutory violation to be a per se unfair trade practice." *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 787, 719 P.2d 531 (1986). Where the Legislature has defined that relationship, courts must respect it. *Id.*

C. A violation of the ADPA establishes the first three elements of a CPA claim per se.

The first two elements of a CPA claim are established where a statute declares that a violation is a per se unfair trade practice. *Hangman Ridge*, 105 Wn.2d at 786. "A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Id.* The public interest element may also be established per se based on a showing that the predicate statute contains a specific legislative declaration of public interest impact. *Id.* at 791; RCW 19.86.093(2).

The Court of Appeals said a violation of the ADPA "satisfies the first two elements of a CPA claim." *Young*, 9 Wn. App. 2d at 36. This statement is too narrow. The legislature has declared that "[a]ny violation of [the ADPA] is deemed to affect the public interest and constitutes a

violation of 19.86 RCW[,]" thus satisfying the unfair and deceptive act or practice element, the trade or commerce element, and the public interest element of a CPA claim. RCW 46.70.310; *see also Hangman Ridge*, 105 Wn.2d at 791 (identifying the ADPA as an example of a statute containing a specific declaration of public interest). To avoid any confusion in future cases, NWCLC respectfully 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 per se.

D. The five required elements of a CPA claim are more than adequate to protect companies from "absolute liability."

Toyota asks this Court to reject "absolute liability," a term it does not define, under the CPA. Toyota speculates that without a materiality requirement, the judicial system will be rife with litigation abuse by money-driven plaintiffs' lawyers and windfall judgments for uninjured plaintiffs. But the reality is that the need for representation for consumers who have been wronged is too great for the private plaintiffs' bar and organizations like NWCLC to serve. A study by the National Center for Access to Justice found that in Washington State, there are only 1.09 legal aid attorneys per 10,000 Washingtonians living in poverty.[1] As this Court

[1] Nat'l Center for Access to Justice, *The Justice Index 2016*, available at https://justiceindex.org/2016-findings/attorney-access/#site-navigation

observed in *Hangman Ridge*, the legislature amended the CPA to provide a private right of action "[i]n apparent response to the escalating need for additional enforcement capabilities" beyond those of the Attorney General. 105 Wn.2d at 784. Consumers and their attorneys must constantly adjust and react to new varieties of unfair and deceptive practices because there is "no limit to human inventiveness" in the realm of consumer fraud and abuse. *Klem v. Washington Mut. Bank*, 176 Wn.2d 771, 786, 295 P.3d 1179 (2013).

A nationwide study in 2017 by the Legal Services Corporation (LSC) sought to measure the gap between low income individuals' civil legal needs and the resources available to meet those needs. *See* Legal Services Corporation, *The Justice Gap: Measuring the Unmet Civil Legal Needs of Low-income Americans* (June 2017).[2] The study found that more than a third of low-income households experienced at least one consumer or finance problem in 2017. *Id.* at 22–23. Fifty-eight percent of those who experienced a consumer or finance problem reported that the problem "very much" or "severely" affected their lives. *Id.* at 26.

[2] Available at https://www.lsc.gov/sites/default/files/images/TheJusticeGap-FullReport.pdf.

The LSC's 2017 study mirrors the reality on the ground in Washington State. In its 2015 report, this Court's Civil Legal Needs Update Study Committee found that more than seventy percent of low-income Washingtonians "face at least one civil legal problem during a 12-month period[,]" and of those individuals, more than seventy-six percent "do not get the help they need to solve their problems." Washington State Supreme Court, Civil Legal Needs Update Study Comm., *2015 Washington State Civil Legal Needs Update* 5, 15 (October 2015).[3] Consumer legal issues are one of the most prevalent legal problems faced by low income Washington families, coming second only to health care problems. *Id.* at 7. Specifically, thirty-seven percent of low-income Washingtonians experienced a consumer, financial services, or credit problem in 2014. *Id.*. Public policy supports making it easier, not harder, for those consumers to find an attorney and obtain relief for financial harms, even those valued at only $10.

IV. CONCLUSION

NWCLC respectfully requests that this Court correct the Court of Appeals' improper adoption of a new materiality requirement not based on

[3] Available at https://www.srln.org/system/files/attachments/CivilLegalNeedsStudy_October2015_V21_Final10_14_15.pdf

the text of the CPA or this Court's precedent. NWCLC asks the Court to reject Toyota's arguments that would limit per se CPA violations. There is no reason to do so. The CPA's well-established five elements already balance the statute's goals of protecting consumers from unfair, deceptive, and fraudulent practices while permitting practices that are reasonable in relation to the development and preservation of business.

RESPECTFULLY SUBMITTED AND DATED this 13th day of April, 2020.

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 13th day of April, 2020.

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April 13, 2020 - 3:24 PM

Transmittal Information

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Appellate Court Case Title:	Duane Young v. Toyota Motor Sales, USA
Superior Court Case Number:	15-2-01859-5

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