

No. 97576-1

No. 358429

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

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DUANE YOUNG, Appellant,

vs.

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

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RESPONDENT'S BRIEF

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## TABLE OF CONTENTS

INTRODUCTION .....	1
RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR .....	4
STATEMENT OF CASE .....	4
I. Young Purchased His 2014 Toyota Tacoma with the Limited Option Package .....	4
II. TMS Learns that a Limited Number of 2014 Tacoma Trucks Were Shipped With an Erroneous Monroney Label and Corrects the Error .....	7
III. TMS Offers to Compensate Affected Customers for the Mistake...	8
IV. Young Rejects TMS' Offer.....	9
RESPONSE ARGUMENT .....	9
I. The Standard .....	9
II. Substantial Evidence Supports the Trial Court's Finding that Plaintiff Failed to Demonstrate a Violation of the CPA .....	10
A. Plaintiff Failed to Prove an "Unfair or Deceptive Act" .....	11
1. The Trial Court Correctly Found that Young Failed to Demonstrate that the Mistake Had the Capacity to Deceive a Substantial Portion of the Public.....	11
2. The Court Properly Found That Young Failed to Provide Evidence that the Mistake was Material .....	15
3. Young's Arguments Do Not Change the Trial Court's Determination .....	16
a. The Trial Court Did Not Improperly Require Young to Show Actual Deception and Reliance to Establish His CPA Claim .....	16
b. The Court Properly Evaluated Young's Evidence Related to "Whether an Act Has the Capacity to Deceive a Substantial Portion of the Public" .....	17
c. The Trial Court Properly Evaluated Young's Credibility .....	18

B. As the Trial Court Correctly Found, Young Cannot Establish  
an “Unfair or Deceptive Act” by Relying on the ADPA .....19

III. As the Trial Court Also Correctly Found, Young Failed to  
Establish that Toyota Caused Any Injury to Him .....22

IV. TMS Should be Granted Costs Upon Prevailing .....23

CONCLUSION.....24

**TABLE OF AUTHORITIES**

	<b>Page(s)</b>
<b>Cases</b>	
<i>Bednaruk v. Northwest Trustee Serv., Inc.</i> , 09-cv-1586, 2010 WL 545643 (W.D. Wash. Feb. 9, 2010) .....	21
<i>Behnke v. Ahrens</i> , 172 Wn. App. 281 (2012) .....	17
<i>Burns v. McClinton</i> , 135 Wn. App. 285 (2006) .....	12, 13
<i>Crane &amp; Crane, Inc. v. C&amp;D Elec, Inc.</i> , 37 Wn. App. 560 (1984) .....	23
<i>Dave Johnson Ins. v. Wright</i> , 167 Wn. App. 758 .....	10
<i>Estribor v. Mountain States Mortgage</i> , No. 13-5297, 2013 WL 6499535 (W.D. Wash. Dec. 11, 2013) .....	23
<i>Fisher Props, Inc., v. Arden-May</i> , 115 Wn.2d 364 (1990) .....	10
<i>Good v. Fifth Third Bank</i> , No. 13-02330, 2014 WL 2863022 (W.D. Wash. June 23, 2014) .....	23
<i>Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.</i> , 105 Wn.2d 778 (1986) .....	22
<i>Holiday Resort Community Association v. Echo Lake Associates, LLC</i> , 134 Wn. App. 210 (2006) .....	11, 15, 18

<i>Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.</i> , 162 Wn.2d 59 (2007) .....	22, 23
<i>Kelly v. Cavalry Portfolio Serv's LLC</i> , 197 Wn. App. 1024 (2016) .....	12
<i>Korst v. McMahon</i> , 136 Wn. App. 202 (2006) .....	10
<i>Kotok v. Homecomings Financial, LLC</i> , 09-cv-662, 2009 WL 2057046 (W.D. Wash. July 14, 2009) .....	21
<i>Ltd. v. U.S. Bank Nat. Ass'n</i> , 133 Wn. App. 835 (2006) .....	12
<i>Lyons v. Homecomings Fin., LLC</i> , 770 F. Supp. 2d 1163 (W.D. Wash. 2011).....	21
<i>In Re Marriage of Akon</i> , 160 Wn. App. 48 (2011) .....	10
<i>Micro Enchance Intern., Inc. v. Coopers &amp; Lyband, LLP</i> , 110 Wn. App. 412 (2002) .....	12
<i>Org. to Preserve Agricultural Lands v. Adams County</i> , 128 Wn.2d 869 (1996) .....	10
<i>Panag v. Farmers Ins. Co. of Wash.</i> , 166 Wn.2d 27 (2009) .....	10, 14
<i>Quinn v. Cherry Lane Auto Plaza, Inc.</i> , 153 Wn. App. 710 (2009) .....	15
<i>Brown ex rel. Richards v. Brown</i> , 157 Wn. App. 803 (2010) .....	12
<i>Ross v. Kirner</i> , 162 Wn. 2d 493 (2007) .....	16

<i>Sorrel v. Eagle Healthcare, Inc.</i> , 110 Wn. App. 290, 298 (2002) .....	10
<i>State of Washington v. La Investors, LLC</i> , 2 Wn. App. 2d 524, 540 (2018) .....	14
<i>State v. Hill</i> , 123 Wn.2d 641 (1994) .....	16
<i>State v. Homan</i> , 181 Wn.2d 102 (2014) .....	9
<i>State v. Mandatory Poster Agency, Inc.</i> , 199 Wn. App. 506 (2017) .....	11, 14, 17
<i>Stephens v. Omni Ins., Co.</i> , 138 Wn. App. 151 (2007) .....	16
<b>Statutes</b>	
Washington Consumer Protection Act, RCW 19.86, <i>et seq.</i> .....	<i>passim</i>
Washington’s Automobile Dealer Practices Act, RCW 46.70.180(1) .....	<i>passim</i>

## INTRODUCTION

Mistakes happen. In this case, the Trial Court found that Plaintiff/Appellant Duane Young (“Young”) tried to take undue advantage of a minor mistake that he first learned about when Toyota Motor Sales, U.S.A. Inc. (“TMS”) affirmatively reached out to him, brought it to his attention, and attempted to address it.

What was the minor mistake that led to this lawsuit? The window sticker (Monroney Labels) for a limited number of 2014 Toyota Tacomas briefly but erroneously stated that an option package included an auto-dimming rearview mirror with an outside temperature gauge and back-up monitor. In fact, the back-up monitor was installed in the dashboard and not in the review mirror (which Young found preferable) and there was no outside temperature gauge. The mistake was also reflected on the TMS website for a very brief time after 2014 Tacoma trucks were available for purchase in the market.

Before any customer contacted TMS about the mistake, TMS discovered and immediately corrected the mistake by replacing erroneous Monroney Labels and correcting the website. TMS also sent out a letter of apology and an offer of \$100 to 147 customers (three in the state of Washington including Young) who *possibly* purchased a vehicle with an incorrect Monroney Label. After that letter went out, Young complained and TMS made further good-will offers to him, including an offer to install an outside temperature gauge in his vehicle.

Instead of accepting those offers, Young filed a class action. After the Trial Court granted summary judgment on Young's fraud claim and denied class certification, the court held a two-day bench trial, during which it "had an opportunity to observe [the] demeanor on the stand" of Mr. Young and three Toyota witnesses. (Clerks Papers ("CP") 428). The Court found for TMS and against Young on his Washington Consumer Protection Act, RCW 19.86, *et seq.* claim ("CPA") and negligent misrepresentation claim—his only remaining claims.

In a comprehensive 44-page opinion, the Trial Court agreed with TMS that the mistake was not intentional, was not material, and was quickly corrected before a substantial portion of the public could be exposed to the error. The Trial Court also agreed with TMS that Young did not pay for something he did not receive because TMS never intended the feature to be included in the package at issue, and therefore, did not charge Young for the missing item.

As the Trial Court observed, Young provided no evidence that any consumers were aware of, much less deceived by, the initial description of the rearview mirror. The only testimony offered in support of the claim was Young's, which the Trial Court found not credible. In fact, the Trial Court explained, "the credibility issues I am looking at may actually show that Mr. Young really did not notice the missing temperature gauge was advertised as a feature until it was brought to his attention [by Toyota]."

(CP 462). The Trial Court also found it “hard to fathom that a part valued at \$10 by Toyota, using a thorough and complicated pricing scheme, would be an important factor in a \$35,000 plus purchase,” (CP 461), *i.e.*, the mistaken reference to the temperature gauge was not material, and that Young failed to prove that TMS’s mistaken reference to the temperature gauge caused Young’s purported injuries. (CP 470).

On appeal, Young argues that the Trial Court’s factual findings should be ignored. According to Young, because TMS’s representation about the temperature gauge was false, it was inherently deceptive and a violation of the CPA regardless of the mistakes materiality, whether anyone was exposed to the mistake, or whether the mistake caused any injury. This is not the law.

Young’s other arguments are equally unavailing. For example, Young argues that the Trial Court’s decision turns exclusively on the Trial Court requiring him to prove “actual deception and reliance.” This is simply untrue. While those words appear in the Trial Court’s order, the Trial Court also found that Young provided no credible evidence that anyone (including Young) was exposed to the mistake prior to purchase. Additionally, Young takes issue with the Trial Court’s rejection of Young’s request to base his CPA claim on a violation of Washington’s Automobile Dealer Practices Act (“ADPA”), RCW 46.70.180(1). As the Trial Court also correctly found, the ADPA is inapplicable to Plaintiff’s

claims, and even if it was applicable, Plaintiff's ADPA claim would have been time barred, and therefore, cannot be used to support his CPA claim. The Trial Court's decision should be affirmed.

#### **RESPONSE TO ISSUES PERTAINING TO ASSIGNMENT OF ERROR**

- A. Did the Trial Court correctly find that Young failed to establish that TMS's mistake "had the capacity to deceive a substantial portion of the public?"
- B. Did the Trial Court correctly find that Young failed to establish that the mistake was material?
- C. Did the Trial Court correctly find that Young failed to establish that the ADPA could serve as a basis for Young's CPA claim?
- D. Did the Trial Court correctly find that Young failed to establish the causation element of his CPA claim?

#### **STATEMENT OF CASE**

##### **I. Young Purchased His 2014 Toyota Tacoma with the Limited Option Package**

On October 30, 2013, Young, purchased a 2014 Tacoma truck for the total price of \$35,686.50. (CP 77, Report of Proceedings ("ROP") 149:13-23). Young claims that three months prior to his purchase (and two months before the vehicles were available for sale) he used the build-a-vehicle feature on Toyota's website. (ROP 144:18-21). The build-a-vehicle feature allows the user to select the type of vehicle they are interested in and then drill down, by selecting a variety of different

choices, to build the vehicle to their exact requirements. (ROP 72:11-15). The build-a-vehicle feature does not allow the user to purchase the vehicle from the website. Rather, the user is directed to go to a dealer to purchase a vehicle. (ROP 147:17-25).

After going through this process, Young decided he wanted a 2014 Toyota Tacoma with the Limited Package. (ROP 73:15-18). The build-a-vehicle feature listed the purchase price for the Limited Package as \$7,660.00, and listed the following features:

- Heated front sport seat with 4-way adjustable driver's seat;
- Chrome clad alloy wheels with P2565/60R18 tires;
- Chrome grille surround & rear bumper;
- Color-keyed front bumper & over fenders;
- Chrome fog lamp housing;
- Chrome door handles;
- Chrome power outside mirrors with turn signal indicator;
- Fog lamps;
- 115V/400W deck powerpoint,
- Variable speed wipers;
- Metallic tone instrument panel trim;
- Leather-trimmed steering wheel with audio controls and shifter;
- Dual sun visors with mirrors and extenders;

- Auto-dimming mirror with outside temperature gauge and HomeLink® universal transceiver;
  - Remote keyless entry system;
  - Cruise control;
  - Sliding rear window with privacy glass; and
  - Entune premium JBL Audio with navigation and app suite.
- (CP 85).

The build-a-vehicle feature, included the following disclaimer:

For details on vehicle specifications, standard features and available equipment in your area contact your Toyota dealer. **A vehicle with particular equipment may not be available at the dealership.** Ask your Toyota dealer to help locate a specifically equipped vehicle.

**All information presented herein is based on data available at the time of posting, is subject to change without notice** and pertains specifically to mainland U.S.A. vehicles only. *Id.* (emphasis added).<sup>1</sup>

Young had difficulty locating a Toyota Tacoma with the Limited Package and with the bed size (long) and exact color (gray/silver) he wanted. (ROP 88:4-90:25). When he finally located the vehicle he wanted,

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<sup>1</sup> Plaintiff takes issue with what he describes as the “gotcha disclaimer” on Toyota’s build-a-vehicle website feature. Plaintiff provides no case law to suggest that WAC 308-66-152(3)(a)(iii) applies to Toyota’s build-a-vehicle feature, which is not a static “printed material.” In any event, the disclosures on Toyota’s build-a-vehicle website feature comply with WAC 308-66-152(3)(a)(iii). *See* CP 85.

he flew from Eugene, Oregon, where he resides, to Burlington, Washington to pick up the vehicle. (ROP 90:24-91:13). Upon arriving at the dealership, he was told that his vehicle was not available because it had been vandalized the night before and the rear window had been broken out of the vehicle. (ROP 93:12-17). It turned out that the dealership had an identical vehicle on the lot, even though the dealership manager was not unaware of the second vehicle until Young pointed it out to him. (ROP 93:21-94:4). Since this was not the same vehicle that had been set aside for Young, the second vehicle had to be cleaned and prepared for delivery to Young before he could take ownership of it. (ROP 93:3-95:10).

**II. TMS Learns that a Limited Number of 2014 Tacoma Trucks Were Shipped With an Erroneous Monroney Label and Corrects the Error**

In late October 2013, TMS learned that a very limited number of MY 2014 Tacoma trucks with the Limited Option Package were shipped with erroneous Monroney labels indicating the vehicles contained an outside temperature gauge as part of the rear view mirror. (ROP 255:12-20). The Monroney labels also incorrectly indicated that the rearview mirror contained a postage-sized view of the back-up camera. (ROP 254:1-5). In fact, the rear camera view had been enlarged and moved to the dashboard console. (ROP 254:6-9). As even Young admitted, this was an upgrade. (ROP 173:4-174:7).

On October 22, 2013, immediately after TMS became aware of the mistake and eight days before Young purchased his vehicle, it sent a memorandum to TMS's regional representatives advising them of the error; informing them that new Monroney labels would be available to print at their facilities the next morning, and requesting that they forward the revised Monroney labels to the dealers. (ROP 255:18-256:21). TMS sent several other communications to the regional representatives and the dealers to ensure that dealers were alerted to the issue and erroneous Monroney labels were replaced with corrected versions. (ROP 296:12-23). TMS also updated all digital brochures and TMS's website to ensure that the information related to 2014 Tacoma trucks with the Limited Option Package was accurate. (ROP 301:4-25).

Although the temperature gauge may have been listed on the Monroney label, no customer was in fact charged for the part. (ROP 351:19-23). This is because the temperature gauge was never supposed to be included in the Limited Option Package for the 2014 Tacoma (ROP 253:16-21).

### **III. TMS Offers to Compensate Affected Customers for the Mistake**

In mid-December 2013, Toyota sent a letter to those customers (147 nationwide and three in the state of Washington) that may have purchased a Tacoma with a Limited Package with an incorrect Monroney label, identifying the error and offering them \$100 for any inconvenience

the mistake may have cost them. (ROP 282:7-19, 303:11-13, 324:20-324:5, 326:7-9).

#### **IV. Young Rejects TMS' Offer**

Young rejected TMS's initial \$100 offer. (ROP 128:12-16). TMS then offered to install an outside temperature gauge in Young's vehicle free of charge. (ROP 128:21-129:8). Young rejected that offer because TMS was only able to offer him the aftermarket part manufacturer's warranty. (ROP 129:10-14). TMS then offered Young \$500 to compensate him for the missing outside temperature gauge. (ROP 132:8-12). Young also rejected that offer. (ROP 132:14-15). In early 2016—after he filed this action and pursued a Lemon Law action against TMS—Young sold his vehicle to a third party for \$30,500.00; \$2,744.31 more than the vehicle's repurchase value. (ROP 133:25-136:6, ROP 185:10-17).

### **RESPONSE ARGUMENT**

#### **I. The Standard**

The applicable, and well-settled, standard is that “following a bench trial, appellate review is limited to determining whether substantial evidence supports the findings of fact and, if so, whether the findings support the conclusions of law.” *State v. Homan*, 181 Wn.2d 102, 105-06 (2014). “‘Substantial evidence’ is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise.” *Id.* at 106. The appellate court must make all reasonable inferences in the light most

favorable to the judgment. *Korst v. McMahon*, 136 Wn. App. 202, 206 (2006). The party alleging error has the burden of showing a finding of fact is not supported by substantial evidence. *Fisher Props, Inc., v. Arden-May fair, Inc.*, 115 Wn.2d 364, 369 (1990).

When a trial court hears live testimony, and judges the credibility of witnesses (as the Trial Court did here), appellate courts accord deference to its determinations of fact. *Dave Johnson Ins. v. Wright*, 167 Wn. App. 758, 778-79, rev. denied, 175 Wn.2d 1008 (2012); *see also Org. to Preserve Agricultural Lands v. Adams County*, 128 Wn.2d 869, 882 (1996). The reviewing court must defer to the trier of fact on issues of credibility of witnesses, and persuasiveness of the evidence. *In Re Marriage of Akon*, 160 Wn.App. 48, 57 (2011) (citing *Burnside v. Simpson Paper Co.*, 123 Wn.2d 93 (1994) (“credibility determinations are solely for the trier of fact [and] cannot be reviewed on appeal.”)).

## **II. Substantial Evidence Supports the Trial Court’s Finding that Plaintiff Failed to Demonstrate a Violation of the CPA**

In a CPA claim, the plaintiff must prove: (1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public, (4) injury to a person’s business or property, and (5) causation. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37 (2009), *citing Hangman Ridge Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986). The failure to meet any one of these elements is fatal. *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298 (2002).

**A. Plaintiff Failed to Prove an “Unfair or Deceptive Act”**

The “unfair or deceptive act” element can be established in one of three ways: (i) per se unfair or deceptive conduct, (ii) an act that has the capacity to deceive a substantial portion of the public, or (iii) an unfair or deceptive act or practice not regulated by statute but in violation of the public interest. *State v. Mandatory Poster Agency, Inc.*, 199 Wn.App. 506, 518 (2017). As the Trial Court correctly found, Young failed to establish an “unfair or deceptive act” by any of these options.

**1. The Trial Court Correctly Found that Young Failed to Demonstrate that the Mistake Had the Capacity to Deceive a Substantial Portion of the Public**

Young’s principal contention on appeal is that false information is inherently deceptive and since the false information appeared in advertising, it automatically has “the capacity to deceive a substantial portion of the public.” Other than multiple citations to Black’s Law Dictionary, Young cites no case law to support this position, nor could he. The case law is clearly contrary. For a plaintiff to prove that an act “had the capacity to deceive, a substantial portion of the public,” plaintiff must demonstrate that the act “reached” a “substantial portion of the public.” *See Mandatory Poster Agency, Inc.*, 199 Wn.App. at 524 (plaintiff must demonstrate that the “misleading mailing reached, and thus had the capacity to deceive, a substantial portion of the public.”); *see also Holiday Resort Community Association v. Echo Lake Associates, LLC*, 134

Wn.App., 210, 226-27 (2006) (explaining that the court must separately evaluate whether the act had the capacity to reach a substantial portion of the public); *Burns v. McClinton*, 135 Wn.App. 285, 305-06 (2006) (no evidence improper billing practices affected “substantial portion’ of the public” because plaintiff failed to present evidence that anyone else was subjected to the improper billing practices).<sup>2</sup>

Here, substantial evidence supports the Trial Court’s finding that Young provided no credible evidence that anyone, *including Young*, was exposed to the inaccurate information prior to purchase. (CP 460-467). Specifically, Plaintiff presented no evidence that any other person saw the Monroney label with reference to the temperature gauge prior to purchase. (CP 460). Plaintiff also presented no evidence that any other person saw the mistake on Toyota’s website. *Id.* In fact, as Toyota demonstrated at trial, the vast majority of purchasers of 2014 Toyota Tacomas with the

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<sup>2</sup> See also *Micro Enchance Intern., Inc. v. Coopers & Lyband, LLP*, 110 Wn.App. 412, 438-439 (2002) (finding that plaintiff failed to establish that the allegedly deceptive conduct “had the capacity to deceive a substantial portion of the public” because “the most MEI showed was that Coopers was in contact with eight other unidentified recipients of proposal letters that may have included similar promises.”); *Kelly v. Cavalry Portfolio Serv. ’s LLC*, 197 Wn. App. 1024, at \*4 (2016) (unpublished) (rejecting CPA claim partly due to a lack of injuring a “substantial portion of the population.”); *Brown ex rel. Richards v. Brown*, 157 Wn. App. 803, 816-817 (2010) (CPA claim defeated because no evidence that Wells Fargo’s actions had “the capacity to deceive a large portion of the public.”); *Westview Inv. ’s, Ltd. v. U.S. Bank Nat. Ass’n*, 133 Wn. App. 835, 855, (2006) (same result).

Limited Package, purchased their vehicles months after the inaccurate information was corrected. (ROP 303:8-22).<sup>3</sup>

As to Young, the Trial Court found “at least seven areas” in which it questioned Young’s credibility. (CP 462-467). This includes, but is certainly not limited to, Young’s inconsistent testimony about whether he saw a Monroney label containing the inaccurate information prior to purchase. *Id.* At trial, Young testified that he saw the Monroney label when he test drove a 2014 Toyota Tacoma in July or August 2013, but at his deposition Young testified that he did not see the inaccurate information on the Monroney label until well after he purchased his vehicle. (CP 467). Young’s deposition testimony was far more credible because Young could not have seen the Monroney label with the inaccurate information related to the temperature gauge during his test drive because the 2014 Tacoma was not introduced to the market until months later. (CP 463; *see also* ROP 260:22-261:19). Similarly, the Trial Court found Young’s testimony that he was aware of the reference to the temperature gauge on the build-a-vehicle website incredible and “that the credibility issues I am looking at may actually show that Mr. Young really

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<sup>3</sup> It is also worth noting that based on the timing of Young’s purchase (8 days after TMS requested that the dealers replace the Monroney labels with the inaccurate information), had Young been able to purchase the 2014 Tacoma with the Limited Package that was originally set aside and prepared for him before the rear window was broken, he likely would have received an accurate Monroney label.

did not notice the missing temperature gauge was advertised as a feature until it was brought to his attention [several months after he purchased his vehicle].” (CP 462). In short, Young provided no evidence, let alone credible evidence, that the inaccurate information related to the temperature gauge reached a substantial portion of the population; and as to Young himself, there was no credible evidence that Young saw the mistake prior to his purchase.

This case stands in stark contrast to the vast majority of cases where deception in violation of the CPA has been found. In those cases, thousands of consumers or more were exposed to the subject deceptive act or statement, and thus, the act was found to have “the capacity to deceive a substantial portion of the public.” *See, e.g., Mandatory Poster Agency*, 199 Wn.App. at 524 (explaining that “because there is no dispute that the mass mailing was sent to over 79,000 consumers, generating 2,901 paid responses, there is no question of fact whether the misleading mailings reached, and thus had the capacity to deceive, a substantial portion of the public.”); *State of Washington v. La Investors, LLC*, 2 Wn.App.2d 524, 540 (2018) (“[t]he undisputed facts” included that defendant “sent the mailer in this case to over 200,000 consumers generating over 9,000 paid responses”). Even in *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, (2009)—a case that Young heavily relies on—the Court of Appeal found “the language in the collection notices has the capacity to

deceive a substantial portion of the public because they are representative of other notices sent to thousands of Washington citizens.” *Id.* at 47-48.

For this Court to overturn the Trial Court’s ruling, it would need to find that there was credible evidence that the inaccurate information related to the temperature gauge reached a “substantial portion or the public.” First, Young failed to present any such evidence. Second, assuming Young’s testimony that he saw the inaccurate information prior to purchase could be extrapolated to other unidentified consumers, this Court cannot second guess the Trial Court’s findings that Young’s testimony was not credible. It is well established that “where a trial court finds that evidence is insufficient to persuade it that something occurred, an appellate court is simply not permitted to reweigh the evidence and come to a contrary finding. It invades the province of the trial court for an appellate court to find compelling that which the trial court found unpersuasive.” *Quinn v. Cherry Lane Auto Plaza, Inc.*, 153 Wn.App. 710, 717 (2009) (explaining that when the trial court weighed conflicting evidence and made a determination, it was “the end of the story”).

**2. The Court Properly Found That Young Failed to Provide Evidence that the Mistake was Material**

To prove that the inaccurate information was unfair or deceptive, Young also needed to demonstrate that the information related to the temperature gauge was material. *See, e.g., Holiday Resort Comm.*, 134 Wn. App. at 226 (“[i]mplicit in the definition of ‘deceptive’ under the

CPA is the understanding that the practice misleads or misrepresents something of material importance”); *Stephens v. Omni Ins., Co.*, 138 Wn.App. 151, 166 (2007) (same).

The Trial Court questioned whether, and noted the lack of evidence establishing, that the mistaken inclusion of an outside temperature gauge worth about \$10 was material enough to have the capacity to deceive a substantial portion of the public into buying a “\$35,000 plus” vehicle. (CP 461). Young does not challenge the Trial Court’s finding of lack of evidence on this issue. On that basis alone, this Court can uphold the Trial Court’s finding that Young failed to prove his CPA claim. *See State v. Hill*, 123 Wn.2d 641 (1994) (unchallenged findings are verities on appeal).

**3. Young’s Arguments Do Not Change the Trial Court’s Determination**

**a. The Trial Court Did Not Improperly Require Young to Show Actual Deception and Reliance to Establish His CPA Claim**

Young argues that the Trial Court improperly required him to establish “actual deception and reliance.” (Appellant’s Brief (“AB”) at 14-18). This is simply untrue. While those words appear in the Trial Court’s decision, the decision is much more nuanced than that.<sup>4</sup> According to the

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<sup>4</sup> It is also worth noting that negligent misrepresentation (the claim Young abandoned on appeal) requires reliance. *Ross v. Kirner*, 162 Wn. 2d 493, 499 (2007).

Trial Court, there was a lack of credible evidence establishing Young (let alone anyone else) was exposed to, saw, noticed, read—let alone relied on—the mistaken reference to the temperature gauge prior to Toyota notifying its customers about the mistake. (CP 460-67). Simply because the Trial Court noted that Young did not prove reliance and deception, does not mean that the Trial Court erroneously found that Young failed to provide credible evidence that anyone (including himself) was exposed to the inaccurate information prior to purchase, the latter being fatal to Young’s claim.

**b. The Court Properly Evaluated Young’s Evidence Related to “Whether an Act Has the Capacity to Deceive a Substantial Portion of the Public”**

Young also argues that the Trial Court’s focus on Mr. Young’s conduct “contradicts longstanding authority finding that undisputed conduct is unfair or deceptive is a question of law, not a question of fact.” (AB at 17). Although Young is generally correct that whether an undisputed act is unfair or deceptive is a question of law, when it is disputed (as it is here) whether an act reached a substantial portion of the public, it is a question of fact. *See, e.g., Mandatory Poster Agency, Inc.*, 199 Wn.App. at 522 (explaining that the “substantial portion of the public component of a deceptive act or practice may present a question of fact”); *Behnke v. Ahrens*, 172 Wn. App. 281, 292, 293 (2012) (explaining that it is a question of fact whether the allegedly unfair act reached a “substantial

portion of the public”); *Holiday Resort Cmty. Ass’n*, 134 Wn. App. at 226-27 (question of fact whether the form rental agreement had the capacity to deceive a substantial portion of the public because it was sent to over 500 mobile home park owners). Thus, the Trial Court correctly evaluated (and rejected) Mr. Young’s evidence on this issue.

**c. The Trial Court Properly Evaluated Young’s Credibility**

Young also takes issue with the Trial Court focusing on Young’s testimony and credibility. (AB at 16-17). But Young provided the Trial Court with no choice because the only evidence provided to the Trial Court that anyone was exposed to the inaccurate information prior to purchase was Young’s testimony. (CP 460).

Young takes issue with the Trial Court’s “consideration of Young as ‘one of the more savvy, better informed, and well-researched customer[s] that I have ever come across,’ in evaluating whether or not Mr. Young was actually deceived, especially as a standard for whether or not Toyota’s false advertising had the capacity to deceive other consumers.” (AB at 17). But the Trial Court was not holding Young to some higher standard in evaluating whether Young was “actually deceived.” Rather, the Trial Court was evaluating the credibility of Young’s testimony about when he claims he first noticed the reference to the temperature gauge. (CP 462-467). Specifically, the Trial Court found that in light of Young’s testimony that made himself out to be “one of the

more savvy, better-informed, and well-researched customers,” his testimony about when he noticed the temperature gauge was not in his vehicle seemed incredible. (CP 462).

**B. As the Trial Court Correctly Found, Young Cannot Establish an “Unfair or Deceptive Act” by Relying on the ADPA**

Perhaps recognizing that he could not prove that TMS’s mistake had “the capacity to deceive a substantial portion of the public,” Young also attempts to establish that the act was “unfair or deceptive,” by relying on the ADPA. (AB at 24-30). As the Trial Court correctly found, Young cannot rely on the ADPA to support his CPA claim.

Plaintiff claims that the Trial Court erred in finding that “Toyota’s indisputably false representations regarding a vehicle feature in its nationwide advertising were not prohibited by RCW 46.70.180(1).” (AB at 24-30). Young cites no case law to support the position that the type of mistake made by TMS is a violation of the ADPA.

As the Trial Court observed RCW 46.70.180(1) of the ADPA does not apply to TMS’s claim. The provision targets “false, deceptive, or misleading statements” related to “the sale, lease, or financing of the vehicle,” *i.e.*, the purchase transaction, not mistakes related to characteristics of the vehicle for which customers were never charged. RCW 46.70.180(1). This is evident by the enumerated examples listed in RCW 46.70.180(1) and cited by the Trial Court in its decision:

- That no down payment is required in connection with sale of a vehicle when a down payment is in fact required, or that the vehicle may be purchased for a smaller down payment than is actually required.
- That a certain percentage of the sale price of a vehicle may be financed when such financing is not offered in a single document evidencing the entire security transaction.
- That a certain percentage is the amount of the service charge to be charged for financing, without stating whether this percentage charge is a monthly amount or an amount to be charged per year;
- That a new vehicle will be sold for a certain amount about or below cost without computing costs as to the exact amount of the factory invoice on the specific vehicle to be sold;
- That a vehicle will be sold upon a monthly payment of a certain amount, without including in the statement the number of payments of that same amount which are required to liquidate the unpaid purchase price.

(CP at 468-469 citing RCW 46.70.180(1). Accordingly, Plaintiff cannot identify any specific provision of the ADPA that has been violated and that can be borrowed to make up for the failures in his CPA deceptive practice claim.

In fact, finding that TMS violated the ADPA is contrary to the purpose of the ADPA, which is to “prevent frauds, impositions, and other abuses upon its citizens and to protect and preserve the investments and properties of citizens of this state” by dealers and manufacturers. RCW 46.700.005. Rather, TMS’s conduct—self-identifying and immediately correcting a mistake and offering compensation to those that may have been impacted by the mistake—is exactly the type of conduct that the drafters of the statute would seem to want to encourage.

Moreover, as the Trial Court correctly found, Young cannot base his CPA claim on the ADPA because his claim is time barred by the ADPA’s one year statute of limitations. Federal courts unanimously have found that a CPA claim cannot be based on an expired claim. *See Lyons v. Homecomings Fin., LLC*, 770 F. Supp. 2d 1163, 1167-68 (W.D. Wash. 2011) (holding that time-barred claims cannot support a CPA claim); *Kotok v. Homecomings Financial, LLC*, 09-cv-662, 2009 WL 2057046, at \* 4 (W.D. Wash. July 14, 2009) (same)); *see also Bednaruk v. Northwest Trustee Serv., Inc.*, 09-cv-1586, 2010 WL 545643, \*4 (W.D. Wash. Feb. 9, 2010) (finding that when the underlying statute is time-barred, “there are no grounds for maintaining a per se CPA cause of action”). Young cites no authority nor any compelling reason these cases should be ignored.

Young argues it is irrelevant that his ADPA claim is time barred because courts can rely “on statutory declarations of public interest to

substantiate CPA claims, even when plaintiffs did not or could not raise private causes of action under associated statutes.” (AB at 27). None of the cases cited by Young, however, involve time-barred claims. Rather, they involve situations in which the predicate statutes did not allow a private right of the action. (See cases cited in AB 28-29). In other words, unlike Young, the plaintiffs could never have pursued a claim under those statutes. This clear distinction is important because it would defeat the purpose of statute of limitations if a time barred claim can simply be resuscitated as a “per se” violation of the CPA.

\* \* \*

In short, Young failed to satisfy the first prong of the CPA, and for that reason alone, this Court should affirm the Trial Court’s ruling in favor of Toyota.

**III. As the Trial Court Also Correctly Found, Young Failed to Establish that Toyota Caused Any Injury to Him**

To prevail on his CPA claim, Young also needed to establish a causal link between the deceptive actions and the plaintiff’s injury.

*Hangman Ridge*, 105 Wn.2d at 785. The State Supreme Court has found that if the expense would have been incurred regardless of whether a violation existed, causation is not established. *Indoor Billboard/Wash., Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 82 (2007) (a plaintiff must prove that the “injury complained of... would not have happened” if not for defendant’s acts).

Young asserts that causation is established because he was “promised” an outside temperature gauge, which he did not receive, and no further inquiry is required. (AB at 20-21). But if, as the Trial Court correctly found, Young did not see the inaccurate information prior to purchase, it could not have been the reason he purchased the vehicle. (CP at 460-467, 470). And if the inaccurate reference to the temperature gauge was not the reason Young purchased the vehicle, the inaccurate information could not be a “but for” cause of his purported injuries. *See, Indoor Billboard*, 162 Wn.2d at 83-84 (in cases alleging reliance on a misrepresentation in an invoice cannot be met by simply receiving the invoice); *Crane & Crane, Inc. v. C&D Elec, Inc.*, 37 Wn.App. 560, 563 (1984) (“Mr. Carpenter falsely represented that he was an employee of C & D when in fact he was an employee of Mid-Valley. But ... there is no evidence ... that this false representation induced Crane to hire Mr. Carpenter. Without inducement, there can be no CPA claim”).<sup>5</sup>

#### **IV. TMS Should be Granted Costs Upon Prevailing**

Under R.A.P. 14.2, a “commissioner or clerk of the appellate court will award costs to the party that substantially prevails on review, unless

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<sup>5</sup> See also *Good v. Fifth Third Bank*, No. 13-02330, 2014 WL 2863022, at \*3 (W.D. Wash. June 23, 2014) (dismissing CPA claim where plaintiff failed to show causal link between alleged act and plaintiff's injury); *Estrigor v. Mountain States Mortgage*, No. 13-5297, 2013 WL 6499535, at \*3 (W.D. Wash. Dec. 11, 2013) (same).

the appellate court directs otherwise in its decision terminating review.”

Under R.A.P. 14.3(a), certain expenses are allowed as costs.

R.A.P. 18.1(b) requires that a “party must devote a section of its opening brief to the request for the fees or expenses.” Thus, in accordance with R.A.P. 14.2, and upon presentation of a cost bill pursuant to R.A.P. 14.4, TMS requests a cost award for prevailing on appeal. Additionally, TMS requests that Young’s request for an award of costs and fees be denied because Young “is not the prevailing party in this action.”

#### CONCLUSION

For the reasons set forth above, the Court should affirm the Trial Court’s decision in favor of TMS. Consequently, TMS is entitled to an award of costs as the prevailing party on appeal.

DATED this 19th day of July, 2018.

Respectfully Submitted,

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I hereby certify that on July 19, 2018, I caused true and correct copies of the foregoing Respondent's Brief to be served by U.S. Mail upon:

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