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STATE OF WASHINGTON
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No. 35842-9-III

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IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

FILED

DUANE YOUNG, Petitioner,

AUG 22 2019

vs.

TOYOTA MOTOR SALES, USA, Respondent.

COURT OF APPEALS
DIVISION III
STATE OF WASHINGTON
By _____

PETITION FOR REVIEW

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A. IDENTITY OF PETITIONER

Petitioner Duane Young asks this Court to accept review of the Division III Court of Appeals' decision designated in Part B herein.

B. COURT OF APPEALS DECISION

On May 23, 2019, the Division III Court of Appeals affirmed the February 27, 2018, decision of the Spokane County Superior Court in favor of Respondent Toyota Motor Sales, USA, finding that Toyota's undisputedly false advertising of its motor vehicle products and features did not violate Washington's Consumer Protection Act (CPA), RCW 19.86, *et seq.*, because:

- 1) Toyota's affirmative misrepresentations were not sufficiently material to constitute an "unfair or deceptive" act or practice, for the first time imposing an unwritten "materiality" requirement to show that an affirmative misrepresentation is "deceptive" under the CPA;
- 2) No *per se* violation of the CPA occurred, because the prohibitions of the Automobile Dealer Practices Act (ADPA), RCW 46.70.180(1), 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” did not apply to Toyota’s affirmative misrepresentations of motor vehicle products and features that did not exist; and

3) Toyota’s failure to deliver the falsely advertised products and features did not cause injury to Mr. Young, because (a) the \$10 factory cost of the promised component was “financially immaterial” to him and other consumers; (b) Toyota did not charge extra money for the nonexistent products and features; and (c) Mr. Young’s otherwise recoverable investigation expenses were caused by the discovery of Toyota’s misrepresentations, not the misrepresentations themselves.

By shifting its inquiry from Toyota’s misrepresentations to whether or not consumers actually relied on those misrepresentations, the lower court has flatly contradicted consumer protection standards that have stood at least as long as the landmark case of *Hangman Ridge Training Stable v. Safeco Title Ins. Co.*, 105 Wn.2d 778 (1986).

Moreover, the lower court has, for the first time, imposed a “materiality” element into the ADPA’s specifically-crafted prohibitions against false advertising in motor vehicle sales,¹ which otherwise require dealers and manufacturers to ensure the truth and accuracy of their

¹ In addition to the “unlawful acts and practices” specified in RCW 46.70, *et seq.*, there are literally scores of special regulations pertaining to vehicle advertising and sales, ranging from the type size of disclaimers to permissible abbreviations to the computation of invoices and much, much more. WAC 308-66-155.

advertising, rather than expecting consumers to avoid being duped by motor vehicle advertisers' false representations.

Finally, the lower court's ruling that Mr. Young did not rely on Toyota's false advertising when he purchased the vehicle, and so Toyota's failure to deliver as advertised did not cause any injury, contradicts the basic principle that "[to prove injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff's "business or property." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 (2013).

Without the final authority of the Supreme Court, the publication of Division III's decision on these issues promises to throw Washington's judicial and administrative regulation of consumer protection standards, particularly those that apply to the specially regulated field of motor vehicle sales, into chaos and confusion. In the meantime, the public interest purposes at the very heart of Washington's consumer protection jurisprudence will be profoundly affected by the final disposition of this case. This matter therefore represents an issue of substantial public interest that should be reviewed by Washington's highest court.

A copy of the appellate court's published Opinion is in the Appendix herein at pages A-1 through A-21.

C. ISSUES PRESENTED FOR REVIEW

1. In addition to showing that an act or practice has the “capacity to deceive” a substantial portion of the public, must a consumer also show that he or she was individually deceived by an advertiser’s affirmative misrepresentations to establish that such false advertising was “unfair or deceptive” under the CPA?

2. Are an advertiser’s affirmative misrepresentations of fact inherently “deceptive,” or must a consumer show that he or she individually relied on such false advertising to satisfy an unwritten “materiality” element of an otherwise “deceptive act or practice” under the CPA?

3. Does an advertiser’s failure to deliver products and features as promised cause an “injury” to affected consumers, or must an individual consumer show that he or she was specifically induced by those products and features prior to ostensibly acquiring them?

4. Can an advertiser’s affirmative misrepresentations proximately cause injury to consumers after those misrepresentations have been discovered by them?

5. Does an unwritten “materiality” element inhere within the Legislature’s specially designated prohibitions against “false, deceptive, or misleading” advertising of motor vehicles under RCW 46.70.180(1)?

6. Does a violation of RCW 46.70, *et seq.*, satisfy only two of five elements of a CPA claim, or does such a violation constitute a *per se* violation of the CPA under RCW 46.70.310?

D. STATEMENT OF THE CASE

In July 2013, Petitioner Duane Young began shopping online for a new mid-sized pickup truck. (CP 68-69). He was particularly interested in the specifications advertised for the 2014 Toyota Tacoma “Limited,”² which included an “auto dimming rearview mirror with outside temperature gauge and HomeLink® universal transceiver.” (CP 74-75). Toyota’s aggregated price for the “Limited Package” was \$7,660. (CP 74).

After visiting multiple dealerships, Mr. Young decided on a new one offered by Foothills Auto Center in Burlington, Washington, which he purchased over the phone. (CP 90-91). On October 30, 2013, he flew up to a dealership in Burlington, Washington, to purchase a new 2014 Tacoma “Limited” and drive it back to his home in Eugene, Oregon. (CP 91-92). In addition to Toyota’s online advertising, the “Monroney label” sticker on the vehicle’s window confirmed that the vehicle was equipped with an “auto dimming rearview mirror with outside temperature gauge and HomeLink® universal transceiver,” among other features (CP 96-99).

² Tacoma “Limited” refers to models equipped with an options package Toyota calls the “Limited Package.”

On his drive back to Eugene, Mr. Young noticed that he couldn't locate the temperature gauge that was ostensibly integrated with the rearview mirror. (CP 108). After he arrived home, he attempted to program the mirror and "turn on" the temperature gauge without success. (CP 109). After a few days, Mr. Young concluded that his vehicle was not equipped as advertised. (CP 109).

On December 13, 2013, Toyota sent Mr. Young a letter stating:

It has recently come to our attention that the Monroney label ("window sticker") on your vehicle indicated that an outside temperature gauge was included in the vehicle's rear view mirror. This feature is not available on any 2014 Tacoma. (CP 113-114).

Toyota's letter also indicated that the company "would like to compensate you with a cash reimbursement of \$100." (CP 114). Mr. Young declined the \$100 offer and instead contacted Toyota. (CP 115). After negotiations, Toyota finally offered to install the integrated mirror as originally advertised, but insisted that it would not include a parts warranty as with all other components of a new Tacoma. (CP 116, 125).

Mr. Young declined Toyota's offer and, having exhausted his options with the company, he retained an Oregon attorney to investigate the matter before being referred to present counsel in Washington to advance his case. (CP 131-132).

In all of this, Toyota has never disputed that the representations it made in its advertising were false. (CP 408). Toyota has also

acknowledged that it sold at least 59 Tacoma “Limited” vehicles in Washington, none of which had all of the features that Toyota advertised in its “Limited Package.” (CP 303). This number does not include countless consumers who might have been exposed to or injured by Toyota’s false advertising³ without purchasing a 2014 Tacoma “Limited.”

Following a bench trial beginning on July 31, 2017, the trial court entered its Opinion on November 1, 2017, ruling that Mr. Young had failed to substantiate his CPA claims, because he did not establish that 1) he was actually deceived by Toyota’s false advertising, or that 2) he actually relied upon Toyota’s misrepresentations. (CP 416). Therefore, the court concluded, Toyota’s affirmative misrepresentations in its nationwide advertising did not have “the capacity to deceive a substantial portion of the public”⁴ or cause anyone any harm. (CP 416).

Following Mr. Young’s timely appeal, the Division III Court of Appeals published its Opinion affirming the trial court in *Young v. Toyota Motor Sales, USA*, 9 Wn. App. 2d 26 (2019). Mr. Young thereafter filed his petition for final review by this Court.

E. ARGUMENT WHY REVIEW SHOULD BE ACCEPTED

This Court may accept a petition for review of a Court of Appeals decision if the decision conflicts with other decisions of this Court or the

³ In cases of false advertising, out-of-pocket expenses, such as the cost of traveling to a dealership in response to false advertisements, are recoverable. *Panag*, 166 Wn.2d at 64.

⁴ RCW 19.86.093(3) requires a showing that a practice “(a) injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.”

Court of Appeals. RAP 13.4(b)(1)-(2). This Court may also accept review if the petition involves an issue of substantial public interest that should be determined by the Supreme Court, RAP 13.4(b)(4). This Court should accept review for both of these reasons.

A. Division III's Decision Contradicts Longstanding Authority of Both the Supreme Court and Appellate Courts.

Washington's CPA broadly prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. In order to prevail on a private CPA claim, "a plaintiff must establish five distinct elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge*, 105 Wn.2d at 780. To establish the first element, that an unfair or deceptive act or practice has occurred, "[a] claimant need not prove reliance or deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public." *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90, 93 (1979). "Whether a plaintiff-consumer has been actually deceived is irrelevant" to establishing that an unfair or deceptive act or practice has occurred. *Testo v. Russ Dunmire Oldsmobile*, 16 Wn. App. 39, 51, (1976); *see also State v. Ralph Williams' N. W. Chrysler Plymouth*, 87 Wn.2d 298, 317 (1976) ("[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.); *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”). Furthermore, “[w]hether 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 (2014); accord *Panag*, 166 Wn.2d at 47.

1. *Division III’s Decision Conflicts with Established Authorities Regarding Determination of “Deceptive Acts or Practices.”*

Division III’s decision to graft a “materiality” prong to the “unfair or deceptive” element of a CPA claim contradicts previous decisions of both the Supreme Court and appellate courts, as well as the very authorities the lower court relies upon to support its decision. See *Young*, 9 Wn. App. 2d at 40-41 (2019) (Fearing, J., concurring in part). For decades, whether or not a consumer is actually deceived has been deemed “irrelevant” in establishing that a deceptive act or practice has occurred, *Testo*, 16 Wn. App. at 51. Moreover, when there is no dispute that an affirmative misrepresentation in advertising has occurred, whether this constitutes an “unfair or deceptive act or practice” under the CPA can be

decided as a matter of law. *Indoor Billboard/Washington, Inc. v. Integra Telecom of Wash., Inc.*, 162 Wn.2d 59, 74 (2007). The lower court’s decision in Mr. Young’s case proposes to abandon these longstanding principles by shifting the inquiry from whether an act or practice has the “capacity to deceive” other members of the *public* to one of *individual* susceptibility, as determined by the actual deception of an idiosyncratic Plaintiff as a measure of “materiality.” Such a precedent undermines the very foundations of Washington’s CPA and the public interests it is designed to promote and protect.

2. *Division III’s Decision Conflicts with Established Authorities Regarding Determination of “Injury” and “Causation.”*

Similar conflicts exist with Division III’s decision regarding the imposition of a “consumer reliance” requirement upon the “injury” and “causation” elements of CPA claims, seemingly without regard for the prophylactic purpose of the CPA’s “capacity to deceive” test.⁵ Prevailing authorities have established that “[t]o establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s “business or property.” *Panag*, 166 Wn.2d at 63-64. An injury to property occurs when “one’s right to possess, use or

⁵ “The purpose of the capacity to deceive test is to deter deceptive conduct *before* injury occurs.” *Hangman Ridge*, 105 Wn.2d at 785 (emphasis original).

enjoy a determinate thing has been affected in the slightest degree.”
Handlin v. On-Site Manager, Inc., 187 Wn. App. 841, 849-50 (2015)
(referencing *Ambach v. French*, 167 Wn.2d 167, 172 (2009)). A sufficient
injury is pleaded if a plaintiff alleges that he was deprived of the use of his
property even for a short amount of time. *Id.*; and see *Sorrel v. Eagle
Healthcare, Inc.*, 110 Wn. App. 290, 298-99, review denied, 147 Wn.2d
1016 (2002). This Court has also established that, “[i]n cases of false
advertising, out-of-pocket expenses are recoverable, such as the cost of
parking, driving, or making a trip to the store to buy something,” as well
as the expenses of investigating potential claims. *Panag*, 166 Wn.2d at
64. The injury requirement is met upon proof the plaintiff’s “property
interest or money is diminished because of the unlawful conduct even if
the expenses caused by the statutory violation are minimal.” *Id.* at 57.

Against this weight of authority, Division III found that Toyota’s
failure to deliver the falsely advertised product features did not cause
injury to Mr. Young, because he did not discover that Toyota
misrepresented its “Limited Package” until after he purchased the vehicle.
Young, 9 Wn. App. 2d at 39. However, a consumer need not show that he
or she was actually deceived to establish injury and causation, *Panag*, 166
Wn.2d at 63-64, but instead must show proximate cause by establishing
that, “but for the defendant’s unfair or deceptive practice, the plaintiff

would not have suffered an injury.” *Indoor Billboard*, 162 Wn.2d at 86. ““Proximate cause”” is defined in WPI 310.07 as a “cause which in direct sequence [unbroken by any new independent cause] produces the injury complained of and without which such injury would not have happened.” *Id.* at 162 Wn.2d 81-82.

In Mr. Young’s case, the lower court did not consider whether falsely advertising nonexistent product features caused injury to those consumers who were deprived of the same, *Young*, 9 Wn. App. 2d at 39, that is, whether “but for” Toyota’s false advertising, Mr. Young would not have been deprived of the products and features the advertiser promised. Instead, Division III redirected the inquiry from the conduct of advertisers who produce misrepresentations to the consumers who are subjected to them. The lower court then endorsed that application of the trial court’s “consumer reliance” standard in finding that it “could 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 [vehicle] and therefore caused him damages.” *Id.* In this respect, the lower courts instituted a “no harm, no foul” standard for false advertising in motor vehicle sales, which fundamentally undermines the prophylactic purposes of the CPA. *Hangman Ridge*, 105 Wn.2d at 785. The lower court also decided that the \$10 factory cost of the missing component was “financially immaterial,”

because although Toyota promised to deliver it to consumers, Toyota did not charge them money for it. *Young*, 9 Wn. App. 2d at 38.

With regard to otherwise recoverable investigation expenses, Division III again replaced a “proximate causation” analysis with a “consumer reliance” standard. Although the lower court acknowledged that “an injury to business or property that is proximately caused by the deceptive act itself is compensable,” *Young*, 9 Wn. App. 2d 39 (citing *Panag*, 166 Wn.2d at 62), it noted that Toyota eventually acknowledged its false advertising to Mr. Young, which then caused him to incur expenses associated with vetting Toyota’s claims and investigating his legal options. *Young*, 9 Wn. App. 2d at 39. The lower court therefore decided that it was the discovery of Toyota’s misrepresentations, not the misrepresentations themselves, that caused Mr. Young to incur these expenses, and therefore Toyota’s false advertising did not cause any injury. *Id.* The lower court did not address whether, but for Toyota’s false advertising, there would be no disclosure or discovery of the same, and therefore Mr. Young would not have incurred expenses investigating Toyota’s conduct and his corresponding options. *Id.*

Ultimately, Division III’s “consumer reliance” approach to causation would produce a scheme in which motor vehicle advertisers are free to indulge in advertising misrepresentations unless a consumer can

show actual reliance upon them, which contradicts one of the central objectives of the CPA to “deter deceptive conduct *before* it occurs.” *Hangman Ridge*, 105 Wn.2d at 785 (emphasis original). Deciding that a \$10 loss on a vehicle purchase is “financially immaterial” also undermines “Washington’s strong Consumer Protection Act policy favoring class adjudication of small-dollar claims.”⁶ *McKee v. AT&T Corp.*, 164 Wn.2d 372, 386 (2008); see also *Dix v. ICT Grp., Inc.*, 160 Wn.2d 826, 842 (2007) (presumption of small-value CPA claims). If every consumer Plaintiff was required to show individual reliance by each member of a putative class, consumer class-actions would be nearly impossible to certify, once again undermining one of the primary purposes and functions of Washington’s CPA. *Id.*

3. *Division III’s Decision Conflicts with Established Authorities Regarding the Legislature’s Specially Regulated Field of Motor Vehicle Sales in Washington.*

Division III’s decision to impute similar “materiality” and “reliance” elements into the specially regulated field of motor vehicle sales, RCW 46.70, *et seq.*, not only contradicts many of the same authorities that govern CPA claims, but also defies the plain language of the statute itself. RCW 46.70.180(1). As a fundamental matter,

⁶ Mr. Young’s case was originally filed as a class-action for damages of \$500, the consumer’s retail cost to purchase and install the missing component, for each member of the putative class.

Washington's Legislature has determined that the public's particular interest in the field of motor vehicle sales warrants specialized regulations, additional scrutiny, and higher standards than other consumer transactions. RCW 46.70.005. The Legislature further mandated that "[a]ll provisions of [RCW 46.70, *et seq.*] shall be liberally construed to the end that deceptive practices or commission of fraud or misrepresentation in the sale, lease, barter, or disposition of vehicles in this state may be prohibited and prevented." RCW 46.70.900. Any violation of the ADPA is a *per se* violation of the CPA. RCW 46.70.310.

Division III has contradicted these special Legislative mandates by deciding that Toyota's indisputably false representations in its nationwide advertising were *not* prohibited by RCW 46.70.180(1), which declares it unlawful to "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*, including but not limited to the following [non-exclusive examples of prohibited conduct]." RCW 46.70.180(1) (emphases added). *Young*, 9 Wn. App. 2d at 37. In conjunction with 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, it is almost implausible that such an expansive prohibition against false, deceptive, or misleading representations” in motor vehicle sales does not apply to Toyota’s affirmative misrepresentations in its nationwide marketing campaign, or that advertising motor vehicle products and features for sale does not relate to the “*sale*, lease, or financing” of those products and features.⁷ RCW 46.70.180(1). *Young*, 9 Wn. App. 2d at 37.

Indeed, higher courts throughout Washington have applied the prohibitions of RCW 46.70.180 broadly to cover all manner of unlawful acts and practices not specifically enumerated under the ADPA. *See, e.g., Sherwood v. Bellevue Dodge*, 35 Wn. App. 741 (1983) (unsecured vehicle dealer's non-judicial repossession of a vehicle was an unlawful act or practice in the sale of motor vehicles under RCW 46.70.180, although it was not a practice specifically enumerated in the statute); *Ralph Williams’ N.W. Chrysler Plymouth*, 87 Wn.2d at fn. 6 (false advertising of prices, warranties, defects, practices, and other issues prohibited); *and see Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 198 (2007) (Madsen, J. dissenting) (RCW 46.70.180 applies to misleading consumers regarding a business and occupation tax being a legal obligation of the customer).

⁷ Agency regulations specifically associated with RCW 46.70.180(1) include literally scores of requirements pertaining to motor vehicle advertising. WAC 308-66-155.

Narrow interpretations regarding the application of RCW 46.70.180(1), such as those advocated by the lower court, are inconsistent with the legislative mandate for a “liberal construction” under RCW 46.70.900.

Separate from its decision regarding CPA claims, the lower court’s decision to impose a “materiality” element upon the Legislature’s special regard for motor vehicle sales in general, and the intentionally broad scope of prohibitions against “false, deceptive, or misleading” statements in particular, defies the plain language of the statute as well as the Legislature’s express intent. RCW 46.70.180(1); RCW 46.70.900; RCW 46.70.005. While the Legislature has clearly and firmly placed the burden of ensuring accuracy and truthfulness in advertising squarely upon vehicle dealers and manufacturers, Division III’s decision would shift this burden to individual consumers, who would have to prove actual reliance upon dealers’ and manufacturers’ “false, deceptive, or misleading” statements before even attempting to prevent “deceptive practices” and “misrepresentation” in motor vehicle sales. RCW 46.70.180(1). This cannot be what the Legislature intended. In the words of this Court, “[i]t is nonsensical for the legislature to write a [statutory] provision free of preconditions, only for this court to read in elements that lawmakers did not include. Indeed, our canons of statutory construction warn against such an interpretation.” *Wright v. Lyft, Inc.*, 189 Wn.2d 718, 729 (2017).

Finally, the lower court's decision contradicts its own precedent by suggesting that "a violation of [RCW 46.70, *et seq.*] therefore satisfies the first two elements of a CPA claim," *Young*, 9 Wn. App. 2d at 37 (referring to RCW 46.70.310), when it has been well established that virtually identical language (i.e., "constitutes a violation of the CPA") creates an equivalency, not merely a partial satisfaction of CPA elements. *Anderson v. Valley Quality Homes*, 84 Wn. App. 511, 520, (1997) ("an unremedied violation of the former *is* a violation of the latter") (emphasis original)).

In these respects, the lower court's decision not only conflicts with established judicial and Legislative authorities, but it also creates internal inconsistencies with the authorities upon which it relies and its own previous decisions in the same jurisdiction. These conflicts warrant the final review, reconciliation, and authority of the Supreme Court.

B. Division III's Decision Will Profoundly Affect the Public Interests that Each Statute Was Enacted to Protect.

The very essence of any CPA claim is the protection of public interests, as memorialized in *Hangman Ridge*, 105 Wn.2d at 788, and codified in RCW 19.86.920. Every Plaintiff must establish that an act or practice is injurious to the public interest in order to vindicate a CPA claim. RCW 19.86.093. The ADPA also includes a Legislatively declared public interest purpose, RCW 46.70.005, which is specific to the distribution, sale, and lease of motor vehicles. To emphasize the special

standards that apply to these vehicle transactions, the Legislature has declared that any violation of the ADPA is also a *per se* violation of the CPA. RCW 46.70.310.

In these respects, Division III's imposition of a "materiality" element to public and private CPA claims proposes to profoundly alter consumer protection jurisprudence, and the public interests it serves, throughout Washington. The lower court seeks to shift the determination of "deceptive acts or practices" from those that have the "capacity to deceive" other members of the public, *Hangman Ridge*, 105 Wn.2d at 785, to an idiosyncratic consumer's actual reliance on otherwise prohibited conduct. The lower court also imposed an "actual reliance" standard over the existing "proximate causation" standard to establish causation and injury in a CPA claim.

Finally, Division III's determination, for the first time, that "a materiality requirement inheres" in the otherwise plainly stated prohibitions of RCW 46.70.180(1) not only undermines the Legislature's special regard for the regulation of motor vehicle sales, but also fundamentally alters how courts and regulatory agencies must apply the ADPA, by shifting the inquiry from whether or not a vehicle dealer or manufacturer engaged in "false, deceptive, or misleading" communications to whether or not an individual consumer was actually deceived by those communications. In so doing, the lower court has swept

aside the higher standards of regulation and scrutiny the Legislature applies to motor vehicle sales in Washington in favor of lesser standards of compliance and review that apply to general consumer transactions.

Perhaps recognizing the potential for the lower court's decision to upset decades of consumer protection jurisprudence in Washington, Judge George Fearing, writing separately from the majority, expressly anticipated this Court's final review of Division III's decision in this case. *Young*, 9 Wn. App. 2d at 40 (Fearing, J., concurring in part). Mr. Young joins the Honorable Judge in requesting that this court grant final review of this matter for the benefit of courts, lawmakers, and the millions of consumers throughout Washington.

C. Mr. Young Is Entitled to an Award of Costs and Fees.

Pursuant to RCW 19.86.090, Mr. Young is entitled to recovery of his costs and fees as the prevailing party in this action. Pursuant to RAP 18.1, he requests that this Court make such an award per RCW 19.86.090.

D. CONCLUSION

Based upon the authorities and arguments herein, Mr. Young petitions this Court to accept final review of this matter.

DATED this 22nd day of August, 2019, and respectfully submitted,

s/ 
Brian G. Cameron, WSBA #44905
Attorney for Petitioner

CERTIFICATE OF SERVICE

The undersigned hereby certifies under penalty of perjury under the laws of the State of Washington that on the **22nd day of August, 2019**, at Spokane, Washington, I caused to be served the foregoing document(s), and accompanying exhibits, on the following person(s) and/or entity(ies) in the manner indicated:

Michael L. Mallow Rachel Strauss Mark D. Campbell Sidley Austin, LLP 555 West Fifth Street, Ste. 4000 Los Angeles, CA 90013 Email: mmallow@sidley.com rstrauss@sidley.com	X VIA REGULAR MAIL X VIA EMAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA EXPRESS DELIVERY
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DATED this 22nd day of August, 2019.

s/Jackie Singleton

JACKIE SINGLETON
Paralegal

APPENDIX

APPENDIX A

Young v. Toyota Motor Sales, U.S.A., 9 Wn. App. 2d. 26 A-1

APPENDIX A

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION THREE

DUANE YOUNG, an individual, and)	
all those similarly situated,)	No. 35842-9-III
)	
Appellant,)	
)	
v.)	PUBLISHED OPINION
)	
TOYOTA MOTOR SALES, U.S.A.,)	
a California corporation,)	
)	
Respondent.)	

SIDDOWAY, J. — Duane Young’s negligent misrepresentation and Consumer Protection Act¹ (CPA) claims against Toyota Motor Sales were dismissed following a bench trial. He appeals dismissal of the CPA claim, challenging the trial court’s legal conclusions. Because the trial court’s factual findings support its conclusion that Mr. Young failed to carry his burden of proof on at least two elements of his claim, we affirm.

¹ Washington’s Consumer Protection Act is codified at chapter 19.86 RCW.

FACTS AND PROCEDURAL BACKGROUND

In December 2013, several months after purchasing a 2014 model year Toyota Tacoma truck from a dealer in Burlington, Washington, Duane Young received a letter from Toyota. The letter stated it had recently come to Toyota's attention that the Monroney label² on the vehicle he purchased might have indicated that an outside temperature gauge was included in the vehicle's rearview mirror. As the letter disclosed, that feature was not available on any 2014 model Tacoma. The letter apologized for the mistake and any confusion it might have caused. It offered to compensate Mr. Young with a cash reimbursement of \$100.

In January 2014, Mr. Young communicated with a customer service representative for Toyota named Jeffrey Moore, expressing his dissatisfaction with the reimbursement offer. By the end of January, Mr. Moore had offered to install a rearview mirror with an outside temperature gauge as an aftermarket part, but because it would not be factory-installed, the three-year 36,000 mile warranty on many of the truck's other parts would not apply. Still dissatisfied, Mr. Young contacted an attorney, after which Toyota offered to pay him \$500 to resolve his complaints. He declined the offer.

² "A Monroney label, or a window sticker . . . is a label that is required in the United States to be displayed on all new vehicles, and it includes certain official information; for example, standard equipment, optional equipment, crash test ratings, fuel economy info., and a manufacturer's suggested retail price." Report of Proceedings at 251.

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Arbitration proceedings with Toyota led to an award of a buyback by Toyota for over \$27,000. Mr. Young rejected the buyback because he thought he could sell the truck for more. He was right; he eventually sold the truck for \$30,500.

In May 2015, Mr. Young filed the lawsuit below. He sought to pursue it as a class action and asserted claims of common law fraud, negligent misrepresentation, and for violation of the CPA. The trial court denied class certification.

Toyota moved for summary judgment on all of Mr. Young's claims; he responded with a cross motion for summary judgment on his CPA claim. In ruling on the motions, the trial court dismissed the fraud claim but declined to grant either party's motions on the negligent misrepresentation and CPA claims, which proceeded to a bench trial.

Trial

At the bench trial, Mr. Young testified that the outdoor temperature gauge was an important feature to him and he was misled into believing it would be included in the limited package by a Monroney label and by the "Build-a-Tacoma" feature on Toyota's website. The "Build-a-Tacoma" feature enables a consumer to select the features of the truck he or she is interested in purchasing.

In the defense case, Toyota called as a witness its distribution pricing administrator, who testified that in early September 2013, an audit of the Monroney label for the 2014 model Tacoma with the limited package revealed that it erroneously

identified the truck's rearview mirror as including an outside temperature gauge.³ The 2013 model Tacoma had included such a temperature gauge, but it had been removed from the limited package for the 2014 model. Toyota presented evidence that in pricing the 2014 limited package the cost of that feature was removed, so purchasers of the limited package never paid for it. It also presented evidence that the cost of the feature was \$10.

The pricing administrator testified that the date on which Toyota first started wholesaling 2014 model Tacomas to dealers was September 4, 2013, so catching the error in the early September audit enabled it to substitute correct labels on most of the 2014 limited package models before they were shipped to dealers. In mid-October 2013, however, Toyota employees realized there might be vehicles in the field that had been shipped with incorrect Monroney labels. The pricing administrator testified that on October 22, 2013, she notified field offices of the possibility of incorrect labels, and that corrected labels would be available to print at their field offices the next day. The e-mail directed the field office to send the corrected Monroney labels to dealers in their region.

³ Employees also discovered that the limited package had been described as having a postage-stamp size monitor for its backup camera in the rearview mirror. The monitor had been moved to the dashboard and enlarged. Mr. Young concedes that this was an improvement.

The general manager for Toyota's Customer Experience Center testified that she learned in late October 2013 that incorrect information about the temperature gauge had been entered into the "Build-a-Tacoma" program on Toyota's website. She testified that the "Build-a-Tacoma" website information was corrected in early November 2013.

Toyota presented evidence that a total of 59 2014 model Tacomas with the limited package were sold in the state of Washington, and only three were sold before Toyota realized there was a mistake with the Monroney label. Of the remaining 56 trucks, 41 were sold after January 30, 2014 (roughly three months after the mistake had been corrected) and 31 were sold after May 1, 2014 (roughly six months after the mistake had been corrected).

Toyota's witnesses testified that letters like the one Mr. Young received in December 2013 were sent to 147 individuals that it identified as the only consumers who possibly purchased the limited package after seeing misleading information. There was no evidence presented that anyone other than Mr. Young claimed to have been misled.

At the conclusion of the bench trial, the court took the matter under advisement, issuing a lengthy and detailed memorandum decision three months later. It found "at least seven areas" where it "question[ed] Mr. Young's credibility." Clerk's Papers (CP) at 411. It concluded that Mr. Young had not proved either of his two remaining claims and directed Toyota's counsel to prepare formal findings and conclusions.

The findings and conclusions thereafter presented and entered incorporated all of the factual findings articulated in the court’s memorandum decision. They concluded that Mr. Young failed to carry his burden of proving multiple elements of both of his claims. Mr. Young appeals.

ANALYSIS

Following a bench trial, appellate review is limited to determining whether substantial evidence supports the trial court’s findings of fact and, if so, whether the findings support the conclusions of law. *State v. Stevenson*, 128 Wn. App. 179, 193, 114 P.3d 699 (2005). “Substantial evidence” is evidence sufficient to persuade a fair-minded person of the truth of the asserted premise. *Id.* We defer to the trial court’s determinations of the weight and credibility of the evidence. *Mueller v. Wells*, 185 Wn.2d 1, 9, 367 P.3d 580 (2016).

Unchallenged findings are verities on appeal, *see id.*, and Mr. Young does not dispute the trial court’s extensive findings. “Thus, the only question is if the unchallenged facts support the trial court’s conclusions of law.” *Id.* Mr. Young’s appeal challenges only the trial court’s dismissal of his CPA claim.⁴

⁴ We recognize that Mr. Young’s request for relief in his briefing to this court is for an unqualified reversal. His assignments of error and legal argument fail to address his negligent misrepresentation claim, however. We will not review its dismissal. *See* RAP 10.3(a)(4) and (6) (required content of an opening brief).

In a private cause of action, the CPA requires a plaintiff to prove five elements: “(1) an unfair or deceptive act or practice, (2) occurring in trade or commerce, (3) affecting the public interest, (4) injury to a person’s business or property, and (5) causation.” *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 37, 204 P.3d 885 (2009); *see also Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). “Failure to satisfy even one of the elements is fatal to a CPA claim.” *Sorrel v. Eagle Healthcenter, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002). The trial court concluded that Mr. Young’s proof of the CPA claim fell short of his burden in five respects. It is sufficient on appeal for us to address whether he proved the first and fifth elements of the claim.

Element One: An unfair or deceptive act or practice

The CPA does not define “unfair or deceptive act or practice.” “To show a party has engaged in an unfair or deceptive act or practice a ‘plaintiff need not show that the act in question was intended to deceive, but that the alleged act had the capacity to deceive a substantial portion of the public.’” *Sing v. John L. Scott, Inc.*, 134 Wn.2d 24, 30, 948 P.2d 816, (1997) (quoting *Hangman Ridge*, 105 Wn.2d at 785). “Implicit in the definition of ‘deceptive’ is the understanding that the actor misrepresented something of material importance.” *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998) (emphasis omitted), *rev’d in part on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). “Deception exists, ‘if there is a representation, omission or practice

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that is likely to mislead' a reasonable consumer." *Panag*, 166 Wn.2d at 50 (quoting *Sw. Sunsites, Inc. v. Fed. Trade Comm'n*, 785 F.2d 1431, 1435 (9th Cir. 1986)).

The "material importance" and "reasonable consumer" standards are consistent with decisions of federal courts and final orders of the Federal Trade Commission (FTC) interpreting provisions of the Federal Trade Commission Act dealing with the same or similar matters, as intended by the Washington Legislature. *See* RCW 19.86.920.⁵ In a 1983 report to a congressional committee on the FTC's enforcement policy against deceptive acts or practices, the FTC provided its view of the meaning of "deceptive acts or practices" under both sections 5 and 12 of the FTC Act.⁶ *See Cliffdale Assocs.*, 103 F.T.C. 110, app. at 174-84 (1984) (Letter from James C. Miller III, FTC Chairman, to the Honorable John D. Dingell, Chairman, U.S. House Comm. on Energy & Commerce (October 14, 1983)). Courts have summarized the Commission's view as prohibiting practices that are "likely to mislead consumers acting reasonably under the circumstances . . . in a way that is material." *Fed. Trade Comm'n v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006) (citing *Fed. Trade Comm'n v. Gill*, 265 F.3d 944, 950 (9th

⁵ RCW 19.86.920 declares that the purpose of the CPA "is to complement the body of federal law governing restraints of trade, unfair competition and unfair, deceptive, and fraudulent acts or practices in order to protect the public and foster fair and honest competition" and declares "the intent of the legislature that, in construing this act, the courts be guided by final decisions of the federal courts and final orders of the federal trade commission interpreting the various federal statutes dealing with the same or similar matters."

⁶ 15 U.S.C. §§ 45, 52.

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Cir. 2001) (citing, in turn, *Fed. Trade Comm'n v. Pantron I Corp.*, 33 F.3d 1088, 1095 (9th Cir. 1994)); *Corder v. Ford Motor Co.*, 285 F. App'x 226, 228 (6th Cir. 2008); and see *Kraft, Inc. v. Fed. Trade Comm'n*, 970 F.2d 311, 314 (7th Cir. 1992); *Cliffdale Assocs.*, 103 F.T.C. 110, at 164-66.

The FTC has summarized its approach to the requirement of materiality as follows:

The basic question is whether the act or practice is likely to affect the consumer's conduct or decision with regard to a product or service. If so, the practice is material, and consumer injury is likely, because consumers are likely to have chosen differently but for the deception. In many instances, materiality, and hence injury, can be presumed from the nature of the practice. In other instances, evidence of materiality may be necessary.

Cliffdale Assocs., 103 F.T.C. 110, app. at 175-76.

“A claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013). Mr. Young primarily contends that Toyota's “false advertising” had the capacity to deceive a substantial portion of the public. Appellant's Br. at 3. He argues alternatively that it was per se unfair or deceptive conduct under chapter 46.70 RCW, which regulates automobile manufacturers and dealers. *Id.*

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Capacity to deceive substantial portions of the public. The court found that “there is no question that there was a mistake both in Toyota’s online Build-a-Tacoma feature, and possibly in as many as 147 Monroney labels for 2014 Tacomas with a limited package that were shipped around the United States.” CP at 408. But it found that Mr. Young failed to demonstrate that Toyota’s mistake was a matter of material importance and therefore deceptive, or that it had the capacity to deceive a substantial portion of the public.

We need address only materiality to affirm the court’s conclusion that Mr. Young failed to prove a deceptive act or practice. The trial court’s unchallenged finding was that the temperature gauge represented \$10 in value, as compared to the \$7,525 cost of the 2014 model limited package. It also made the unchallenged finding that because the temperature gauge was never intended to be a feature of the limited package, it was not included in pricing the package, so no purchaser of the package ever paid for it. This unchallenged evidence establishes that Toyota’s error was financially immaterial.

Mr. Young did not present credible evidence that Toyota’s error was material for any nonfinancial reason. Having weighed Mr. Young’s credibility, the court rejected his assertion that he, personally, was induced by the mistake to buy the limited package. Mr. Young presented no evidence that the mistake would have been material to others.

A similar failure to present evidence caused this court to affirm summary judgment dismissal of a CPA claim in *Brummett v. Wash.’s Lottery*, 171 Wn. App. 664,

676, 288 P.3d 48 (2012). Mr. Brummett sued the Washington Lottery and its outside advertising agency, contending (among other claims) that the agency's false advertisement that tickets being offered in a special raffle were "going fast" violated the CPA. *Id.* at 672. He alleged that the advertisements would have induced the public to purchase tickets, but as this court observed, "[H]e did not, however, support this assertion with evidence that he would produce if he defeated summary judgment and went to trial." *Id.* at 676.⁷ In affirming dismissal of his CPA claim, this court stated that the agency's "'going fast' statements could not be categorized as misrepresenting something of material importance." *Id.* at 678.

The trial court's findings support its conclusion that Mr. Young failed to prove Toyota's error was of material importance, and thereby failed to prove it was deceptive.

Per se unfair or deceptive conduct. Alternatively, Mr. Young argues that the trial court erred in concluding that he failed to prove a *per se* violation, based on Toyota's alleged violation of chapter 46.70 RCW. Shortly after *Hangman Ridge* was decided, the legislature declared that "[a]ny violation of [chapter 46.70] is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW." LAWS OF 1986, ch. 241, § 23,

⁷ Materiality was relevant to two of Mr. Brummett's claims: a fraud claim and the CPA claim. The immateriality of the "going fast" statements was discussed first in connection with his fraud claim, *see Brummett*, 171 Wn. App. at 675-76, with a reference back when the court held that for CPA purposes, the statements did not misrepresent something of material importance.

codified at RCW 46.70.310. Demonstration of a violation of the chapter therefore satisfies the first two elements of a CPA claim.

Mr. Young relies specifically on RCW 46.70.180(1). It provides that it is unlawful to disseminate in any manner “any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading,” “including” a list of five actionable statements or misrepresentations, all of which deal with sale, lease, or financing terms. The trial court construed the language “with regard to the sale, lease, or financing of a vehicle” as language of limitation and concluded that Toyota’s temperature gauge error was not a statement or representation dealing with sale, lease, or financing terms. Mr. Young argues that this construes the provision too narrowly.⁸

The language relied on by the court and the maxim of ejusdem generis as applied to the five nonexclusive examples provide support for the trial court’s construction of RCW 46.70.180(1). But we need not construe the statute because we hold that a materiality requirement inheres in the provision, just as it inheres in the CPA and in

⁸ The trial court also relied on the fact that a claim under RCW 46.70.180(1)—which has a one-year statute of limitations—would be time-barred, and on a couple of federal district court decisions holding that it therefore could not be the basis of a per se CPA claim. The only precedential Washington decision addressing the issue came to the opposite conclusion. *Walker v. Wenatchee Valley Truck & Auto Outlet, Inc.*, 155 Wn. App. 199, 209-10, 229 P.3d 871 (2010) (a per se CPA claim is governed by the CPA’s own four-year statute of limitations).

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sections 5 and 12 of the FTC Act. We can affirm a trial court judgment on any basis within the pleadings and proof. *Gosney v. Fireman's Fund Ins. Co.*, 3 Wn. App. 2d 828, 877, 419 P.3d 447, *review denied*, 191 Wn.2d 1017 (2018) (citing *Wendle v. Farrow*, 102 Wn.2d 380, 382, 686 P.2d 480 (1984)).

Provisions of chapter 46.70 RCW support this construction. Its declaration of purpose states that the chapter was enacted “in order to prevent frauds, impositions, and other abuses upon its citizens and to protect and preserve the investments and properties of the citizens of this state.” RCW 46.70.005. Immaterial errors are not frauds, impositions, or abuses. And RCW 46.70.220 provides that the chapter “shall be considered in conjunction with chapter[] . . . 19.86,” with the powers and duties of the State as they may appear in that chapter “shall apply against all persons subject to this chapter.”

As earlier discussed, Toyota's mistake was found to be financially immaterial because purchasers of the limited package were never charged for the \$10 temperature gauge. We will not presume that a \$10 part for which the consumer was not charged was material to purchase of the \$7,525 model 2014 limited package. The trial court found that Mr. Young presented no credible evidence that the temperature gauge error was material to him, and no evidence whatsoever that it was material to other consumers.

Here again, because Mr. Young failed to prove Toyota's error was of material importance, he failed to prove that it constituted a violation of RCW 46.70.180(1).

Element Five: Causation

A CPA plaintiff may only recover for injury to his or her business or property that was proximately caused by a defendant's unfair or deceptive practices. *Panag*, 166 Wn.2d at 63-64. The injury "need not be great" and no monetary damages need be proven. *Mason v. Mortg. America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990).

The causation element is satisfied if the plaintiff demonstrates that a misrepresentation of fact led him to choose the defendant's product. *Mayer v. Sto Industries, Inc.*, 123 Wn. App. 443, 458, 98 P.3d 116 (2004), *aff'd in part, rev'd in part on other grounds*, 156 Wn.2d 677, 132 P.3d 115 (2006). In his reply brief, Mr. Young argues that this was the nature of his injury. But after weighing the evidence, the court "c[ould] 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, caused him damages." CP at 419. Factual findings of the trial court that support this conclusion are unchallenged. We do not reweigh the evidence or determine credibility.

During the bench trial, Mr. Young argued that investigative expenses he incurred also qualify as recoverable injury. Expenses incurred to pursue a CPA claim do not

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constitute injury, although an injury to business or property that is proximately caused by the deceptive act itself is compensable. *Panag*, 166 Wn.2d at 62 (comparing *Demopolis v. Galvin*, 57 Wn. App. 47, 786 P.2d 804 (1990) (litigation expenses incurred to institute CPA counterclaim does not constitute injury), with *Sign-O-Lite Signs, Inc. v. DeLaurenti Florists*, 64 Wn. App. 553, 825 P.2d 714 (1992) (loss of business profits resulting from time spent embroiled in disputing improper payment demand constitutes injury)).

The trial court made an unchallenged finding that Mr. Young did not do anything about the missing temperature gauge until he received the December 2013 letter from Toyota notifying him of its mistake and offering a \$100 cash reimbursement. A further unchallenged finding was that the conduct the court found credible “[was] much more consistent with someone who learned that Toyota had made a mistake and wanted to take advantage of it, than someone who relied upon that item in good faith.” CP at 415.

Based on the trial court’s findings, which are supported by the evidence, the investigation performed by Mr. Young was proximately caused by his receipt of Toyota’s truthful December 2013 letter, not by its earlier mistake.

Mr. Young’s failure to prove any injury to business or property proximately caused by Toyota’s mistake provided an additional basis for the trial court’s dismissal of his CPA claim.

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Affirmed.

Siddoway, J.
Siddoway, J.

I CONCUR:

Lawrence-Berrey, C.J.
Lawrence-Berrey, C.J.

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FEARING, J. (concurring) — I write separately to express some disagreement with the majority opinion.

The majority attaches a requirement of materiality to element one of a Consumer Protection Act claim, chapter 19.86 RCW, the element of an unfair or deceptive act or practice. I question the validity of appending an element of materiality to this first component of a Consumer Protection Act suit. Nevertheless, I assume, consistent with the majority opinion, that the Washington Supreme Court, based on federal law, will add the materiality component to the unfair or deceptive act or practice element, at least to a claim not involving a per se violation of the act.

The majority adds a materiality requirement to the unfair or deceptive act or practice element based on this court's decisions in *Brummett v. Washington's Lottery*, 171 Wn. App. 664, 676, 288 P.3d 48 (2012) and *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. 722, 730, 959 P.2d 1158 (1998), *rev'd in part on other grounds*, 138 Wn.2d 248, 978 P.2d 505 (1999). The *Brummett* court cited *Stephens v. Omni Insurance Co.*, 138 Wn. App. 151, 166, 159 P.3d 10 (2007), *aff'd, sub nom. Panag v. Farmers Insurance*

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Co. of Washington, 166 Wn.2d 27, 204 P.3d 885 (2009) for the proposition that implicit in whether an act is “deceptive” is the understanding that the actor misrepresented something of material importance. James Brummett asserted a Consumer Protection Act claim against the advertising firm Cole & Weber, not against the government agency administering the state lottery. This court summarily dismissed one allegation based on the Consumer Protection Act against the advertising agency not because of any misrepresentation lacking materiality but because Cole & Weber did not create the alleged false advertisement aired by the lottery. Without any analysis, this court summarily affirmed the second allegation of a false advertisement because of lack of materiality. *Stephens v. Omni Insurance Co.*, 138 Wn. App. at 166 cited *Hiner v. Bridgestone/Firestone, Inc.*, 91 Wn. App. at 730, for the rule that implicit in the term “deceptive” is the understanding that the actor misrepresented something of material importance. Nevertheless, the *Stephens* court did not base its decision on a lack of materiality.

Hiner v. Bridgestone/Firestone, Inc., 91 Wn. App. at 730 cites *Potter v. Wilbur-Ellis*, 62 Wn. App. 318, 327, 814 P.2d 670 (1991) for the proposition that implicit in the definition of “deceptive” is the understanding that the actor misrepresented something of material importance. The *Hiner* court did not base its decision on the lack of materiality.

In *Potter v. Wilbur-Ellis*, this court held that a seller of goods may commit an unfair or deceptive act or practice when failing to disclose a material fact that renders the

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goods less desirable. *Potter* involved the nondisclosure of a feature of the product, not an affirmative representation. A nondisclosure of information creates significantly different concerns and questions than an affirmative misrepresentation, since the seller of a product has no obligation to disclose numerous features or facts concerning the product.

I agree with the majority that Washington State often looks to federal law when construing the Consumer Protection Act. RCW 19.86.290. I further agree with the majority that federal law consistently and materially imposes the concept of materiality to the notion of an unfair or deceptive act or practice. *Federal Trade Commission v. Cyberspace.com LLC*, 453 F.3d 1196, 1199 (9th Cir. 2006); *Kraft, Inc. v. Federal Trade Commission*, 970 F.2d 311, 314 (7th Cir. 1992); *Cliffdale Associates*, 103 F.T.C. 110, 164-66 (1984). Thus, I would expect our state Supreme Court to follow the federal courts and add materiality to either the first element of a Consumer Protection Act action or add a sixth element to the consumer's claim.

I question whether the courts should graft a constituent of materiality to the element of unfair or deceptive act or practice. The words "unfair" or "deceptive" do not necessarily connote important, relevant, or material statements or conduct. Some people cannot help themselves from repeatedly acting and speaking deceptively even when their conduct and speech lacks materiality.

As noted by the majority, in addition to showing a material unfair or deceptive act or practice to establish the first element of the Consumer Protection Act action, the

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claimant may fulfill the first element by showing per se unfair or deceptive conduct. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d 778, 780, 719 P.2d 531 (1986). The claimant may establish a per se act by proving a violation of a statutory scheme declared by the legislature to affect the public interest. *Hangman Ridge Training Stables, Inc. v. Safeco Title Insurance Co.*, 105 Wn.2d at 780. One such legislative enactment is the auto dealers practices act, chapter 46.70 RCW. RCW 46.70.310.

RCW 46.70.180, a portion of the auto dealers practices act, reads in relevant part:

Each of the following acts or practices is unlawful:

(1) To 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, including but not limited to the following:

....

(2)(a)(i) To incorporate within the terms of any purchase and sale or lease agreement 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 terms that include as an added cost to the selling price or capitalized cost of a vehicle an amount for licensing or transfer of title of that vehicle which is not actually due to the state, unless such amount has in fact been paid by the dealer prior to such sale.

None of the language in RCW 46.70.180 requires that a false statement by an auto dealer be material to be actionable. I compliment Toyota Motor Sales for its conduct after misrepresenting the presence of a temperature gauge on the rearview mirror.

Nevertheless, I conclude that Toyota Motor Sales violated the statute and committed a

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per se violation of the Consumer Protection Act by placing the false statement in its Monroneys label and its website.

A lack of materiality will generally preclude recovery under the Consumer Protection Act because of the act's fourth and fifth elements of injury and causation. If the absence of materiality always prevents a finding of injury or causation, my concurrence lacks any practical importance. But then adding materiality as an element also serves no function.

Although I cannot fathom any occasion, there may be an occasion or two when immateriality will not otherwise preclude fulfillment of causation and damages. Thus, I disagree with creating an aftermarket "materiality" accessory to the unfair or deceptive act or practice element. In Duane Young's appeal, I would affirm the trial court's dismissal of Young's Consumer Protection Act cause of action based on findings supported by substantial evidence that any misrepresentation and, in turn, any unfair or deceptive act or practice by Toyota Motor Sales did not cause Young any damage.

I CONCUR:

Fearing, J.

Fearing, J.