

FILED
SUPREME COURT
STATE OF WASHINGTON
9/12/2025 10:31 AM
BY SARAH R. PENDLETON
CLERK

No. 1041624

IN THE SUPREME COURT OF THE
STATE OF WASHINGTON

CERTIFICATION FROM THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

SHAWNNA MONTES,

Plaintiff-Appellant,

v.

SPARC GROUP LLC,

Defendant-Appellee,

**AMICUS CURIAE BRIEF BY NATIONAL ASSOCIATION OF
CONSUMER ADVOCATES**

Toby J. Marshall
tmarshall@terrellmarshall.com
Blythe H. Chandler
bchandler@terrellmarshall.com
Elizabeth A. Adams
eadams@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103
Telephone: (206) 816-6603

Attorneys for Amicus Curiae NACA

TABLE OF CONTENTS

	Page
I. IDENTITY AND INTEREST OF AMICUS CURIAE	1
II. INTRODUCTION AND STATEMENT OF THE CASE	2
III. ARGUMENT	3
A. The causation element under the CPA is simply a link between the unfair or deceptive conduct and the injury	4
B. Injury must be “to business or property.”	8
C. The FTC’s regulations support Montes, not Sparc ..	11
D. Injury is distinct from damages	12
E. The purposes of the CPA would be frustrated by a finding that any of Plaintiff’s injury theories are unviable	13
IV. CONCLUSION	14
V. RAP 18.17 CERTIFICATION	14

TABLE OF AUTHORITIES

Page

STATE CASES

<i>Allen v. Am. Land Research</i> , 95 Wn.2d 841 (1981)	14
<i>Ambach v. French</i> , 167 Wn.2d 167 (2009)	10
<i>Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778 (1986)	4, 8
<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59 (2007)	5
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27 (2009)	10, 11, 12
<i>Peoples v. United Servs. Auto. Ass’n</i> , 194 Wn.2d 771 (2019)	10
<i>Schnall v. AT&T Wireless Servs., Inc.</i> , 171 Wn.2d 260 (2011)	5
<i>Wright v. Lyft, Inc.</i> , 189 Wn.2d 718 (2017)	5

FEDERAL CASES

<i>Montes v. Sparc Group, LLC</i> , --- F.4th ----, 2025 WL 1352258 (9th Cir. May 9, 2025)....	2, 4
---	------

STATUTES

RCW 19.86.090	8, 9
---------------------	------

REGULATIONS

16 C.F.R. § 233.1	11
16 C.F.R. § 233.1(e).....	11

OTHER AUTHORITIES

Gorkan Ahmetoglu et al., <i>Pricing Practice: A Critical Review of Their Effects on Consumers</i> , 21 J. Retailing & Consumer Servs. 696 (2014)	7
David Adam Friedman, <i>Reconsidering Fictitious Pricing</i> , 100 Minnesota L. Rev. 921 (2016)	6
Dhruv Grewal & Larry D. Compeau, <i>Comparative Price Advertising: Informative or Deceptive?</i> , J. Pub. Pol’y & Marketing 52 (1992)	6, 7
Richard H. Thaler, <i>Mental Accounting and Consumer Choice</i> , 27 Marketing Sci. 15, 24 (2008)	6

I. IDENTITY AND INTEREST OF AMICUS CURIAE

The National Association of Consumer Advocates (NACA) is a nonprofit association of more than 1,600 attorneys and consumer advocates committed to representing consumers' interests. NACA's members are private and public sector attorneys, legal services attorneys, law professors, and law students whose primary focus is the protection and representation of consumers. They have represented hundreds of thousands of consumers in small-damages actions and consumer class actions. As a national organization fully committed to promoting justice for consumers, with an emphasis on those of modest means or those who are otherwise especially vulnerable, NACA's members have also long advocated to ensure that consumers have remedy and means of redress of injuries caused by unfair practices.

II. INTRODUCTION AND STATEMENT OF THE CASE

Washington's Consumer Protection Act provides redress to persons injured in their "business or property" by unfair or deceptive practices.

At issue in this case is a particularly prevalent unfair and deceptive practice: a "false discounting" scheme. Plaintiff Shawna Montes alleges that she visited Aéropostale's website (owned by Defendant Sparc), saw leggings that were "on sale" for \$6 with a strikethrough "list" price of \$12.50, and was thus induced to purchase the leggings because she believed that she was receiving a special bargain. *Montes v. Sparc Group, LLC*, --- F.4th ----, 2025 WL 1352258, at *3 (9th Cir. May 9, 2025). In fact, the leggings were never or virtually never sold at \$12.50. *Id.* Montes alleges that she would not have purchased the leggings if she had known that the discount was false. *Id.*

The issue presented to this Court, in brief, is whether Montes's purchase of the leggings based on the misrepresented

price history is sufficient to satisfy the injury requirement of the CPA. Because Montes alleges that she spent money that she otherwise would not have spent (an allegation that must be taken as true at the pleading stage), she adequately alleges injury to business or property within the meaning of the CPA.

Sparc asks this Court to adopt a rule for injury requiring that a plaintiff be “objectively worse off” to demonstrate that they have been injured. This rule finds no support in the plain language of the CPA or in any of this Court’s prior decisions interpreting it. The Court should reject this untethered proposal as inconsistent with the plain language and protective purpose of the CPA and find that Montes’s alleged injury suffices to satisfy the injury element of the CPA.

III. ARGUMENT

To prevail on a CPA claim, a plaintiff must establish five elements: (1) an unfair or deceptive act or practice; (2) in trade or commerce; (3) which affects the public interest; (4) injury to

business or property; and (5) causation. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784-85 (1986). The certified question before the Court concerns only the “injury to business or property” element. Nevertheless, because Sparc conflates the “injury” and “causation” elements, a brief discussion of causation is useful to understanding why Sparc’s arguments are incorrect.

A. The causation element under the CPA is simply a link between the unfair or deceptive conduct and the injury.

As the parties and the Ninth Circuit acknowledge, causation is not before the Court on this appeal. See Montes Opening Brief at 16 (“Defendant conceded the deceptive acts and causation elements were met for purposes of the present motion, and that injury is the sole issue before the court.”); *Montes*, --- F.4th ----, 2025 WL 1352258, at *4 (“[I]njury is the sole issue for purposes of this appeal.”). Yet Sparc spends much of its brief discussing its view of causation and how it relates to injury and damages. As a result, amicus addresses the causation

element to clarify the distinction and aid the Court in analyzing the injury question before it.

Under Washington law, the causation element requires that “but for the defendant’s unfair or deceptive act or practice the plaintiff’s injury would not have occurred.” *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82 (2007); *see also Schnall v. AT&T Wireless Servs., Inc.*, 171 Wn.2d 260, 278 (2011) (“A plaintiff must establish that, but for the defendant’s unfair or deceptive practice, the plaintiff would not have suffered injury.”). Causation, therefore, is the link between the unfair or deceptive conduct (what Sparc refers to as the “violation”) and the “injury to business or property.” *See Indoor Billboard*, 162 Wn.2d at 83 (“[T]here must be some demonstration of a causal link between the misrepresentation and the plaintiff's injury.”).

Montes alleges that she was induced to purchase the leggings by misrepresentations about the regular and discounted

price. In other words, Montes alleges that Sparc's misrepresentations caused the injury.¹ This is a factual question. *See id.* ("Proximate cause is a factual question to be decided by the trier of fact.").

Montes's allegation is supported by common sense. It is also backed by academic literature regarding consumer behavior. *See, e.g.,* David Adam Friedman, *Reconsidering Fictitious Pricing*, 100 Minnesota L. Rev. 921, 933-937 (2016) (discussing behavioral influences on consumers of "fictitious pricing" schemes) (citing, e.g., Richard H. Thaler, *Mental Accounting and Consumer Choice*, 27 Marketing Sci. 15, 24 (2008) and Dhruv Grewal & Larry D.

¹ Sparc claims that Plaintiff's argument conflates causation with injury—specifically, that both the causation element and the injury element are satisfied by Montes having simply purchased the leggings. *See* Sparc Answering Brief at 36. In other words, Sparc claims that the Violation-Causation-Injury chain is the "Allegedly false reference price"-"Montes buys the leggings"-"Montes buys the leggings." *Id.* This analysis is wrong. A correct understanding of the Violation-Causation-Injury chain is "False reference price"-"induces"-"Montes buys the leggings." Inducement is the causal link between Violation and Injury.

Compeau, *Comparative Price Advertising: Informative or Deceptive?*, J. Pub. Pol’y & Marketing 52, 55-58 (1992)). “[A]n abundance of evidence . . . show[s] that advertised reference prices (ARPs) influence a range of consumer price-related responses, including increasing perceptions of the fair price, the normal price, the lowest available price in the market, the potential savings and the purchase value The effects of reference pricing on consumer deal evaluations and behaviour have been replicated fairly consistently.” Gorkan Ahmetoglu et al., *Pricing Practice: A Critical Review of Their Effects on Consumers*, 21 J. Retailing & Consumer Servs. 696, 699 (2014). Montes’s allegation that the false discounts caused her to make a purchase is thus in line with academic literature regarding consumer behavior in this context. This makes her allegation even more plausible.

Because Montes sufficiently alleges that the misrepresentations regarding price history caused her to incur

injury, she has satisfied the pleading standards at this Rule 12 stage. The Court should go no further in analyzing the causation element, which is not in dispute.

B. Injury must be “to business or property.”

All five of the elements of a CPA claim are “statutorily based.” *Hangman Ridge*, 105 Wn.2d at 784. This includes the injury element, which provides a cause of action to “[a]ny person who is injured in his or her business or property” by a violation of the CPA. RCW 19.86.090; *see also Hangman Ridge*, 105 Wn.2d at 785 (CPA “requires a showing of injury to plaintiff in his or her business or property”). “On matters of statutory interpretation,” a court’s “fundamental objective is to ascertain and carry out the Legislature’s intent.” *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 722 (2017). “If the statute’s meaning is plain on its face, then the court must give effect to that plain meaning as an expression of legislative intent.” *Id.*

There is no support in the plain text of the statute or any opinion of this Court for the distinction Sparc tries to make between “a violation that causes a transaction” and “one that causes an injury.” Sparc Answering Brief at 21. Likewise, there is no support in the statute or this Court’s jurisprudence for the assertion that a plaintiff must be “objectively worse off” than before they made the purchase. *See id.* at 16. Not a single case interpreting the Washington Consumer Protection Act uses those words.

Sparc reframes Montes’s economic harm as mere “disappointment” in the transaction, likening this to a personal or emotional injury, and then argues that “subjective” injuries are not actionable under the CPA. *Id.* at 12. But a quick review of the plain language of the statute shows why personal injuries and emotional distress are not covered by the CPA: an injury must be to “business or property.” RCW 19.86.090. Personal injury and emotional distress are not injuries to “business or property.” But

a loss of money that would not have otherwise been paid but for unfair or deceptive conduct is squarely an “injury to business or property.” Multiple cases confirm this. *See, e.g., Peoples v. United Servs. Auto. Ass’n*, 194 Wn.2d 771, 777-781 (2019) (drawing distinction between whether a CPA claim “seek[s] to vindicate [plaintiff’s] right to be free of bodily harm” or “their property interest”); *Ambach v. French*, 167 Wn.2d 167, 172-177 (2009) (distinguishing between injury to property and personal injury); *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 57-58 (2009) (“damages for mental distress, embarrassment, and inconvenience are not recoverable under the CPA” but “the injury requirement is met upon proof the plaintiff’s property interest or money is diminished because of the unlawful conduct”). None of these cases discuss “objective” versus “subjective” injuries because the plain language of the statute does not draw such a line. Instead, injury to “business or property” is covered; personal injury is not.

If an unfair or deceptive act causes a plaintiff to engage in a transaction that otherwise would not have occurred, the plaintiff has suffered an injury under the CPA. Montes spent money she would not have otherwise spent. And money is quintessentially “property” under the CPA. Montes has thus been injured in her “business or property.”

C. The FTC’s regulations support Montes, not Sparc.

Sparc claims that other states that model their laws on the FTC’s Unfair Trade Practices and Consumer Protection Law have foreclosed the kind of damages Montes seeks here. But the FTC has specifically issued regulations that it refers to as “Guides Against Deceptive Pricing,” including 16 C.F.R. § 233.1, which is entitled “Former price comparisons.” These regulations describe exactly what Sparc did here as “fictitious price comparisons,” and then specifically state that “if the former price is set forth in the advertisement,” then “the advertiser should make certain that the former price is not a fictitious one.” 16 C.F.R. § 233.1(e). In

other words, the FTC has concluded that what Montes alleges Sparc did here is unfair. It would make no sense for the FTC to have identified fictitious pricing as an unfair practice if the FTC also supported the view that no injury occurs when a person is induced to make a purchase by a fictitious pricing scheme.

D. Injury is distinct from damages.

Finally, the issue of damages is not before the Court; only the issue of “injury.” The Court need not decide the appropriate measure of damages for Montes’s claim on this appeal. Instead, the certified question focuses on whether each of Montes’s theories are sufficient to establish the injury element of the CPA. As this Court has made clear, “‘injury’ is distinct from ‘damages.’” *Panag*, 166 Wn.2d at 58. Thus, whether Montes was injured by paying the full purchase price of the leggings is a separate question from whether the appropriate measure of damages is the full price paid for the leggings. The Court need only determine that the injury alleged (payment of the purchase price

of the leggings) is an “injury to business or property” within the meaning of the CPA.

On remand, the trial court will have discretion to decide the appropriate measure of damages, as well as any other remedies, if Montes prevails on her CPA claim by proving all five elements of her claim, including that she suffered injury. “The court has wide discretion in determining the measure of damages” under the CPA. *Allen v. Am. Land Research*, 95 Wn.2d 841, 852 (1981).

E. The purposes of the CPA would be frustrated by a finding that any of Plaintiff’s injury theories are unviable.

Determining that Montes suffered no injury here would frustrate the purposes of the CPA because it would leave businesses free to advertise false discounts on their products with impunity. Inducing purchases through such unfair and deceptive practices is precisely what the CPA seeks to prevent.

Accordingly, Montes and other consumers should be protected from such conduct.

IV. CONCLUSION

For the foregoing reasons, amicus respectfully asks this Court to find that Montes's theories of injury are sufficient to state a CPA claim.

V. RAP 18.17 CERTIFICATION

I hereby certify that this brief contains 2,121 words in compliance with Rap 18.17(b) and RAP 18.17(c)(6).

//

//

//

//

//

RESPECTFULLY SUBMITTED AND DATED this 12th day of
September, 2025.

By: /s/ Elizabeth A. Adams, WSBA #49175
Toby J. Marshall, WSBA #32726
Email: tmarshall@terrellmarshall.com
Blythe H. Chandler, WSBA #43387
Email: bchandler@terrellmarshall.com
Elizabeth A. Adams, WSBA #49175
Email: eadams@terrellmarshall.com
TERRELL MARSHALL LAW GROUP PLLC
936 North 34th Street, Suite 300
Seattle, Washington 98103-8869
Telephone: (206) 816-6603
Facsimile: (206) 319-5450

Attorneys for Amicus Curiae NACA

CERTIFICATE OF SERVICE

I certify that on September 12, 2025, I caused a true and correct copy of the foregoing to be served on the following via the Court of Appeals Electronic Filing Notification System:

Che Corrington, WSBA #54241
Email: che@hattislaw.com
Daniel M. Hattis, WSBA #50428
Email: dan@hattislaw.com
Paul Karl Lukacs, WSBA #56093
Email: pkl@hattislaw.com
HATTIS LUKACS & CORRINGTON
11711 SE 8th Street, Suite 120
Bellevue, Washington 98005
Telephone: (425) 233-8628

Attorneys for Plaintiff-Appellant

Molly J. Henry, WSBA #40818
Email: mhenry@schwabe.com
David R. Ebel, WSBA #28853
Email: debel@schwabe.com
SCHWABE, WILLIAMSON & WYATT, P.C.
1420 Fifth Avenue, Suite 3400
Seattle, Washington 98101
Telephone: (206) 622-1711

Stephanie A. Sheridan, CSB #135910
Email: ssheridan@beneschlaw.com
Meegan B. Brooks, CSB #298570
Email: mbrooks@beneschlaw.com
Michael D. Meuti, CSB #227939
Email: mmeuti@beneschlaw.com
BENESCH, FRIEDLANDER, COPLAN & ARONOFF LLP
100 Pine Street, Suite 3100
San Francisco, California 94111
Telephone: (628) 600-2250

Attorneys for Defendant-Appellee

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

DATED this 12th day of September, 2025.

By: /s/ Elizabeth A. Adams, WSBA #49175
Elizabeth A. Adams, WSBA #49175

TERRELL MARSHALL LAW GROUP PLLC

September 12, 2025 - 10:31 AM

Transmittal Information

Filed with Court: Supreme Court
Appellate Court Case Number: 104,162-4
Appellate Court Case Title: Shawнна Montes v. Sparc Group, LLC

The following documents have been uploaded:

- 1041624_Briefs_20250912102750SC332932_4396.pdf
This File Contains:
Briefs - Amicus Curiae
The Original File Name was Amicus Brief.pdf
- 1041624_Motion_20250912102750SC332932_1386.pdf
This File Contains:
Motion 1 - Other
The Original File Name was Mtn for Leave to File Amicus Brief.pdf

A copy of the uploaded files will be sent to:

- AppellateAssistants@schwabe.com
- bhandler@terrellmarshall.com
- che@hattislaw.com
- dan@hattislaw.com
- debel@schwabe.com
- docketrequests@terrellmarshall.com
- filing@terrellmarshall.com
- hrota@terrellmarshall.com
- kbrown@terrellmarshall.com
- mbrook@beneschlaw.com
- mhenry@schwabe.com
- mmeuti@beneschlaw.com
- pk1@hattislaw.com
- sdenittis@denittislaw.com
- ssheridan@beneschlaw.com
- tmarshall@terrellmarshall.com

Comments:

Sender Name: Holly Rota - Email: hrota@terrellmarshall.com

Filing on Behalf of: Elizabeth Anne Adams - Email: eadams@terrellmarshall.com (Alternate Email:)

Address:
936 N. 34th Street
Suite 300
Seattle, WA, 98103
Phone: (206) 816-6603

Note: The Filing Id is 20250912102750SC332932

