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NO. 63111-0-I

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COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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STATE OF WASHINGTON,

Respondent,

v.

JOSEPH KAISER and HEIDI M. KAISER, husband and wife, G. HOBUS  
INVESTMENTS, LLC; BOBO BUYS REAL ESTATE, LLC; PRE FLOP  
LLC; and UNCLAIMED FUNDS, INC., a Washington Corporation,

Appellants.

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REPLY BRIEF OF APPELLANTS

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## I. INTRODUCTION

The State of Washington surely only brings actions under the Consumer Protection Act (“CPA”) when it believes itself to be in the right. However, the State’s belief in the virtue of its cause is not enough to entitle it to prevail in a court of law. To properly win judgment against a citizen or business accused of violating the CPA, the State has to show that the defendant committed an unfair or deceptive act or practice in trade or commerce, and that the act or practice affected the public interest. It has to meet this burden for each alleged violation. In its case against Appellants Joseph and Heidi Kaiser and various businesses under their control (henceforth “Kaiser”), the State failed to carry its burden for many of the violations it alleged, and the trial court erred in concluding otherwise. Accordingly, this Court should reverse the trial court and remand the matter for further proceedings.

## II. ARGUMENT IN REPLY

The trial court decided Kaiser’s liability in two stages. First, it issued an Order Granting Plaintiff’s Motion for Partial Summary Judgment (“Order on Summary Judgment”) which concluded that Kaiser committed 23 or 24 different types of CPA violation. CP 1035-1040.<sup>1</sup> Second, after a bench trial, the trial court entered Findings of Fact and Conclusions of Law (“Findings and Conclusions”) that found additional CPA violations relating to Kaiser’s “partial interest” transactions and

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<sup>1</sup> The number of different types of violation found by the Order on Summary Judgment is unclear. See *Opening Brief of Appellant* (“*Appellants’ Brief*”), p. 30, n. 20.

“four other deals.” CP 1276-1284. The multiplicity of alleged violations, and the fact that some were found at summary judgment and others after a bench trial, gives Kaiser’s argument on appeal an unavoidable degree of complexity. However, underlying all of Kaiser’s arguments are two basic points. First, at the State’s invitation, the trial court reached numerous mistaken conclusions of law, both at summary judgment and at trial. Second, on summary judgment, the trial court improperly resolved material questions of fact against Kaiser. Both of these types of error necessitate reversal and remand.

1. Arguments specific to the Order on Summary Judgment

a. Summary Judgment is not proper if the moving party is not entitled to judgment as a matter of law

Summary judgment should be granted only if there is no genuine issue of material fact “and . . . the moving party is entitled to judgment as a matter of law.” *CR 56(c)* (underlined emphasis added); *see also Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982). In the *Opening Brief of Respondent* (“*Respondent’s Brief*”), the State incorrectly suggests that summary judgment is only improper if there are genuine issues of material fact. *Respondent’s Brief*, pp. 8-10. Although Kaiser has shown that there are genuine issues of material fact that should have prevented summary judgment, he has also argued that the trial court’s Order on Summary Judgment rested on erroneous conclusions of law. *Appellants’ Brief*, pp. 13-15, 36-38, 38-39, 41-42. This Court performs a *de novo* review of questions of law that arise at summary judgment. *Syrovoy v.*

*Alpine Resources, Inc.*, 122 Wn.2d 544, 548 n. 3, 859 P.2d 51 (1993). As Kaiser demonstrated in *Appellants' Brief*, and reiterates below, the trial court's errors of law provide independent grounds for reversing its grant of summary judgment.

The State also suggests that there is something inappropriate about Kaiser's reliance on evidence submitted by the State to defeat summary judgment. *Respondent's Brief*, p. 10. Here too, however, the law is clear: on summary judgment, "all facts are considered in the light most favorable to the nonmoving party, and summary judgment is granted only if, from all of the evidence, reasonable persons could reach but one conclusion." *Vallandigham v. Clover Park School District No. 400*, 154 Wn.2d 16, 26, 109 P.3d 805 (2005) (emphasis added, internal citation omitted). Plainly, Kaiser is entitled to all reasonable inferences from all of the evidence, including evidence submitted by the State. *A fortiori*, where the evidence submitted by the State directly contradicts its own contentions (as it does, for instance, when the State claims that that "Kaiser never tells owners about the overage" and "takes . . . owners' equity . . . for nothing"), it is entirely proper for Kaiser to point this out. Compare CP 648 with CP 502, 513-14, 519, and 528-31; and compare *Respondents' Brief*, p. 19 with CP 497.

b. Kaiser's overage transactions did not violate RCW 84.64.080

The trial court concluded that Kaiser violated the CPA "[b]y intercepting tax overage funds in violation of the protections contained in

RCW 84.64.080, which mandate that the tax overage be paid directly to the owner at the time the certificate of delinquency is issued.” CP 1038, ¶ 3. However, *Stephenson v. Pleger*, 150 Wn. App. 658, 663, 208 P.3d 583 (2009) establishes that “RCW 84.64.080 has no impact on determining the rightful owner of the proceeds” of a tax sale.<sup>2</sup> Kaiser did not violate any prohibition in RCW 84.64.080 simply by purchasing properties on the eve of tax foreclosure sales. Moreover, nothing in RCW 84.64.080 can be used to suggest that Kaiser was not the “rightful owner of the proceeds” from the relevant tax sales.

In order to defend the trial court’s holding regarding RCW 84.64.080 in light of *Stephenson*, the State is forced into the contorted position of arguing that Kaiser somehow violated the CPA—despite being presumptively the rightful owner of the overages—simply by requesting that counties pay overages directly to him. *Response Brief*, pp. 14-15. Neither common sense nor the plain language of RCW 84.64.080 supports this claim. How can the presumptive “rightful owner of proceeds” engage in an “unfair or deceptive act or practice” simply by requesting that those proceeds be paid to him?<sup>3</sup> Nothing in RCW 84.64.080 purports to impose any duty on the rightful owner of the proceeds not to ask that they be paid to him.<sup>4</sup> Kaiser’s actions in purchasing properties on the verge of tax

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<sup>2</sup> The State does not ask this Court to disagree with *Stephenson*. *Respondent’s Brief*, p. 15.

<sup>3</sup> Other allegedly unfair or deceptive aspects of the overage transactions are discussed in the following section, but are not relevant to the issue of whether those deals violated RCW 84.64.080.

<sup>4</sup> RCW 84.64.080 at most imposes a duty on counties to pay overages to the record owner of the property at the time the certificate of delinquency was issued. *Stephenson* clearly

foreclosure sales, and requesting payment of the overage, violated neither RCW 84.64.080 nor the CPA. The trial court erred as a matter of law when it concluded otherwise.<sup>5</sup>

c. Kaiser's overage transactions were not otherwise deceptive, unfair, or unconscionable

The fact that Kaiser's overage transactions did not violate RCW 84.64.080 does not, of course, mean that they could not have violated the CPA for some other reason. Indeed, the State alleged, and the trial court found, that the overage transactions were "unfair or deceptive" (CP 1035) or "unfair and unconscionable" (CP 1037, ¶ 2) for reasons having nothing to do with RCW 84.64.080. Accordingly, Kaiser devoted a substantial part of *Appellants' Brief* to separately analyzing the purported deceptiveness, unfairness, and unconscionability of the overage transactions. *Appellants' Brief*, pp. 15-28.

The gravamen of the State's claim that the overage transactions were deceptive is that Kaiser failed to disclose material facts, and in particular failed to disclose that property sellers might receive substantial overages if they held onto their properties and let them go to tax sales.<sup>6</sup>

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implies that any such duty is not absolute—if there were, it would not have remanded “for the trial court to determine the owner of the proceeds.” *Stephenson*, 150 Wn. App. at 663.

<sup>5</sup> The State appears to concede that even if Kaiser had violated some requirement of RCW 84.64.080, this would not constitute a *per se* violation of the CPA. Compare *Appellants' Brief*, p. 15, with *Respondent's Brief*, pp. 13-17.

<sup>6</sup> See CP 648. In *Respondent's Brief*, the State mischaracterizes Kaiser's argument when it says that “Kaiser claims that the ‘gravamen’ of the State's CPA *unfairness* claim is his failure to disclose material facts.” *Respondent's Brief*, p. 18 (emphasis added). The State overlooks the fact that Kaiser analyzed deceptiveness and unfairness and unconscionability separately. Cf. *Appellants' Brief*, p. 16.

However, it is well established that a purchaser of real property has no duty to disclose information about market conditions to the seller unless the purchaser is a fiduciary for the seller. *Appellant's Brief*, pp. 17-19 (citing to *Laidlaw v. Organ*, 15 U.S. 178, 4 L. Ed. 214, 2 Wheat. 178 (1817), *Williams Electronics Games, Inc. v. Garrity*, 366 F.3d 569 (7<sup>th</sup> Cir. 2004), and *Liebergessell v. Evans*, 93 Wn.2d 881, 613 P.2d 1170 (1980)). Moreover, whether or not Kaiser had fiduciary duties to the persons from whom he bought properties is at the very least a disputed question of fact. *Appellants' Brief*, pp. 19-22, and CP 502, 516-17, and 830-31.

*Respondent's Brief* completely fails to address these arguments, effectively conceding their correctness. Kaiser's purported failure to disclose material facts during his overage transactions could not justify summary judgment on the basis that those transactions were deceptive, and the trial court erred if it did in fact so rule.<sup>7</sup>

The trial court also erred in finding the overage transactions to be "unfair and unconscionable." CP 1037, ¶ 2. According to the State, Kaiser's most "egregious" unfairness "is that [he] takes all or part of property owners' equity after tax foreclosure for nothing." *Respondent's Brief*, p. 19. See also CP 1037, ¶ 2 (holding that "Defendants have provided nothing of value to the owner in exchange for the overage"). However, there is at the very least a genuine issue of fact concerning

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<sup>7</sup> The conditional character of this sentence is due to an ambiguity in the Order on Summary Judgment. As explained in *Appellants' Brief*, p. 16, note 9, it is not clear whether the trial court found the overage plays to be deceptive, or unfair and unconscionable, or both. Kaiser's argument thus conservatively addresses each possibility.

whether Kaiser “provided nothing of value to the owner.” The evidence is uncontroverted that Kaiser purchased properties for what the prior owners regarded as acceptable amounts, and that he always paid what he promised. CP 497, 513, 806-811. There is also no dispute that at the time Kaiser purchased the properties, any overage from a tax sale was an uncertain future prospect. CP 809. Although the State asserts that “Kaiser could not produce, at summary judgment or trial, even one property owner to testify that they knowingly entered this [type of] transaction,” on summary judgment he was entitled to the reasonable inferences from the documents signed by his contractual counterparts—and put into evidence by the State—indicating that those counterparts did in fact understand and voluntarily agree to the terms Kaiser proposed. *Respondent’s Brief*, p. 19; CP 497-531. The trial court erred when it decided that there were no genuine issues of fact concerning the purported unfairness or substantive unconscionability of Kaiser’s overage transactions.

Similarly, the trial court erred to the extent it also determined the overage plays to be procedurally unconscionable. CP 1037, ¶ 2. Even if a court could in theory properly determine a contract to be unconscionable on summary judgment—which is at the very least questionable, given *Schroeder v. Fageol Motors*, 86 Wn.2d 256, 544 P.2d 20 (1975) and the arguments presented in *Appellants’ Brief*, pp. 23-25—it could not do so on the record before the trial court here.

The critical question concerning procedural unconscionability is whether the alleged victim was able to make a “meaningful choice.” *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 345, 103 P.3d 773 (2004). In evaluating the existence of such choice, courts look to “the manner in which the contract was entered, whether [a party] had reasonable opportunity to understand the terms of the contract and whether the important terms were hidden in a maze of fine print.” *Adler*, 153 Wn.2d at 347.

In this case there is no evidence that the important terms of the overage deals were hidden in a maze of fine print. Indeed, the overage documents submitted by the State prove the opposite. CP 494-531. For example, the Sagmoens, Michael McKinney and Phyllis Cunningham all signed documents, printed in a standard sized font, that clearly and specifically set forth the terms of the overage transactions. CP 502, 513-14, and 528-31. There is also no support for the State’s contention that Kaiser’s overage transactions used a “large number of objectively confusing documents.” *Respondent’s Brief*, p. 21.<sup>8</sup> Finally, Kaiser testified during his deposition that he “tr[ie]d to make sure that everybody understands what is happening” (CP 276, lns. 2-3), and that he asked customers to read the documents provided. CP 277, lns. 1-2. Because the

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<sup>8</sup>The documents cited by the State to support this characterization, CP 494-528, come from four different overage transactions: Sagmoen (CP 494-502), Radvik (CP 504-506), McKinney (CP 508, 510-11, 513-14, 516-17, 519-20, 522-26) and Cunningham (CP 528). It is clearly inappropriate to aggregate documents across completely independent transactions and claim that the resulting total is a “large number.” The State does not offer any argument that the documents for any one of the deals are “objectively confusing.” *Respondent’s Brief*, p. 21.

unconscionability (or unfairness) of the overage transactions was decided on summary judgment, the trial court erred by not drawing all reasonable inferences from this evidence in Kaiser's favor. If it had done so, it could not have granted the State summary judgment on the alleged unfairness or unconscionability of the overage transactions.

- d. The trial court erred in holding that Kaiser's use of powers of attorney and licensed attorneys in connection with the overage transactions violated the CPA

For the reasons set forth above, the trial court erred on summary judgment both when it concluded that Kaiser violated RCW 84.64.080 and when it determined that his overage transactions were deceptive or unfair and unconscionable. The first conclusion rested on an error of law, and the second involved deciding disputed questions of material fact. Given that these two conclusions were erroneous, the trial court could not properly establish who owned the relevant overages: on summary judgment, this question ought to have been left open.

Since the trial court could not properly determine on summary judgment who owned the overages, neither could it properly determine at that stage whether Kaiser's use of powers of attorney or actual attorneys to secure payment of the overage involved any breach of fiduciary duty or violation of the CPA. In particular, in those cases where it is possible that Kaiser was the sole rightful owner of the overage, the trial court could not correctly decide that he had a fiduciary duty to advise the former owners of the overage amounts. After the sale of these properties to Kaiser, the former owners simply had no abiding interest in any overage amount, and

no right to be informed—at least in so far as could be appropriately established on summary judgment.<sup>9</sup> *See Appellants Brief*, pp. 36-38.

With regard to those overage transactions where Kaiser gave the prior property owner a right to a percentage of the overage in exchange for his or her help in collecting it (the so-called “participation overage plays”), an important part of the preceding argument still applies. *Cf. Respondent’s Brief*, pp. 12-13. In particular, there should be no presumption that these “participation overage plays” involved either violations of RCW 84.64.080, or deception or unfairness, since those issues should have remained open on summary judgment. The only difference between the straight overage transactions and the participation overage transactions is that in the latter sort of deal, the prior owner clearly received an interest in the overage. However, the critical point is that the nature and extent of the prior owner’s interest was defined by the document creating it. CP 528-531. The State has not even alleged, and there is no evidence to suggest, that Kaiser used powers of attorney or

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<sup>9</sup> The State asserts that Kaiser’s argument here “relies on the flawed premise that the Court found that his transactions were lawful, therefore making him the legitimate owner of the overage money.” *Respondents’ Brief*, p. 11. Kaiser is under no illusion that the trial court found his overage transactions to be lawful. Rather, the premise of his argument is that the trial court improperly found his overage transactions to be unlawful. Having shown that the trial court erred as a matter of law when it found that Kaiser violated RCW 84.64.080, and that it improperly resolved material questions of fact when it concluded that the overage transactions were deceptive or unfair and unconscionable, Kaiser believes that it follows that the court could not legitimately decide on summary judgment that Kaiser violated the CPA by “using powers of attorney to conceal the existence of . . . tax overage funds due to the former owner . . . .” CP 1038, ¶ 5 (emphasis added). If Kaiser owned the overage funds, they weren’t “due to the former owner,” and accordingly the issue of the alleged breaches of fiduciary duty to the former owners could not be decided on summary judgment either. The same is true for the trial court’s holding regarding Kaiser’s use of actual attorneys. CP 1038, ¶ 4.

actual attorneys to defeat the interest, or breach a duty, defined in the executed documents. *See, e.g.*, CP 528-531 (establishing duties with regard to the splitting of the overage that the State does not allege to have been violated). The trial court erred in concluding at summary judgment that Kaiser's use of powers of attorney and actual attorneys violated the CPA.

- e. The trial court should not have granted summary judgment on the issue of whether Kaiser's partial interest transactions result in homeowners keeping their homes

In the Findings and Conclusions entered after trial, the court below stated that it "has already found that Kaiser's transactions do not result in homeowners keeping their home," and referenced its Order on Summary Judgment. CP 1277, ¶ 3 (emphasis added). In *Appellants' Brief*, Kaiser questioned whether the Order on Summary Judgment can correctly be read as including this finding. *Appellants' Brief*, pp. 29-30. Assuming for the sake of argument that it can be so read, the critical issue becomes whether the trial court acted properly in granting summary judgment.

The State defends the grant of summary judgment by pointing to numerous findings entered after trial. *Respondent's Brief*, pp. 29-30 (citing to CP at 1277, ¶¶ 6-7; 1278, ¶¶ 8-11; 1279, ¶ 15; 1283, ¶¶ 29-32). However, since the trial court made the ruling in question on summary judgment, its propriety or lack thereof should be evaluated based on the record before the court at summary judgment, with all reasonable inferences drawn in Kaiser's favor, and not on the record presented at trial.

In its Rebuttal to Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment, the State conceded that "Kaiser has allowed most people to remain in their homes." CP 866. This factual concession, and the inference that follows from it that the people Kaiser dealt with remained in possession of their homes, should have sufficed to defeat summary judgment on this issue.<sup>10</sup>

f. Kaiser's advertisements and solicitations for his real estate transactions were not deceptive, or at least could not be properly judged to be deceptive on summary judgment

The State clearly believes that the only advertisements or solicitations Kaiser should be able to use for his real estate transactions are ones that say "Everything I do is deceptive or unfair, and probably both. I provide no conceivable benefit to you, the consumer. If you receive this mailing, please call the Attorney General and lodge a complaint." The trial court essentially adopted the State's position at summary judgment,

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<sup>10</sup> Kaiser is aware that denial of summary judgment on the issue of whether partial interest deals allowed people to keep their homes would have resulted in the issue being addressed at trial. The State will no doubt argue that in this context, any error was harmless, because the trial court did go ahead and enter findings after trial—some of them unchallenged—that resolved the issue. However attractive this argument, it is too simple. First of all, Kaiser is not aware of any authority holding that a trial court's error in granting partial summary judgment can be inadvertently cured by the conduct of the trial, prior to appeal and remand, and prior to acknowledgment of any error. Secondly, as applied to this case, the argument overlooks the consequences that the trial court's improper grant of summary judgment had on other issues. In particular, as explained in the next section, the trial court could not have properly granted summary judgment holding many of Kaiser's advertisements and solicitations to be deceptive without first having determined that Kaiser's deals provided no benefits to his customers. Because the deceptiveness or lack thereof of Kaiser's advertisements was not determined at trial, the trial court's error in granting summary judgment on the lack of any benefits generated by the partial interest transactions cannot be said to have been harmless.

and found all of Kaiser's actual solicitations to be deceptive. CP 1036-1037, ¶ 1(a) – 1(l).

If every type of real estate transaction Kaiser engaged in had in fact been properly found on summary judgment to simply be a rip-off, then Kaiser would have no valid objection to the trial court's condemnation of his solicitations. Representing a rip-off as something other than a rip-off is deceptive. However, the logic underlying the State's position also works in reverse: if Kaiser's transactions were not simply rip-offs, and instead provided benefits or assistance to consumers, then Kaiser's solicitations were not deceptive simply by virtue of offering that help.

As set forth above in Sections (d) and (e), and explained in more detail in *Appellants' Brief*, pp. 13-31, the trial court erred in granting summary judgment on the deceptiveness or unfairness of Kaiser's overage plays, and it also erred in determining that Kaiser's partial interest deals provided no benefit to the former homeowners. Moreover, Kaiser engaged in other types of transaction—such as straight purchases of “junk” properties—that were neither overage plays nor partial interest deals. CP 824. Thus, the trial court did not properly find that all of Kaiser's real estate transactions were rip-offs. Accordingly, it could not properly find on summary judgment that Kaiser's solicitations were deceptive just because they claimed that Kaiser provided benefits to those with whom he dealt.

Putting it slightly differently, and focusing solely on the overage transactions and partial interest deals, there are at least genuine issues of material fact about whether they actually provided help, or benefits, to the parties Kaiser transacted with. These material questions of fact should have prevented the trial court from concluding on summary judgment that Kaiser's solicitations for these transactions were deceptive simply because they claimed to offer help or provide assistance. Kaiser is aware that the question of whether a given action constitutes a violation of the CPA is typically a question of law. *Appellants' Brief*, p. 31, and *Leingang v. Pierce County Medical Bureau*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). But here, the validity of the trial court's condemnation of his solicitations (the contents of which are not in question) depends on the accuracy of its factual assertion that Kaiser's transactions provided no benefits to consumers. The evidence shows that there was at least a question about whether his transactions provided benefits to consumers, either in the form of consideration that reduced an uncertain future overage amount to a current cash sum in the case of the overage transactions, or in the form of granting the ability to remain in residence in a home after a tax sale in the case of the partial interest deals. The court could not grant summary judgment on the alleged deceptiveness of Kaiser's solicitations for the overage and partial interest transactions

without improperly deciding as a matter of fact that those transactions provided no benefits to consumers.<sup>11</sup>

The trial court's grant of summary judgment regarding the "false names" solicitations suffers from an independent infirmity. According to the trial court, Kaiser violated the CPA by "sending the two False Names solicitations . . . that purport to come from John Morris and Nick Johnson, two names Kaiser made up, and which have these fictional persons promising to buy owners' property or otherwise assist owners." CP 1037, ¶ 1(l). However, as pointed out in *Appellants' Brief*, pp. 34-36, there is nothing inherently deceptive about using a fictitious name in trade or commerce. The State's assertion that Kaiser used these solicitations "to conceal his identity and to make affirmative representations that he could later deny when convenient to the negotiations" is devoid of all support. Respondent's Brief, p. 33. The solicitations clearly do not contain "affirmative promises to buy . . . home[s]." *Compare* CP 136-137 with CP 647.<sup>12</sup> There is no evidence that Kaiser or his associates ever failed to do any "running around" required to close a property purchase. The

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<sup>11</sup> If this Court should decide that the trial court's ruling is better understood as drawing a conclusion of law rather than as making a factual determination, then Kaiser would reformulate his point here to allege legal error. It would be legal error to conclude that a voluntary overage transaction in which Kaiser provided cash up front in exchange for the right to an uncertain future sum provided no benefit to the former owner. Similarly, it would be legal error to determine that in partial interest transactions the ability to stay on as a resident in a home that has been sold at a tax foreclosure sale is not a benefit to the prior owner.

<sup>12</sup> Because of the poor quality of the copy of CP 136, a clean copy of the same solicitation is attached to this Reply Brief as Appendix A.

State's inclusion of this claim in its motion was simply piling on, and the trial court erred in granting summary judgment on this point.

- g. The trial court should not have granted summary judgment holding Kaiser's "Unclaimed Funds" solicitations to be deceptive

Early on in the case, Kaiser's individual co-defendants settled with the State and entered into a consent decree that created a restitution fund. CP 593-606. Three of the trial court's 23 or 24 separate findings on summary judgment concerned Kaiser's solicitations relating to this restitution fund, which he sent through his company, Unclaimed Funds, Inc. CP 1038-1039. On appeal, Kaiser has argued that he only sent relevant solicitations to eight or fewer people, and that his action therefore lacked the necessary capacity to deceive the public as a matter of law. *Appellants' Brief*, pp. 38-39 (citing to *Swartz v. KPMG LLC*, 401 F.Supp.2d 1146, 1154 (W.D. Wash. 2004) and *Micro Enhancement International, Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 438-39, 40 P.3d 1206 (2002)).

In response, the State first notes that Kaiser did not raise this argument below. *Respondents' Brief*, p. 24. Kaiser, who was effectively without assistance of counsel when he prepared his summary judgment pleadings, acknowledges that he did not cite to the relevant case law, or make this precise argument, in his filings with the trial court. CP 934-943. However, Kaiser did clearly inform the trial court that "there were exactly eight sellers fitting Plaintiff's description" of parties entitled to receive restitution, thereby creating the clear inference that he only sent the

solicitations to eight or fewer people. CP 812.<sup>13</sup> Kaiser asks that this Court now exercise its discretion under RAP 2.5(a) to consider his argument based on *Swartz*.

The State also claims that the inference that Kaiser sent eight or fewer relevant solicitations cannot be reconciled with either Kaiser's claim to have conducted "approximately 400 transactions with owners of parcels facing tax foreclosure," or the trial court's later determination that "Kaiser sent approximately 500 deceptive solicitations regarding the services of Unclaimed Funds, Inc." *Respondent's Brief*, p. 24 (citing to Appellants' Brief, p. 6), and CP 2213 ¶ 9.<sup>14</sup> However, both of these claimed

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<sup>13</sup> The State's assertion that this "statement in the brief is unsworn" is incorrect. *Respondent's Brief*, p. 24. Kaiser attached a declaration to Defendants' Memorandum in Opposition to Motion for Partial Summary Judgment in which he averred under penalty of perjury that the statement of facts in his memorandum was true and correct to the best of his knowledge. CP 818.

<sup>14</sup> The State asserts that Kaiser has not properly challenged the Order Imposing Penalties and Restitution on appeal. *Respondent's Brief*, p. 24. Kaiser respectfully suggests that this is incorrect. Kaiser's Amended Notice of Appeal, filed with the trial court on June 29, 2009, explicitly stated that "this Amended Notice of Appeal is intended to bring up for appeal all prior orders and judgments in the above referenced case which 'prejudicially affect the final judgment,' including without limitation . . . the Order Imposing Penalties and Restitution . . ." CP 2222. It is true that the Assignment of Errors section of *Appellants' Brief* does not refer to the Order Imposing Penalties and Restitution in general, nor in particular to Paragraph 9 thereof, which imposed a penalty of "\$50,000 for Defendants' approximately 500 deceptive solicitations regarding the services of Unclaimed Funds, Inc." CP 2213, ¶ 9. However, Kaiser submits that Paragraph 9 of the Order Imposing Penalties is not a finding of fact, but is instead a conclusion of law or a component of the judgment. As a leading commentary puts it, "RAP 10.3 is silent on the question of whether specific assignments of error must be included for each conclusion of law entered by the trial court, or whether it is sufficient to address the trial court's conclusions of law in the body of the brief itself. The absence of such a requirement in RAP 10.3 implies that specific assignments of error are not required, and a pre-RAP decision by the Supreme Court so held." 3 *Wash. Prac.* Rules Practice RAP 10.3. *Appellants' Brief* specifically brings up Paragraph 9 of the Order Imposing Penalties at p. 39, n. 28.

contradictions rest on nothing more than assumptions. In particular, the State appears to simply be assuming that 1) a significant proportion of Kaiser's transactions were overage transactions; 2) that Kaiser sent Unclaimed Funds solicitations to everyone with whom he had done an overage transaction; and 3) that all of his Unclaimed Funds solicitations related to the restitution issue. There is nothing in the record at summary judgment that establishes the State's entitlement to the benefit of these assumptions.

Next, the State claims that “[e]ven if there were only eight solicitations, this fact alone would not render them non-deceptive.” Respondent's Brief, p. 24. Citing to *Henery v. Robinson*, 67 Wn. App. 277, 291, 834 P.2d 1091 (1992), it argues that “‘a misrepresentation made to only one person has the capacity to deceive many,’ particularly where the statement is included in a form contract or designed for communication to many.” *Respondents' Brief*, p. 25. However, Kaiser's solicitations regarding the restitution fund were not designed for communication to many: they were designed for communication to the handful of people who were entitled to restitution from the fund. This is what makes Kaiser's case analogous to *Swartz*, which concerned a tax dodge designed for persons who faced capital gains on millions of dollars, and which held that “as a matter of law, conduct directed toward a small group cannot support a CPA claim.” *Swartz*, 401 F.Supp.2d at 1154. At summary judgment, the trial court should have accepted the reasonable inference from Kaiser's testimony (and the complete absence of any

countervailing evidence) that there were eight or fewer such people who could be targeted by the relevant solicitation.<sup>15</sup>

Finally, even if the Court does not conclude that the CPA claims based on the Unclaimed Funds solicitations fail as a matter of law under *Swartz*, there is at least one genuine issue of fact that should have prevented summary judgment. In the Order on Summary Judgment, the trial court held that Kaiser violated the CPA with regard to the Unclaimed Funds solicitations by “falsely stating that under state law the funds will soon be lost forever, when no such law applies.” CP 1038, ¶ 9(a). The State is therefore incorrect when it asserts in *Respondent’s Brief* that the alleged falsity of Kaiser’s claim about approaching escheatment played no role in the trial court’s order. *Cf. Respondent’s Brief*, p. 26, n. 8. More importantly, for the reasons explained at page 39 of *Appellants’ Brief*, there is a factual dispute about the falsity of the claim that the funds would soon be lost forever.<sup>16</sup> The trial court should not have granted summary judgment holding that Kaiser’s Unclaimed Funds solicitations violated the CPA.

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<sup>15</sup> That the alleged misrepresentations were made in form solicitations that Kaiser may have also used for other purposes (such as soliciting clients like Mallia Booi) does not turn all uses of the forms into misrepresentations. CP 612- 622; CP 813, Ins. 8-13. See also *Appellants’ Brief*, p. 38, n. 25.

<sup>16</sup> Kaiser’s claim that the funds would soon be lost to the State also underpins his assertion that recipients of his solicitations would be unlikely to obtain part of the restitution money without his help. CP 621, Recital No. 3. The factual question about the truth or falsity of this claim should have also prevented granting summary judgment as set forth in Paragraph 10 of the Order on Summary Judgment. CP 1039, ¶ 10.

- h. Kaiser did not violate the CPA simply by virtue of being both trustee and beneficiary of the partial interest land trusts

Contrary to the State's assertion, Kaiser's objection to Paragraph 7 of the Order on Summary Judgment is not that he took no actions in his capacity as trustee of the partial interest land trusts. *Cf.* Respondents' Brief, p. 33. Rather, it is that neither the State in its Motion for Partial Summary Judgment nor the trial court in its Order on Summary Judgment identified any actions by Kaiser that breached his duties as trustee. CP 659-660, CP 1038 ¶ 7. Kaiser's contention is thus that the State requested, and the trial court granted, summary judgment on this issue simply because of Kaiser's status as both trustee and beneficiary. Kaiser believes that the authorities cited in *Appellants' Brief* at pp. 41-42 clearly establish that simply being both trustee and beneficiary of a trust does not constitute an unfair or deceptive act.

For the first time on appeal, the State has now identified actions by Kaiser as trustee that it claims were understood by the trial court to constitute violations of his fiduciary duties and support its holding in Paragraph 7. *Respondents' Brief*, p. 33. The trouble with the State's position is two-fold: 1) there is nothing in the trial court's decision suggesting that it in fact viewed the listed actions as supporting Paragraph 7; and 2) even if it did believe this, it thereby engaged in double counting. For example, Paragraph 6 of the Order on Summary Judgment already listed falsifying Real Estate Excise Tax Affidavits as a violation of

Kaiser's fiduciary duties. CP 1038, ¶ 6.<sup>17</sup> Kaiser submits that the juxtaposition of Paragraphs 6 and 7 supports his argument that the trial court distinguished between actions taken by Kaiser as trustee, and his simple status of being both trustee and beneficiary, and improperly used Paragraph 7 to penalize him for assuming that status. CP 1038, ¶¶ 6-7.

i. The State has not established that filing false real estate excise tax affidavits violated the CPA

On appeal as at trial, the issue in this case with regard to Kaiser's filling out of real estate excise tax affidavits is not whether it was illegal to fill them out falsely. Instead, the issue is whether false statements in those affidavits amounted to violations of the CPA, as the trial court found on summary judgment. CP 1038, ¶ 6. In *Appellants' Brief*, Kaiser identified two reasons why the filing of false affidavits did not violate the CPA: 1) the submission of four affidavits for four distinct transactions lacked the capacity to deceive the public, and 2) the State did not establish that filing the false affidavits affected the public interest. *Appellants' Brief*, p. 40.<sup>18</sup>

The State attempts to rebut the first of these arguments by referring to a ruling made by the trial court after summary judgment had been decided. *Respondent's Brief*, p. 27 (citing to CP 2212, ¶ 4). At the very

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<sup>17</sup> Similarly, the Order Imposing Penalties and Restitution assigns separate penalties for "creation and participation in 33 unfair and deceptive partial interest deals," "creation and participation in 29 falsified real property tax affidavits," and "acting as trustee with a fiduciary duty, and, as co-beneficiary seeking a profit, on 33 land trust agreements in violation of [his] fiduciary duty." CP 2212. If creation of the partial interest deals and filing falsified tax affidavits were the actions that supported the impropriety of being both trustee and beneficiary, then the trial court was double-counting in assigning penalties. See *Appellants' Brief*, p. 42, n. 32.

<sup>18</sup> Kaiser acknowledges that he did not raise these arguments below. He asks this Court to use its discretion under RAP 2.5(a) to consider these arguments now.

least, the State has not established the propriety of using materials not in the record before the court on summary judgment to uphold the validity of that judgment. *Cf. Appellants' Brief*, p. 40, n. 29. The State also claims that the real issue posed by the false affidavits is not their capacity to deceive, but rather their unfairness. *Respondents' Brief*, p. 27. However, what the State does not do is show that it either specifically alleged or established that filing of false affidavits impacted the public interest. The absence of either allegation or evidence on this necessary element of a CPA claim should have prevented the trial court from granting summary judgment.

2. Arguments specific to the trial court's Findings and Conclusions

a. The trial court erred as a matter of law by allowing participants in the partial interest deals to repudiate their signatures on written deeds and disclaimers

Under *Nat'l Bank of Wash v. Equity Investors*, 81 Wn.2d 886, 913, 506 P.2d 20 (197), "a party whose rights rest upon a written instrument which is plain and unambiguous, and who has read or had the opportunity to read the instrument, cannot claim to have been misled concerning its contents or to be ignorant of what is provided therein." All of the State's witnesses who testified about Kaiser's partial interest deals had the opportunity to read the contracts. RP (12/08/2008), p. 40, lns. 8-9; RP (12/08/2008), p. 73, lns. 16-18; RP (12/09/2008, morning) p. 114, lns. 18-25 and p. 115, lns. 1-9; and RP (12/09/2008, morning), p. 145, lns. 15-18. Moreover, *de novo* review by this Court will show that the relevant contracts were not ambiguous. *See* Ex.1, pp. 2-28, Ex. 2, pp. 1-18, 20-23,

Ex. 3, pp. 3-24. *See also Carlstrom v. Hanline*, 98 Wn. App. 780, 784, 990 P.2d 986 (2000) (noting that whether a contract is ambiguous is a question of law); and *McGary v. Westlake Investors*, 99 Wn.2d 280, 285, 661 P.2d 971 (1983) (noting that an ambiguity will not be read into a contract when “it can reasonably be avoided by reading the contract as a whole”).

Because the relevant witness had had an opportunity to read the contracts, and because those contracts were not ambiguous, the trial court erred by making factual findings and legal conclusions based on their testimony that they were ignorant of the contracts’ terms and had been misled by Kaiser. CP 1278, ¶¶ 13, 14, 18, and 23.

b. The trial court erred in concluding that the partial interest deals were unfair

The essence of Kaiser’s criticism of the trial court’s decision that his partial interest deals were unfair and violated the CPA is this: the court failed to understand that fairness has a critical comparative dimension. In particular, whether a deal is fair depends in large part on what the available alternatives are.<sup>19</sup> *Appellants’ Brief*, pp. 45-46. For the people who entered into partial interest deals with Kaiser, the relevant alternative was almost surely eviction following the sale of their home for taxes. It is true that “[g]iven the mechanics of state tax auctions . . . all [of these persons] would likely have received *something* for their homes to

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<sup>19</sup> At least when the available alternatives are not under the control of the person offering the deal. Here, the State does not and could not allege that Kaiser created the difficult circumstances confronting his counterparts.

jumpstart their future housing plans.” *Respondents’ Brief*, p. 39 (underlined emphasis added; italicized emphasis in original). However, it is entirely conceivable that a fully informed person could voluntarily choose to remain living in his or her home—even if the right to do so could be lost by future default—instead of “likely” receiving “something” to start over somewhere else. Doing justice to the beneficial purpose of the CPA requires that fully informed consumers should be allowed to make this sort of choice. *See* RCW 19.86.920.

Kaiser concedes that this argument would work against him *if* he had deceived people into transacting with him. He understands that it is one thing to argue that the CPA should be construed to allow consumers to make fully informed choices, and quite another to say that businesses should be able to deceive consumers into making deals they really do not want. Thus, his argument here depends on the correctness of his argument in the foregoing section. Given that his contractual counterparts had the opportunity to read the unambiguous contracts he was offering them, they should be deemed to have been fully informed, and their choices to enter those contracts should be honored.

3. This Court should require the trial court to vacate or revise the remedies imposed

If this Court accepts the foregoing arguments, or some part of them, it should remand the matter to the trial court to vacate and revise the remedies it imposed. *See Appellants’ Brief*, pp. 48-49. Moreover, even if this Court rejects all of the above arguments, Kaiser requests that it require

the trial court to revise Paragraph 3 of the Order Granting Injunctive Relief. CP 1287, ¶ 3. That paragraph is currently so broadly drawn as to prevent him from offering to work for a contingent fee to help people claim overages to which they are already entitled (as in the Mallia Booi transaction). CP 813. This sort of contingent fee work, where Kaiser first becomes involved after the tax sale has occurred and the relevant county has failed to find the owner of record, was in no way implicated by this lawsuit, and should not be prohibited as a result.<sup>20</sup>

### III. CONCLUSION

For the reasons set forth above and in Appellants' Brief, Kaiser requests that this Court reverse the trial court, vacate the judgment, and remand this matter for further proceedings.

Respectfully submitted this 29<sup>th</sup> day of January, 2010.

David Corbett PLLC

By:



David J. Corbett, WSBA # 30895  
Attorney for Appellants

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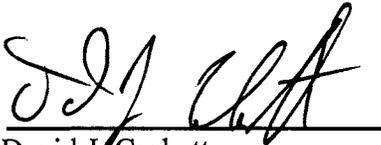
<sup>20</sup>The State objects to this request on the grounds that Kaiser did not designate the Order Granting Injunctive Relief under RAP 5.3. Kaiser respectfully contends that this is incorrect. CP 2222-2223.

CERTIFICATE OF SERVICE

I certify under penalty of perjury of the laws of the State of Washington that on January 29, 2010 I sent a copy of the attached Reply Brief of Appellants ("Reply Brief") via email PDF attachment to Assistant Attorney General James Sugarman, attorney for Respondent, at JamesS6@ATG.WA.GOV. Mr. Sugarman has agreed to accept service of pleadings in this matter via email. I also deposited the Reply Brief with the United States Post Office in Tacoma, postage pre-paid, for delivery by first class mail to:

James T. Sugarman and Jason E. Bernstein  
Assistant Attorneys General  
Consumer Protection Division  
Attorney General of Washington  
800 5<sup>th</sup> Ave., Suite 2000  
Seattle, WA 98104-3188

Dated this 29<sup>th</sup> day of January, 2010 at Tacoma, Washington.

By:   
David J. Corbett

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# **APPENDIX A**

# Can you believe it's property tax time, again?

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