

FILED
Court of Appeals
Division III
State of Washington
8/20/2018 4:58 PM

No. 97576-1

No. 358429

COURT OF APPEALS, DIVISION III
OF THE STATE OF WASHINGTON

DUANE YOUNG, Appellant,

vs.

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

APPELLANT'S REPLY BRIEF

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A. INTRODUCTION

In this case, it is undisputed that Toyota falsely advertised its motor vehicles in its nationwide print and online media, including Washington (CP 408).

It is also undisputed that Washington law prohibits “unfair or deceptive acts or practices in the conduct of any trade or commerce,” RCW 19.86.020, including business that “cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive or misleading.” RCW 46.70.180.

Finally, there is no dispute that Washington’s Legislature has declared that “the distribution, sale, and lease of vehicles in the state of Washington vitally affects the general economy of this state and the public interest and the public welfare.” RCW 46.70.005.

At issue in this appeal is the lower court’s misapplication of the law in finding that Toyota’s misrepresentations in its nationwide advertising did not have the capacity to deceive a substantial portion of the public, because Mr. Young, whom the Court assessed as “one of the more savvy, better-informed, and well-researched customer[s] I have ever come across,” (CP 411), failed to establish that he relied on those false representations when

he purchased his vehicle. This is contrary to the long-standing rule in CPA claims that “[a] claimant need not prove consumer reliance to establish an unfair or deceptive practice. A claimant must prove that the conduct has the capacity or tendency to deceive.” *State v. Ralph Williams’ N. W. Chrysler Plymouth*, 87 Wn.2d 298, 317, (1976); see also *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 802 (2015) (“While elements of other claims involving deception or unfair acts typically include reliance . . . this court rejected the principle that reliance is necessarily an element of plaintiff’s CPA claim”). Nowhere in its analysis does the lower court consider whether falsely advertising non-existent products and features to prospective customers throughout Washington might be an “unfair” practice under the CPA. RCW 19.86.020; *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986) (“unfair or deceptive act or practice” is the first element of a CPA claim).

Also before this Court is the issue of whether or not the Legislature’s express declaration of public interest in “the distribution, sale, and lease of vehicles” ceases to exist because the statute of limitations limits a private cause of action to recover damages, even where the undisputed facts establish a violation of the statute that incorporates such a declaration. In this case, the lower court ruled that Mr. Young failed to show that Toyota’s false advertising was injurious to the public interest because, although there

was no dispute that Toyota falsely advertised its motor vehicles in its statewide print and online media, the one-year statute of limitations had run on his potential claim for damages under the ADPA. RCW 46.70.190. The court additionally questioned whether Toyota's false advertising of motor vehicles in its statewide sales and marketing campaigns fell within the ambit of the ADPA's prohibition against "advertising [or otherwise disseminating] any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive or misleading," RCW 46.70.180(1).

Finally, the lower court seemingly held that Mr. Young was required to show that he purchased the vehicle because he relied on Toyota's false advertising, and that the purchase of the vehicle, rather than Toyota's failure to provide the promised part, was the proximate cause of his damages. Essentially, Toyota argues that it is allowed to falsely advertise product features, so long as consumers cannot prove that they would not have purchased the vehicle but for the misrepresentations. Not only does this defy the long-standing purpose of the CPA "to deter deceptive conduct **before** injury occurs," *Hangman Ridge*, 105 Wn.2d at 785 (1986) (emphasis added), but Mr. Young further submits that, but-for the falsity of Toyota's advertising, he would have received and benefitted from the use of the

advertised products and features, and avoided other injuries resulting from Toyota's false promise and failure to deliver.

For its part, Toyota remains wholly unapologetic for its false advertising. "Mistakes happen," Toyota shrugs in its opening remarks to the Court, (Respondent's Brief 1). Besides, argues Toyota, its admittedly false advertising cannot be "deceptive" unless it is proven that many people believed that they would get the specific product that Toyota advertised (Resp't's Br. 3).

Moreover, Toyota argues, that the false advertising caused no harm. (Resp't's Br. 22-23). Toyota claims that this is because, Mr. Young probably didn't know that he was getting less than what was promised. *Id.* Even if he did, the non-existent products that Toyota promised and failed to deliver were not worth much to Toyota anyway. *Id.* Toyota's argument is indicative of the reason why consumer protection statutes must exist. Toyota attempts to flip the CPA on its head by forcing the inquiry to focus on the perception of each individual plaintiff rather than the conduct of the business.

Notwithstanding Toyota's unabashedly anti-consumerist stance, Washington's CPA places the burden of truthful advertising on the advertiser, not the consumer. In so doing, courts construe the CPA liberally in favor of consumers, disregarding the obsolete doctrine of *caveat emptor*

in favor of “a standard of fair and honest dealing.” *Deegan v. Windermere Real Estate/Center-Isle, Inc.*, 197 Wn. App. 875, 884-85 (2017). Consistent with these consumer protection standards, the CPA requires false advertisers to pay for their own mistakes, rather than passing the costs and consequences on to consumers like Mr. Young.

B. ARGUMENT

1. Toyota’s False Representations in Its Advertising Were Actually or Potentially Deceptive to Their Target Audiences.

In its responsive briefing, Toyota states that Mr. Young failed to prove that Toyota’s false advertising in its nationwide media campaigns was an “unfair or deceptive act.” (Resp’t’s Br. 11). Deception exists if there is a representation, omission or practice that is likely to mislead a reasonable consumer. *Panag v. Farmers*, 166 Wn.2d 27, 50 (2013). In evaluating the tendency of language to deceive, the court should look not to the most sophisticated readers but rather to the least. *Id.* A communication may be deceptive by virtue of the “net impression” it conveys, even though it contains truthful information. *Id.*

“Whether undisputed conduct is unfair or deceptive is a question of law, not a question of fact.” *Lyons v. U.S. Bank Nat’l Ass’n*, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014); accord *Panag*, 166 Wn.2d at 47 (“Whether a particular act or practice is ‘unfair or deceptive’ is a question of law.”) (*citing*

Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997))). “[A]n act or practice can be unfair without being deceptive.” *Klem*, 176 Wn.2d at 787. Washington’s Supreme Court recognizes that “[b]ecause the act does not define ‘unfair’ or ‘deceptive,’ this court has allowed the definitions to evolve through a ‘gradual process of judicial inclusion and exclusion.’” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 785, 295 P.3d 1179, 1186 (2013) (quoting *Saunders v. Lloyd's of London*, 113 Wn.2d 330, 779 P.2d 249 (1989)). “That ‘gradual process of judicial inclusion and exclusion’ has continued to take place in cases that, properly, did not read *Hangman Ridge* as establishing the only ways the first two elements could be met.” *Id.* at 785.

Toyota, as well as the lower court, correctly noted that an unfair or deceptive act or practice may be established by showing that such conduct had the “capacity to affect a substantial portion of the public,” *Panag*, 166 Wn.2d at 47, but this does not mean that a court cannot, as a matter of law, find that an indisputably false representation in mass-market advertising is inherently unfair or deceptive, or that the very nature of misrepresenting facts in multiple statewide media platforms over the course of many months has the capacity to affect “a substantial portion of the public,” or at least those audiences who are targeted by the false advertising. *Lyons v. U.S.*

Bank Nat'l Ass'n, 181 Wn.2d 775, 786, 336 P.3d 1142 (2014); *Klem*, 176 Wn.2d at 785.

Unlike cases involving unquestionable falsehoods, such as advertising product features that do not exist, the “capacity to deceive a substantial portion of the public” standard is typically applied in cases where an act or practice may be some degree of misleading, or opportunistic, or specious, or otherwise *potentially*, but not *necessarily*, deceptive. See, e.g., *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 167, 159 P.3d 10, 19 (2007) (subrogation claims made to look like dunning letter present potentially deceptive, but not necessarily false practices); *Dwyer v. J.I. Kislak Mortgage Corp.*, 103 Wn. App. 542, 547, 13 P.3d 240 (2000) (practice of including miscellaneous service charges such as fax fees on a mortgage payoff statement has the capacity to deceive because it creates the misleading appearance that the mortgage cannot be released unless miscellaneous charges, unrelated to the mortgage are paid); *Bowers v. Transamerica Title Ins. Co.*, 100 Wn.2d 581, 592, 675 P.2d 193 (1983) (closing agent's employment of a non-attorney to prepare closing documents is deceptive where the sellers could have reasonably believed the agents had legal expertise); *Trans World Accounts, Inc. v. Fed. Trade Comm'n*, 594 F.2d 212, 215-16 (9th Cir. 1979) (Threatening debtors with imminent legal action in “Trans-O-Grams,” a format designed to resemble

telegrams, is deceptive because it misrepresents the urgency of the communication). Even those cases that Toyota relies upon to support its tenuous position that its repeated misrepresentations were not deceptive involve potentially “misleading” mailings, “improper” billing practices, and otherwise dubious practices, (Resp’t’s Br. 11-12, citing cases¹), not unquestionable falsehoods such as a nationwide advertiser promising to deliver products and features that do not, in fact, exist.

In addition, false advertising of motor vehicles is a deceptive act or practice that is both regulated by statute, being RCW 46.70, *et seq.*, and in violation of the widespread public interest regarding truth and accuracy in advertising. RCW 46.70.180(1); RCW 9.04.050; RCW 48.30.040; RCW 18.35.180; RCW 18.32.665; RCW 51.36.130; RCW 19.100.110, etc. As such, false advertising in the course of selling motor vehicles is “an unfair or deceptive act or practice” under the third prong of the *Klem* test. *Klem*, 176 Wn.2d at 787.

Not only has the Legislature directed that the CPA “*shall be liberally construed* that its beneficial purposes may be served,” *Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 799, 363 P.3d 587, 590 (2015) (emphasis original) (citing RCW 19.86.920), but Washington’s Supreme

¹ *Mandatory Poster Agency, Inc.*, 199 Wn.App. 506, 524 (2017); *Holiday Resort Community Association v. Echo Lake Associates, LLC*, 134 Wn.App., 210 (2006); *Burns v. McClinton*, 135 Wn.App. 285, 305-06 (2006).

Court has also made clear that “the individual *Hangman Ridge* factors should not be read in isolation so as to render absurd conclusions.” *Ambach v. French*, 167 Wn.2d 167, 178, 216 P.3d 405, 411 (2009). Construing the CPA such that falsely representing nonexistent products for sale in nationwide advertising media does not have the capacity to deceive its target audiences not only offends the fundamental purposes of the CPA, but also leads to the demonstrably absurd conclusion that false advertising, which unequivocally misrepresents the truth, is not “deceptive.”

Where there is no dispute about what the parties did, “whether the conduct constitutes an unfair or deceptive act can be decided by this court as a question of law.” *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150 (1997). In this case, there is no dispute that Toyota falsely advertised its motor vehicles in its statewide and nationwide media campaigns, or that numerous consumers, including Mr. Young, did not receive the products and features that Toyota promised in its advertising. The lower court erred in ruling that Toyota’s indisputably false, mass-market advertising was not deceptive and that it did not have the capacity to deceive its target audience; that Toyota’s promise to deliver non-existent products and obvious failure to do so was not unfair to its consumers or competitors; and that Toyota’s false advertising did not violate the public’s interest in truthfulness in advertising, which is articulated in a plethora of

statutes and statutory schemes. This court should rule that, as a matter of law, Toyota's false advertising was an "unfair" and/or "deceptive" practice under the CPA.

2. To Establish a Public Interest Impact, a Plaintiff Need Only "Show a Violation" of a Statute, Regardless of Any Right to Recover Damages.

With regard to the public interest element of Mr. Young's CPA claim, Toyota persists with the lower court's conflation of the "capacity to deceive a substantial portion of the public" standard regarding deceptive acts with the "capacity to injure other persons" standard regarding public interest impact, which is articulated in RCW 19.86.093 and was implemented in 2009. In fact, Toyota's responsive briefing completely ignores the CPA's statutory standard for establishing the public interest element of a CPA claim, which plainly does *not* require Mr. Young to show a "capacity to deceive a substantial portion of the public." Rather, the CPA provides that "a claimant may establish the act or practice is injurious to the public interest because it . . . (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons," among other methods. RCW 19.86.093(3)(a).

Toyota's obfuscation and avoidance of RCW 19.86.093 is an attempt to misdirect this Court, as it did with the lower court, from applying the statutory standard for establishing public interest impact in CPA claims.

This is because Toyota does not dispute that it falsely advertised and sold products and features that did not actually exist to *multiple* consumers, besides Mr. Young, throughout Washington and beyond. (Resp't's Br 1.) That is, Toyota's admits that its false advertising failed to deliver promised products and features to "other persons" who purchased a falsely advertised vehicle. This not only satisfies RCW 19.86.093(3)(a) regarding actual injury to other persons, but it also establishes that Toyota's false advertising had the capacity to do the same thing to anyone else who decided to buy one of Toyota's falsely advertised vehicles, which satisfies RCW 19.86.093(3)(b). As addressed in more detail in sections *infra*, falsely advertising and failing to deliver promised products and features to consumers constitutes an "injury" under the CPA. "When a misrepresentation causes inconvenience that deprives the claimant of the use and enjoyment of his property, the injury element is satisfied." *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 180 (2007). Thus, the undisputed facts of this case establish that Toyota falsely advertised and sold nonexistent products and features to multiple Washington consumers, which actually injured other persons, besides Mr. Young, and had the capacity to injure many more. The lower court erred in failing to consider or apply the CPA's statutory standards for establishing a public interest impact under RCW

19.86.093(3), and this Court should not be distracted by Toyota's persistent attempts to avoid the standard altogether.

In addition to the "capacity to injure" standard established in RCW 19.86.093(3), the CPA also provides that "a claimant may establish that the act or practice is injurious to the public interest because it . . . (2) violates a statute that contains a specific legislative declaration of public interest impact." RCW 19.86.093(2). Significantly, the CPA does not require a claimant to file a private cause of action or to recover damages from a statute containing such a legislative declaration of public interest impact. The CPA simply states that a claimant must show that an act or practice "violates" such a statute. *Id.* In this case, the undisputed facts establish that Toyota violated such a statute, the Automobile Dealer Practices Act (ADPA), RCW 46.70, *et seq.*, which not only has a legislative declaration of public interest impact, RCW 46.70.005, but goes so far as to state that "[a]ny violation of this chapter is deemed to affect the public interest **and constitutes a violation of chapter 19.86 RCW.**" RCW 46.70.310 (emphasis added).

For its part, Toyota first amplifies the lower court's somewhat bemusing conclusion that the ADPA's prohibition against "caus[ing] or permit[ting] to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, *any*

statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading, including but not limited to the following [nonexclusive examples],” RCW 46.70.180(1) (emphasis added), does not apply to false advertising of vehicle products and features in nationwide advertising campaigns. (Resp’t’s Br. 19; CP 468-69.) Given the Legislature’s mandate that “[a]ll provisions of [the ADPA] shall be liberally construed to the end that deceptive practices or commission of fraud or misrepresentation . . . may be prohibited and prevented,” RCW 46.70.900, as well as the exhaustively broad scope of the ADPA’s prohibition against “false, deceptive, or misleading” representations in motor vehicle advertising, the lower court erred in concluding that the ADPA did not apply to Toyota’s false advertising in this case. There is no dispute that Toyota falsely advertised vehicle products and features to potential customers throughout Washington, and there is little question that such “false, deceptive, or misleading” mass-market advertising violated RCW 46.70.180(1), which in turn “constitutes a violation of chapter 19.86 RCW” under the ADPA. RCW 46.70.310.

With regard to the ADPA’s legislative declarations that “the distribution, sale, and lease of vehicles in the state of Washington vitally affects the general economy of the state and the public interest and the public welfare,” (RCW 46.70.005), and that “[a]ny violation of this chapter

is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW,” (RCW 46.70.310) Toyota responds simply by restating and paraphrasing the lower court’s erroneous opinion. Toyota does, however, acknowledge the numerous cases in which courts have routinely recognized a legislatively declared public interest, even when a CPA plaintiff has not sought to recover damages under the particular statute in which the declaration appears. (Resp’t’s Br. 21-22.) In this respect, Toyota agrees that a plaintiff need not bring an action to recover damages under a particular statute in order for that statute’s incorporated declaration of public interest to apply to a CPA claim. Toyota would therefore seem to agree that, had Mr. Young brought his CPA claim within one year of accrual, then Washington’s “vital” public interest in “the distribution, sale, and lease of vehicles,” (RCW 46.70.005), would have full force and effect. Toyota’s argument is that that, because the statute of limitations had run on an ADPA claim for Mr. Young, then the public interest in “the distribution, sale, and lease of vehicles,” *Id.*, ceases to exist in his case.

The problem with Toyota’s argument is that it presumes that if Mr. Young fails to file an action to recover damages within the one-year statute of limitations under the ADPA, then the Legislature’s declaration of public interest in “the distribution, sale, and lease of vehicles,” somehow ceases to exist. However, nowhere does the CPA require a plaintiff to recover

damages in order to show that a particular statute has been violated or, more importantly, that the public interest has been injured by a defendant's violative conduct. The CPA requires a claimant to show that "the act or practice is injurious to the public interest because it . . . violates a statute that contains a specific legislative declaration of public interest impact." RCW 19.86.093(2). This is consistent with longstanding case law, which also requires merely "a **showing** that a statute has been violated which contains a specific legislative declaration of public interest impact," not a right to recover damages under that particular statute. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 791, (1986) (emphasis added).

Toyota's concerns regarding resuscitation of a time-barred claim, (Resp't's Br. 22), might be more viable if there were any facts in dispute regarding Toyota's violative conduct, but there are not. It is undisputed that Toyota falsely advertised its motor vehicles in its nationwide print and online media, including markets in Washington (CP 408). It is also undisputed that the ADPA prohibits acts and practices that "cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive or misleading." RCW 46.70.180.

Under these undisputed facts, Mr. Young does not have to establish that he is entitled to recover damages under the ADPA in order to offer “a showing that a statute has been violated which contains a specific legislative declaration of public interest impact,” *Hangman Ridge*, 105 Wn.2d at 791. It is also true that Washington’s “vital” public interest in “the distribution, sale, and lease of vehicles,” RCW 46.70.005, continues to exist whether or not Mr. Young or any other plaintiff chooses to file a private right of action for damages under the ADPA. The lower court erred in ruling otherwise.

3. Toyota’s False Representations in Its Advertising Were Actually or Potentially Deceptive to Their Target Audiences.

The lower court completes its ruling on Mr. Young’s CPA claim by stating:

... I can not conclude, more probably than not, that Mr. Young’s reliance on a mistaken website is the proximate cause of his decision to purchase the Toyota Tacoma Limited Package, and, therefore, cause him damages.

CP 419.

To satisfy 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.” *Blair v. Nw. Tr. Servs., Inc.*, 193 Wn. App. 18, 37, (2016) (quoting *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 84, 170 P.3d 10 (2007)).

“For purposes of a private action under the Consumer Protection Act (chapter 19.86 RCW), the injury to business or property need not be great and need not be measurable in terms of monetary damages. A nonquantifiable injury may be sufficient.” *Stephens v. Omni Ins. Co.*, 138 Wn. App. 151, 158 (2007). “When a misrepresentation causes inconvenience that deprives the claimant of the use and enjoyment of his property, the injury element is satisfied.” *Id.* at 180.

In this case, the lower court’s erroneous emphasis on Mr. Young’s reliance on Toyota’s false advertising led it to conclude that Toyota’s misrepresentations did not injure Mr. Young, because the lower court decided that he did not know that he was being cheated when he bought the falsely advertised vehicle. Such a conclusion is anathema to the CPA’s fundamental consumer protection purpose “to deter deceptive conduct **before** injury occurs,” *Hangman Ridge*, 105 Wn.2d at 785 (1986) (emphasis added); discarding of *caveat emptor* in favor of a standard of “good faith and fair dealing,” *Deegan*, 197 Wn. App. at 884-85; and confuses an otherwise straightforward statement of proximate causation. But-for Toyota’s false advertising, Mr. Young would have had the use and value of the products and features that were promised, but not delivered. Simply stated, Toyota failed to deliver what it promised, and what Mr. Young understood would be included with the falsely advertised vehicle, whether

before or after the actual purchase date. This deprived him of the use and benefit of the undelivered products and features, which is more than sufficient to establish injury and causation under the CPA. The court erred in finding that Toyota's false advertising of nonexistent products and features did not cause Mr. Young to lose the benefit of those products and features after he purchased the falsely advertised vehicle.

4. CONCLUSION

"No rogue should enjoy his ill gotten plunder for the simple reason that his victim is by chance a fool." *Woody v. Benton Water Co.*, 54 Wash. 124, 127-28, 102 P. 1054, 1056 (1909). Based upon the legal authorities and arguments herein presented, Mr. Young respectfully requests that this Court reverse the decision of the Superior Court and rule in favor of his claims or remand with instructions.

DATED this 20th day of August, 2018.

Respectfully submitted,

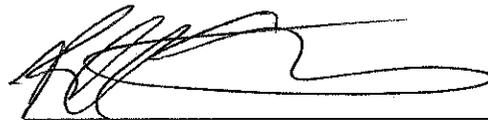

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CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on this 20th day of August, 2018, at Spokane, Washington, I caused to be served the foregoing document on the following person(s) in the manner indicated:

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DATED this 20th day of August, 2018.



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August 20, 2018 - 4:58 PM

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

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