

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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**OPENING BRIEF OF RESPONDENT STATE OF WASHINGTON**

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## I. INTRODUCTION

This is an enforcement action brought by the State under the Consumer Protection Act (CPA), RCW 19.86.080 and .140, to protect vulnerable consumers from the predatory real property transactions of Appellant Joseph Kaiser. Mr. Kaiser developed and executed a method of taking the homes and/or equity of low-income consumers facing county tax foreclosure for no or nominal consideration. Over the past seven years, Kaiser fleeced his victims of over \$3 million in property equity. The State brought suit to enjoin these practices and to secure restitution for the former property owners. The Court resolved many of the legal issues by granting the State's Motion for Partial Summary Judgment; after a five-day bench trial, the Court found in favor of the State on all remaining causes of action and imposed injunctive relief and awarded the State \$4.2 million in restitution, civil penalties, costs, and attorney's fees.

Mr. Kaiser appeals the Partial Summary Judgment Order and the Trial Court's Findings of Fact and Conclusions of Law. He contends that there are genuine issues of material fact; that his business practices are not unfair or deceptive as a matter of law; that no one could have relied on his representations; and that no one was harmed by his practice, or alternatively, so few were harmed that the public interest was not implicated.

Mr. Kaiser's legal theory is that his deals are a property owner's best option when facing tax foreclosure and that the owners knowingly choose to participate. He also argues that a signed contract is irrefutable evidence of its own legality.

However, this matter is a state CPA enforcement action, not a private contract dispute. The State alleged, and the Trial Court agreed, that Mr. Kaiser's acts and practices were objectively unfair and had the capacity to deceive a substantial number of consumers, and therefore violated the CPA. The Trial Court's decision should be affirmed in its entirety.

## **II. COUNTERSTATEMENT OF THE ISSUES**

1. Are Kaiser's Alleged Genuine Fact Disputes Actually Legal Conclusions?
2. Did the Court Properly Rule that Kaiser Unlawfully Intercepted Tax Overage Payments?
3. Did the Court Properly Find that Kaiser's Overage Plays Were Unfair Acts or Practices in Violation of the CPA?
4. Was Kaiser's Concealment of Tax Overages Through the Use of Powers-of-Attorney and Actual Attorneys a Violation of the CPA?
5. Did Kaiser Use Misrepresentations and Unfair Practices in an Attempt to Obtain the Restitution Money Paid By His Co-Defendants?
6. Was Kaiser's Use of Falsely Sworn Tax Affidavits on Behalf of Property Owners a Violation of the CPA?

7. Did the Trial Court Contradict Itself in Finding That Kaiser's Transactions Do Not Help People Keep Their Homes?
8. Were Kaiser's Solicitations Misleading?
9. Did Kaiser's Acts as Both Trustee and Co-Beneficiary Seeking a Profit Violate the CPA?
10. Could the Trial Court Properly Hear Victim Testimony About Their Understanding Of The Contracts?
11. Are Partial Interest Deals Unfair Or Deceptive When (1) The Purchaser Induces The Seller To Contract By Waiting Until The Seller Is In Tax Foreclosure, (2) The Purchaser Pays No Or Nominal Consideration For The Property, (3) The Purchaser Misrepresents That The Seller Will Keep The House When, In Fact, This Does Not Occur?
12. Did the Trial Court Properly Find that the "Other Four" Transactions Implicated the Public Interest?

### **III. COUNTERSTATEMENT OF THE CASE**

#### **A. Factual Background**

Joseph Kaiser solicits consumers facing real property tax foreclosure and offers to save them from the foreclosure. CP at 1036-37; 1277. Instead of rescuing them, Kaiser has them deed their home or land to him in one of two transactions he devised: an overage play or a partial interest deal. *Id.* An overage play (sometimes referred to in the record as a participation overage play), occurs when Kaiser takes ownership of a property, allows it to proceed to tax sale, and takes all or a portion of the leftover money remaining after the delinquent taxes and fees are deducted

from the auction price. CP at 1036, ¶ 1. A partial interest deal occurs when Kaiser takes ownership and control over the property by placing it into a trust, the terms of which allow him to sell the property at will, with no obligation to sell or otherwise return title to the original owner. CP at 1036, ¶ 1; 1277-28, ¶¶ 5-7.

Kaiser's direct mail advertising and other solicitations promise that Kaiser and his associates will "help" with real estate problems and stop foreclosures. CP at 1036-37, ¶ 1; 122-37. Instead of helping, Kaiser purposely failed to pay the tax arrearage and let the property to be sold at tax auction. CP at 1037-38. But for Kaiser's intervention, this overage money would have gone directly from the county to the owner pursuant to RCW 80.64.080. CP at 1037-38, ¶ 2. Kaiser intercepted overage funds by either directly applying for the overage money, using powers of attorney to apply for the money on behalf of his victims, or, eventually, obtaining lawyers for his victims and having them act as escrow agents. CP at 1038, ¶¶ 3-6.

In partial interest deals, Kaiser engaged in what he called "partnering up" with his victims. CP at 1277, ¶ 2. Kaiser paid the property taxes to stop foreclosure, but only after his victims had agreed to grossly unfair contract terms. CP at 1277-81. The homeowners had to place the property into a "land trust" which left them with only two

tenuous rights: (1) the right to some percentage of the sale proceeds if Kaiser chose to sell the property, and (2) the right to occupy the property for one to three years, provided the victim paid rent. CP at 1277, ¶ 6. These two rights were illusory however because: (1) under Kaiser's contract terms both rights are voided if the former owner is five days late on a rental payment or violates any other term of the contract, CP at 1277, ¶ 7, and (2) the homeowner has no say in when or how the home will be sold allowing Kaiser to evict them at will and to sell to whomever he chooses at whatever price he chooses. *Id.*, ¶ 10. Kaiser admitted at trial that every partial interest deal is in default, meaning no homeowner retained the right to occupy their former home or their right to proceeds if the property is sold. CP at 1278, ¶ 8. Additionally, Kaiser routinely falsified real property excise tax affidavits to avoid paying excise tax while acting as power of attorney on behalf of his victims. CP at 1277, ¶ 4. Using the power-of-attorney he obtained from each homeowner, Kaiser filed affidavits stating the no real interest in the property changed hands and thus no excise tax was due, subjecting the homeowners to prosecution for perjury or an action for debt by the State. CP at 1038, ¶ 6.

Kaiser's partners and co-defendants settled their liability early in the litigation by paying \$290,000 in restitution and agreeing to certain reforms in their business practices. CP at 593-606. After the co-

defendants settled, Kaiser formed another company, defendant Unclaimed Funds, Inc. He used this business to contact the victims who were entitled to restitution money paid by his co-defendants. CP at 1038-39, ¶¶ 9-11. Kaiser told the victims that he had “found” money they were entitled to and that he would get it for them for a fee. *Id.* Similar to the overage deals, Kaiser misrepresented the nature of the “service” and provided no real services in exchange for his share of the restitution money owed the victims. *Id.*

**B. Procedural History**

The State brought this action on March 14, 2007, against the Kaisers and all former co-defendants alleging violations of the Consumer Protection Act. On May 11, 2007, all defendants except Kaiser signed a Consent Decree and were dismissed from the case. CP at 62-75. The State thereafter amended and supplemented its complaint twice to add Kaiser’s newer business entities as defendants and to include Kaiser’s mid-litigation attempts to gain a portion of the restitution funds paid by his former co-defendants. CP at 1226-27. On October 24, 2008, the State moved for partial summary judgment that Kaiser’s advertisements, overage play deals, and restitution scheme were all unfair or deceptive under the CPA. CP at 625-65. The Trial Court granted the State’s motion in its entirety on November 21, 2008. CP at 1035-40.

The matter proceeded to bench trial on the allegations involving Kaiser's "partial interest" deals and other transactions. CP at 1041-99. Following trial, the Court issued an oral ruling and written Findings of Fact and Conclusions of Law on February 6, 2009. CP at 1276-85; RP (Jan. 14, 2009) at 4-16. The Trial Court found Kaiser's partial interest deals unfair and deceptive and made numerous factual findings in support thereof. *Id.* The Trial Court also found that Kaiser violated the CPA through his "four other deals" that were similar to the partial interest deals and by his use of an automated dialing device to solicit business. *Id.*

The Trial Court granted injunctive relief on February 11, 2009, CP at 1286-89, and awarded consumer restitution, penalties, costs and fees, on May 6, 2009, in the amount of \$4,195,151.47. CP at 2209-10, 2211-14. The Court issued its final judgment on May 29, 2009, and this appeal followed. CP at 2215-17.

#### **IV. ARGUMENT**

The Consumer Protection Act (CPA) forbids "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. The purpose of the CPA is to "protect the public and foster fair and honest competition." *Id.* To accomplish this, the requirements of the CPA should be "liberally construed that its beneficial purposes may be served." *Id.* The legislature first mandated that the CPA

be enforced by the Attorney General's Office and then added provisions making it privately enforceable. *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 784, 719 P.2d 531 (1986). Where, as here, the State brings a CPA claim it must prove: (1) unfair or deceptive acts or practices; (2) trade or commerce; and (3) public interest. *See Robinson v. Avis Rent A Car System, Inc.*, 106 Wn. App. 104, 22 P.3d 818 (2001) (when the state brings a CPA action it is not required to prove causation or injury); *State v. Ralph Williams Northwest Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 274, 510 P.2d 233 (1973). CPA law is unique. It is not about fault, negligence, privity, intent, reliance, or good faith. It is about stopping practices that have the capacity to deceive the general public or that offend commonly held notions of fairness or stated public policy.

**A. The Trial Court Properly Granted the State's Motion for Partial Summary Judgment.<sup>1</sup>**

**1. Kaiser's Assignments of Error Do Not Raise Genuine Issues of Material Fact; They Are His Legal Conclusions.**

Summary judgment is appropriate when no issue of material fact exists and only questions of law remain to be determined. *Hontz v. State*, 105 Wn.2d 302, 311, 714 P.2d 1176 (1986). The non-moving party must

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<sup>1</sup> The exhibits to the State's summary judgment motion, CP at 121-624, appear in the Clerk's Papers before the motion itself. CP at 625-65. These exhibits were also admitted at trial as Exhibit 11. RP (Dec. 10, 2008) at 71:24-73:9.

produce actual facts that dispute the movant's material facts. *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 225, 770 P.2d 182 (1989). Conclusions and opinions are insufficient to create a triable issue. *Grimwood v. University of Puget Sound, Inc.*, 110 Wn.2d 355, 360, 753 P.2d 517 (1988).

Throughout his brief, Kaiser contends that material facts are in dispute; however, these alleged facts are actually legal conclusions he draws from the undisputed facts. *See e.g.*, Brief of App. at 16, 19, 22 (whether a fiduciary duty existed); *id.* at 16-18 (whether Kaiser's disclosures were sufficient to remove any unfairness); *id.* at 22, 26, 27 (whether the overage transactions are unfair trade practices). Facts are "an event, an occurrence, or something that exists in reality... as distinguished from...opinion." *Grimwood*, 110 Wn.2d at 359. The *Grimwood* case was a wrongful termination suit that plaintiff lost at summary judgment due to uncontradicted evidence of poor job performance. Plaintiff's counter-evidence was his own statement that characterized the incidents of poor job performance as "petty" or exaggerated. *Id.* at 358. The Court ruled that these statements were opinions, or ultimate facts, not evidentiary facts, and that they were insufficient to create a material factual dispute. *Id.* at 359-61.

Here, Kaiser presents only the legal conclusions he draws from the evidence submitted by the State. Kaiser does not dispute any of the documents submitted in support of the State's Motion for Partial Summary Judgment. He does not contradict his deposition testimony or his training manuals. Instead, he relies on the State's record evidence and draws different opinions and legal conclusions than the Trial Court. Kaiser contends that: his disclosures were sufficient to remove any unfairness, Brief of App. at 16; he did not have a duty to disclose, *id.* at 17-18; public policy is not served by requiring disclosure, *id.* at 19; his documents did not create a fiduciary duty, *id.* at 22-23; the terms of his overage deals were not unfair, *id.* at 22-23; his terms were not unfair because he paid "good and valuable consideration", *id.* at 26; and the transactions were voluntary and knowing, *id.* at 28. All of these contentions are opinions or legal conclusions, not genuine, material, disputed facts. Thus, they are not grounds for objecting to summary judgment on the basis of a factual dispute. *Micro Enhancement Intern., Inc. v. Coopers & Lybrand, LLP*, 110 Wn. App. 412, 438, 40 P.3d 1206 (2002) ("When...parties do not dispute that particular conduct occurred, the question whether those actions give rise to a CPA violation is reviewable as a question of law."); *American Linen Supply Co. v. Nursing Home Bldg. Corp.*, 15 Wn. App 757, 767-68, 551 P.2d 1038 (1976).

**2. The Trial Court Properly Found that Kaiser Violated the CPA By Using Powers-of-Attorney and Licensed Attorneys to Divert Overages From the Former Owners.**

One device Kaiser employed to make his overage transactions work was a power-of-attorney. He had each owner sign a power-of-attorney during the transactions. Kaiser would then send letters to county officials as “attorney-in-fact” for the owner, telling the county that “under no circumstances” should the county contact the owner regarding any tax overage created by the foreclosure sale. CP at 566; 654-55. In this way, Kaiser kept the county from telling the owner about the existence or amount of the tax overage. Kaiser admits this is the purpose of his letter. CP at 1038, ¶ 5; 293. The Court found that Kaiser committed unfair or deceptive acts or practices by using these powers-of-attorney to conceal the existence and amount of the tax overage from the record owner. CP at 1038, ¶5.

Kaiser assigns error to this finding and claims that he is the owner of the overage money, and therefore the owners have no interest in knowing of its existence or amount. Brief of App. at 35-36. Kaiser’s argument relies on the flawed premise that the Court found that his transactions were lawful, therefore making him the legitimate owner of the overage money. To the contrary, the Court held the transactions unlawful.

CP at 1037-38, ¶¶ 2-5. Further, some of Kaiser's transactions at least purport to give a percentage of the overage to the owner, CP at 529, so even under the terms of his own documents some owners maintained an interest in the overage and he had a duty under the power-of-attorney *not* to conceal information about those overages. CP at 655-56; *In re Estate of Palmer*, 145 Wn.App. 249, 263-64, 187 P.3d 758, 766 (2008); *Crisman v. Crisman*, 85 Wn.App. 15, 22, 931 P.2d 163 (1997). Kaiser admits that instead of using the powers of attorney to "fully disclose all facts" to his agent, *Estate of Palmer*, 145 Wn. App. at 264, he uses them to keep his principals from learning about the overage. CP at 282 (137:7-14).

Kaiser eventually added another subterfuge to his scheme – he hired licensed attorneys to "represent" the property owners. CP at 560 (fax from Kaiser's company to private lawyer stating "we have a new client we are sending you."). Many attorneys Kaiser approached refused to participate on moral or legal grounds. CP at 556-58. Kaiser's stated purpose in hiring these attorneys was to collect the overage money directly from the county without it being paid to the former owner, even though the attorney presumably would be acting in the former owner's interest. CP at 298 (153:2-14). Kaiser hired attorneys who followed his instructions, enforced Kaiser's agreements, and were paid either directly by Kaiser, CP at 562, or by taking a portion of the overage funds.

CP at 533. The Court found that by obtaining attorneys on behalf of owners and instructing the attorneys to divide the overage before it reached the owners, Kaiser committed unfair and deceptive acts because he was hiring attorneys to act contrary to the property owners' interest and to lull them into the believing that their interests were protected. CP at 1038, ¶ 4. Kaiser's contention that the owner has no interest in the overage is belied by the elaborate means he devised to obscure and negate their interest and by the lopsided terms of his deals, CP at 529, ¶ 8; 533. The Trial Court properly found that Kaiser's actions were unfair or deceptive in violation of the CPA.

**3. The Court Properly Ruled That Kaiser Committed an Unlawful Trade Practice by Intercepting Tax Overages That Should Have Been Paid Directly to the Record Property Owners.**

Kaiser objects to the Trial Court's ruling that he violated the CPA by interfering with the payment of excess real property tax foreclosure proceeds directly to the record owner of the property. Brief of App. at 13-15. The Court found that Kaiser engaged in unfair and deceptive practices by "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 at 1038, ¶ 3. RCW 84.64 establishes the process counties use to

foreclose and sell property due to tax delinquencies. Any excess money from a tax foreclosure auction must be paid to the owner who held title at the time the county issued a certificate of delinquency. RCW 84.64.080.<sup>2</sup> Kaiser was never the owner when the county issued a certificate of delinquency and Kaiser has never alleged he was the record holder at the time any certificate was issued. The statute does not permit direct payment of the excess to other parties, even if those parties obtain a subsequent interest in the property. *Id.* Therefore, property owners who have lost their property to unpaid taxes are at least assured of regaining any possible equity and are protected from those who would try to divest them of that equity without their even knowing of its existence.

The State never alleged that a property owner is not permitted to sell or assign the overage money to another person. Instead, the State alleged, and the Court found, that Kaiser could not interfere with the statutory process whereby the overage must first be paid directly to the record property owner. The language is mandatory – “shall be refunded”, RCW 84.64.080, and subsequent assignments of interest “shall not affect the payment of excess funds to the record owner.” *Id.* The record fully

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<sup>2</sup> RCW 84.64.080 provides: “the excess shall be refunded ... to the record owner of the property. The record owner of the property is the person who held title on the date of issuance of the certificate of delinquency. Assignments of interests, deeds, or other documents executed or recorded after filing the certificate of delinquency shall not affect the payment of excess funds to the record owner.” (Emphasis supplied.)

establishes that Kaiser interfered with this payment to the record owner by demanding counties pay the overage money directly to him.<sup>3</sup> The Trial Court properly determined that this act of interference is an unfair trade practice in violation of the CPA.

Contrary to Kaiser's argument, the *Stephenson* case does not contradict the Court's finding. Brief of App. at 13-15. In *Stephenson v. Pleger*, 150 Wn. App. 658, 208 P.3d 583 (2009), the court held that the trial court could not use RCW 84.64.080 to void a contract assigning the overage from one party to another because RCW 84.64.080 "has no impact on determining the rightful owner of the proceeds." *Id.* at 663. The Trial Court's Summary Judgment Order in this case does not rely on RCW 84.64.080 to determine the rightful owner of the overage money. Instead, the Court concluded that Kaiser committed an unfair or deceptive act when he circumvented RCW 84.64.080's express mandate that the overage must be paid directly to the record owner at the time of the delinquency.

Kaiser's interception of the county's overage payment was essential to the operation of his scheme. Because overage deals allowed Kaiser to gain all or a portion of the overage money while ultimately

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<sup>3</sup> CP at 281-82 (136:14-137:14), CP at 325, 554, 549, 565, 654-655.

paying nothing himself,<sup>4</sup> he realized that no rational person could be convinced to hand over the funds. Kaiser admits that if the money was paid directly to the record owner they could never be convinced to pay a portion to Kaiser.<sup>5</sup> Kaiser's scheme required that he get his hands on the overage money before the county paid it to the record owners; it is Kaiser's circumvention of the statutory process that violates the CPA.

Kaiser's interference with RCW 84.64.080 significantly impacts the public interest because he used this scheme against hundreds of victims. Brief of App. at 6 (claiming 400 transactions). Kaiser's unfair and deceptive conduct in circumventing RCW 84.64.080 satisfies the public interest element of a CPA case because the actions (1) were committed in the course of Kaiser's business, (2) were part of a generalized course of conduct, (3) were repeated, and (5) have a real and substantial potential for repetition. *Hangman Ridge*, 105 Wn.2d at 790.<sup>6</sup> By violating RCW 84.64.080, Kaiser sought to unlawfully evade the

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<sup>4</sup> CP at 1037, ¶ 2; CP at 647-48, 650, 654

<sup>5</sup> CP at 235 (90:19-22), 242 (97:17), 255 (110:2-13), 281-283 (136-138), 291 (146:2-147:3)

<sup>6</sup> Although the public interest element of the CPA is fulfilled in this matter, there is no statute or case law requiring the State to prove the claims it brings are in the public interest. *Hangman Ridge* is punctilious in restricting its holding to private actions, e.g. "[w]e hold that to prevail in a private CPA action..." *Hangman Ridge* at 780 (emphasis added). A later opinion assumes but does not directly address that state agencies acting under statutes with explicit public interest duties are presumed to act in the public interest. *Nationscapital Mortg. Corp. v. State Dept. of Financial Institutions*, 133 Wn. App. 723, 740, 137 P.3d 78 (2006).; See also *State v. Ralph Williams' Northwest Chrysler Plymouth, Inc.*, 82 Wn.2d 265, 274-75, 277, 510 P.2d 233 (1973) (a suit brought by the State to enforce the CPA is imbued with the public interest).

statute's protections, further affecting the public interest. *Failor's Pharmacy v. Department of Social and Health Services*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994) (contract in conflict with mandates of statute is unenforceable); *Machen, Inc. v. Aircraft Design, Inc.*, 65 Wn. App. 319, 333, 828 P.2d 73 (1992), *overruled on other grounds*, *Waterjet Technology, Inc. v. Flow Intern. Corp.*, 140 Wn.2d 313, 996 P.2d 598 (2000).

**4. The Court Correctly Found That Kaiser's "Overage Plays" Were an Unfair or Deceptive Act or Practice in Violation of the CPA.**

In the "overage play" transactions, Kaiser obtained the excess tax proceeds from a foreclosure sale for himself for a nominal amount or no money at all. Kaiser's transactions evolved as the State conducted its investigation, but in all cases Kaiser obtained tax delinquent property owners' equity for nothing. He approached owners using the same solicitations as his partial interest deals, offering to help save the property from foreclosure. CP at 1037, ¶ 2; 647-49; 122-37. Kaiser used signed powers of attorney and a pre-signed application to the relevant county officials to collect the money. CP at 647-49, 492.<sup>7</sup> After over a dozen of his deals wound up in litigation, CP at 865-66 (fn. 3), and the State began

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<sup>7</sup> *E.g.* Kaiser paid Edna and Borden Sagmoen \$100 for a property that later sold at auction for \$20,500. CP at 647; 493. Without Kaiser's deception, the county would have paid the Sagmoens \$16,654.68 (sale price less the delinquent taxes). RCW 84.64.080. All the Sagmoens had to do was sign the county's application form. *Id.*

investigating him, Kaiser added additional documents and disclaimers in an attempt to paper-over the fact that he was still obtaining an owner's equity for nothing. CP at 242-43 (97:13-98:10). These documents contain virtually every possible boilerplate disclaimer and defense that might apply to an abusive contract. CP at 516.

Kaiser finally revised his transactions to make them appear negotiated by creating the illusion that he was splitting the overage money with the former owner. The split is illusory because Kaiser first pays himself back the money he paid up front, and after he gets his money back, he then divides the remaining overage with the former owner. CP at 648, 533. Thus, Kaiser gets a percentage of the overage that would have been paid directly to the owner, without Kaiser having to pay any money at all. *Id.*; CP at 1037, ¶ 2. Kaiser was assured of a substantial overage because foreclosure auctions were “very, very hot,” meaning competitive. CP at 216 (71:15). Kaiser and his partner/co-defendant, Walter Scamehorn (who settled), had stopped buying at foreclosure auctions and started using overage plays because properties were going for close to market price at auction. CP at 273 (128:16-129:11), CP at 545 (112:22-24).

Kaiser claims that the “gravamen” of the State’s CPA unfairness claim is his failure to disclose material facts, Brief of App. at 16. While

Kaiser's failures to disclose material facts violate the CPA, the more egregious violation is that Kaiser takes all or part of property owners' equity after tax foreclosure auction for nothing. Without Kaiser and his foreclosure rescue scheme, property owners would receive their equity simply by signing a form the county sends them. RCW 84.64.080; CP at 143-44; 650. Kaiser devised a way to take all or most of this equity by soliciting vulnerable homeowners with promises to help them save their home from foreclosure and then having them sign a blizzard of forms and disclaimers that ultimately gave him the equity for nothing.

Kaiser contends that his deals are not unfair because the homeowners preferred to get \$100 upfront for their real property rather than wait for the foreclosure sale. Brief of App. at 23. He claims that the owners wanted to avoid "rolling the dice" at a foreclosure auction. CP at 651; 549. What he would have the Court believe is that property owners knowingly accepted \$100 up-front for their real property, agreed to split the proceeds of a tax sale of the property, and agreed to give Kaiser back the \$100 he paid before those proceeds are split. CP at 648. Despite performing hundreds of these transactions, Brief of App. at 6, Kaiser could not produce, at summary judgment or trial, even one property owner to testify that they knowingly entered this transaction.

The Trial Court properly held that, notwithstanding all the disclaimers, the transactions are unlawfully one-sided and overly harsh. *Nelson v. McGoldrick*, 127 Wn.2d 124, 131, 896 P.2d 1258 (1995); *Adler v. Fred Lind Manor*, 153 Wn.2d 331, 355-57, 103 P.3d 773 (2004). The Court agreed that Kaiser's "Participation Overage Plays" were unfair and in violation of the CPA because Kaiser targeted people facing tax foreclosure and offered to help them keep their home or otherwise assist them. However, Kaiser instead took title to the property, let it go to tax sale, and kept all or a percentage of the proceeds that otherwise would have gone directly to the owner. CP at 1037, ¶ 2.

Kaiser contends that the Trial Court erred in granting summary judgment on unfairness because his transactions did not involve duress. Kaiser claims that without duress there could be no absence of meaningful choice and therefore no procedural unconscionability. Brief of App. at 27. However, the Court did not need to find duress to hold that Kaiser's victims lacked meaningful choice in entering the transactions. Rather, courts examine "the manner in which the contract was entered, whether [a party] had a reasonable opportunity to understand the terms of the contract and whether the important terms were hidden in a maze of fine print." *Adler v. Fred Lind Manor*, 153 Wn.2d at 347 (citations omitted). The

Trial Court properly considered all the circumstances of the transaction, not just whether the victims were under duress.

Given the imminent tax sale, there was certainly pressure on property owners to do something quickly to avoid the loss of their property, and Kaiser admits he took tactical advantage of this time pressure. CP at 634-35; 411 (Kaiser describes a deal saying: “[h]e was desperate, in danger of losing his home, and with only days to spare I stepped in and took advantage of his situation.”); CP at 409 (describing the “drop-dead day advantage”). However, Kaiser’s large number of objectively confusing documents also contributed to the absence of meaningful choice. CP at 494-528; 277 (Kaiser admits he uses “too many documents.” 132:15.). Kaiser never clearly explains to the homeowners, and none of the documents plainly state, the actual terms of the transaction. CP at 276-77. This is procedurally unconscionable. However, even if there was no procedural unconscionability, courts may find a transaction unconscionable based solely on its substantive terms. *Adler v. Fred Lind Manor*, 153 Wn.2d at 346.

Kaiser wrongly contends that, at summary judgment, a party can only lose an unconscionability claim, not win it. Brief of App. at 23-24. His only authority for this proposition is the absence of a published Washington case where a party prevailed on an unconscionability claim at

summary judgment. *Id.* Even if the absence of a published case were legal authority, Kaiser fails to distinguish between a contract defense of unconscionability and the State's affirmative claim of unfairness under the CPA. Unconscionability is a principle that can guide a court when deciding unfairness under the CPA. *See e.g., Ralph Williams*, 87 Wn.2d at 309 (unconscionable contracts are an unfair trade practice under the CPA). Unconscionability is not the claim asserted by the State; the State alleged unfairness under the CPA. There is nothing unusual (or erroneous) about a plaintiff prevailing on a dispositive motion under the CPA. *See, e.g., State v. Lee*, 144 Wn. App. 462, 467, 182 P.3d 1008, 1011 (2008); *Watkins v. Peterson Enters, Inc.*, 57 F. Supp. 2d 1102 (E.D. Wash. 1999); *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, 930 P.2d 288 (1997). Further, where courts have held that an unconscionability claim may be dismissed at summary judgment, they have not relied on legal principles limited to dismissal but have relied on principles that also would encompass a grant of summary judgment. *See e.g., Jeffery v. Weintraub*, 32 Wn. App. 536, 542, 648 P.2d 914, 918-19 (1982) ("We see no reason why principles of summary judgment should not apply to test the legal sufficiency of the facts underlying a claim of unconscionability....The purpose of summary judgment is to avoid a useless trial where there are no material facts at issue.").

**5. The Court Properly Found Kaiser Violated the CPA By Attempting to Obtain a Portion of the Settlement Funds.**

Early in this litigation, Kaiser's co-defendants settled their liability for acts and practices in furtherance of Kaiser's transactions by paying \$290,000 in consumer restitution and agreeing to certain restrictions on their business practices. CP at 593-606. Kaiser, the only remaining defendant at the time, tried to obtain a portion of this restitution money using tactics similar to his overage transactions. CP at 1038-39, ¶¶ 9-11. Kaiser created a new company, Unclaimed Funds, Inc., and sent a letter from Unclaimed Funds, Inc. to the people he believed were entitled to this restitution money. CP at 612-24; 660-62. Kaiser told his former victims in solicitation letters that he had located an "abandoned account," CP at 614, and that they have to "ACT NOW or by state law [the money] will be lost forever." CP at 612; 1038, ¶ 9(a). He told the recipients that he had the "required forms on file" that were needed to obtain this found money, CP at 1038, ¶ 9(b); 614, and that, without Kaiser's help, the victim would be "unlikely to realize the financial benefits of claiming the funds." CP at 1038, ¶ 10; 621, ¶ 3. All of Kaiser's claims regarding the restitution money were false. CP at 1038, ¶¶ 9-11; 608-09; 661-662. The Court found that Kaiser's solicitations and agreements contained multiple misrepresentations and violated the CPA. CP at 1038-39, ¶¶ 9-11.

Kaiser assigns error to this finding and contends that because he sent only a few of these solicitations, “they lacked the relevant capacity to deceive as a matter of law.” Brief of App. at 38. As a preliminary matter, Kaiser did not make this argument at the trial level so this Court need not consider it. *Sneed v. Barna*, 80 Wn. App. 843, 847, 912 P.2d 1035 (1996). Moreover, the argument is factually and legally incorrect.

In response to the State’s summary judgment, Kaiser offered no evidence regarding how many people received the restitution solicitations. On appeal, Kaiser cites as evidence a statement contained in an opposition brief he filed that only eight people were potentially entitled to restitution funds. Brief of App. at 38 n.25; CP at 812. The statement in the brief is unsworn and has no citation to evidence. This statement also cannot be reconciled with Kaiser’s claim to have conducted “approximately 400 transactions with owners of parcels facing tax foreclosure.” Brief of App. at 6. Ultimately, it is also contrary to the Court’s unchallenged finding in its Order Imposing Penalties and Restitution, which found that Kaiser sent approximately 500 solicitations for Unclaimed Funds, Inc. CP at 2213, ¶ 9. Kaiser has not challenged that Order on appeal.

Even if there were only eight solicitations, this fact alone would not render them non-deceptive. Brief of App at 38. Kaiser’s authority for this argument, *Swartz v. KPMG, LLC*, 401 F. Supp. 2d 1146 (W.D. Wash.

2004), *rev'd other grounds* 476 F.3d 756 (9th Cir. 2007), concerns a multi-millionaire plaintiff who was sold a tax dodge that failed. *Swartz* found that the scheme was not deceptive because there are few people who face capital gains on millions of dollars; therefore, the scheme was unlikely to deceive a “substantial portion” of the public. *Id.* at 1153-54. This case has no bearing on the present facts and does not even concern deceptive solicitations mailed to the public. However, *Swartz* does cite a Washington case that supports the present facts as actionable under the CPA, *Henery v. Robinson*, 67 Wn. App. 277, 834 P.2d 1091 (1992). *Swartz*, 401 F. Supp. 2d at 1153. *Henery* concerns a low-income plaintiff who was sold a defective mobile home. The plaintiffs’ CPA claim alleged that the salesman falsely promised certain finance terms. The Court held that this was an isolated incident and that therefore the statements regarding the terms did not have the capacity to deceive a substantial portion of the public.” *Henery* at 291. However, the Court pointed out that the question of whether an unfair or deceptive practice has the capacity to deceive a substantial portion of the public does not live or die on the number of recipients of the statement: “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. *Id.* Kaiser’s misrepresentations were on form

contracts and on solicitations sent to a list of his former victims. CP at 1038-39, ¶¶ 9-11; 612-22. Thus, they had the capacity to deceive a substantial portion of the public. *See Firestone Tire & Rubber Co. v. Federal Trade Comm'n*, 481 F.2d 246, 249 (6th Cir. 1973) (A statement has a capacity to deceive even if only 10% of the viewers are deceived.)<sup>8</sup>

**6. The Court Properly Found That Kaiser Violated the CPA By Using Powers of Attorney on Behalf of the Owners to Misrepresent Real Property Transactions on Sworn Excise Tax Affidavits.**

When a party sells an interest in real property to another, the seller must sign a sworn statement identifying the consideration paid for the property. RCW 82.45.150, .060, and .080; *see also* RCW 82.46.060. The parties must swear to the accuracy of the sales price and all other information in the affidavit under penalty of perjury. RCW 82.45.090(3). If the proper excise taxes are not paid, counties may collect by suing or foreclosing on the property. RCW 82.45.080. To avoid paying excise taxes, Kaiser routinely entered false information on excise tax affidavits.

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<sup>8</sup> Kaiser also claims there is a genuine dispute as to whether it was deceptive for him to state that the “unclaimed funds will very soon escheat” to the State. Brief of App. at 39. However, the Court did not mention this statement in its Partial Summary Judgment Order. Kaiser contends that his misrepresentations that that he had the forms needed to obtain the money and that he had found the money through public records requests were not “material” misrepresentations, but he does not state why they are not material, Brief of App. at 39, therefore the State cannot effectively respond to this argument. A consumer could certainly be induced to do business with Kaiser based on his belief that Kaiser had the proper forms to request the money. It would also be material that Kaiser learned of the money’s existence because he was a co-defendant in the lawsuit that created the money, and not because he filed public records requests.

CP at 1038, ¶ 6; 568; 656-57. Kaiser would then sign and swear to those statements on behalf of the owner through his power-of-attorney, CP at 568, or have his partners sign them on behalf of the owners. CP at 584-85; 587.

Kaiser has never denied falsely swearing to these affidavits. Instead, he claims that because the State only produced four of them at summary judgment they lacked the capacity to deceive a substantial portion of the public. Brief of App. at 40. Once again, Kaiser's argument fails on appeal because he did not raise it at trial. *Sneed*, 80 Wn. App. at 847. Significantly, Kaiser did not offer any factual evidence that those affidavits were the only four. His allegation is contrary to the Court's unchallenged finding in its Order Imposing Penalties and Restitution that found that Kaiser falsified 29 affidavits. CP at 2212, ¶ 4. Finally, the law does not require any specific number of misrepresentations before it is actionable – one misrepresentation may be adequate. *Henery*, 67 Wn. App. at 291.

Further, it is the unfairness of Kaiser's actions that is most compelling. Kaiser's false swearing on the affidavits violated the law and he knew that. CP at 591 (e-mail exchange between Kaiser and employee); 658 fn. 20. By signing on behalf of sellers he exposed them to prosecution and an action for debt. RCW 82.45.080 and .090; CP at 658. This is an

unfair or deceptive trade practice in violation of the CPA. CP at 1038, ¶ 6; *see Karst v. Goldberg*, 88 Ohio App. 3d 413, 623 N.E.2d 1348, 1352 (Ohio 1993) (by selling satellite system that required consumer to make use of an illegal computer chip, seller committed unfair and deceptive trade practice); *Masure v. Donnelly*, 962 F.2d 128, 134 at n.4 (Me. 1992); *State v. Colorado State Christian College*, 76 Misc.2d 50, 346 N.Y.S.2d 482 (N.Y. 1973).

**7. The Summary Judgment Order Properly Found That Kaiser's Transactions Do Not Result in Homeowners Keeping Their Home.**

Kaiser assigns error to what he believes is a discrepancy between the Summary Judgment Order and the Findings of Fact and Conclusions of Law. Brief of App. at 29-31. In the Summary Judgment Order, the Court states that Kaiser locates owners facing tax foreclosure, takes ownership of their property, and then either lets the property be sold at tax sale or puts it in a trust that allows Kaiser to sell the property at will. CP at 1036, ¶ 1. In its Findings of Fact and Conclusions of Law, the Court states that it has “already found that Kaiser’s transactions do not result in homeowner’s keeping their home.” CP at 1277, ¶ 3. Kaiser believes that the Court’s second finding mischaracterizes its first finding. There is no contradiction between finding that Kaiser took away ownership of a property and finding that Kaiser failed to help someone keep their home.

Even where the former owner continues to occupy the property he or she has still lost ownership – they did not “keep” their home in any objective or ordinary sense of the word, or in its most important aspects. CP at 644-45; *c.f. National Comm’n on Egg Nutrition v. F.T.C.*, 570 F.2d 157, 161 at n. 4 (7th Cir. 1977) (“[A]n otherwise false advertisement is not rendered acceptable merely because one possible interpretation of it is not untrue.”) The Court has found in its oral ruling and written Findings and Conclusions that mere occupancy, at the will of Kaiser, does not mean that Kaiser allowed former owners to keep their homes and does not render his transactions lawful under the CPA. CP at 1283, ¶¶ 29–31; RP (Jan. 14, 2009) at 8, 10-11.

Kaiser also argues that the Trial Court was substantively wrong in its finding that partial interest deals do not result in homeowners keeping or saving their homes. Brief of App. at 30-31. As stated above, no reasonable trier of fact would find that Kaiser’s victims “keep” or have “saved” their homes after dealing with Kaiser. There are numerous unchallenged findings of fact that Kaiser’s victims lose all ownership interest in their homes. CP at 1277, ¶¶ 6-7; 1278, ¶¶ 8–11; 1279, ¶¶ 15; 1283, ¶¶ 29–32. Kaiser’s arguments to the contrary require the acceptance of an unreasonable definition of “save” or “keep” and again challenge the court’s legal conclusion based on a conclusion, not on facts. These

arguments should be disregarded and the Trial Court should be affirmed.

**8. Kaiser's Advertisements Had the Capacity to Deceive a Substantial Number of Consumers and Kaiser's Different Interpretation of the Evidence Does Not Create a Genuine Issue of Material Fact.**

Mr. Kaiser argues that “there are material fact questions about the meaning of Kaiser’s statements and the nature of his actions,” and therefore summary judgment was inappropriate. Brief of App. at 31 (emphasis supplied). A conflict regarding the meaning and nature of undisputed statements is not a factual dispute. Deception is a matter of law under the CPA. The question is whether the act or practice has the capacity to deceive consumers. See *Hangman Ridge*, 105 Wn.2d at 785. The Trial Court found that twelve of Kaiser’s advertisements met this test. CP at 1036–37, ¶ 1. Kaiser contends that the Trial Court erred in two regards.: First, he contends that the Trial Court erroneously found the advertisements deceptive because “they implied that Kaiser worked for free, when in fact he did not.” Brief of App. at 32. There is no support for this argument in the record. The Trial Court’s Order Granting Summary Judgment does not mention “free” or “work for free” at all. The State never alleged Kaiser claimed he worked for free.

Second, Kaiser’s contends that the Trial Court erred because Kaiser actually *does* provide “help” to his victims and therefore there are

“genuine issues of fact” about whether his advertisements are truthful. But Kaiser and the State agreed before the Trial Court on what the facts are—the dispute arises in deciding what those facts *mean* as a matter of law. Kaiser does not dispute that the overage transactions took place or that they took place under the circumstances described in the record. *See* CP at 863; 820-849; 627-34; 1277-83. Kaiser draws different legal conclusions from these facts and labels his conclusions “material fact questions.” Brief of App. at 31. For example, regarding the “Wonder Woman” solicitation, Kaiser argues that “the relevant question is whether the claim had the capacity to deceive a substantial portion of the public” and states that “at the very least, reasonable fact finders could disagree about this issue, rendering summary judgment inappropriate.” Brief of App. at 34. Whether an act or practice is deceptive is a question of law, not fact. *Panag v. Farmers Ins. Co. of Washington*, 166 Wn.2d 27, 47, 204 P.3d 885 (2009). The Trial Court was competent to determine whether an advertisement had the capacity to deceive a substantial portion of the public and Kaiser does not dispute that he sent thousands of such advertisements. CP at 1296-97; 208-09 (63:1 – 64:4); 212 (67:13).

Kaiser misstates the Court’s findings when trying to argue that the “Wonder Woman” solicitations are not deceptive. The Court did not hold that the letters were deceptive only because they describe Kaiser’s partner

as “like a superhero.” Brief of App. at 33. The Court’s full finding was that Kaiser “falsely claims Tina Worthey is like a superhero who will act on property owner’s behalf to get them out of trouble, and that she stops foreclosure,” CP at 1037, ¶ 1 (h); also, that “she is an experienced foreclosure professional who will act on the owner’s behalf.” *Id.* at ¶ (i). The Court found that Kaiser offered two transactions, both of which resulted in the homeowner losing their property and their equity. *Id.* at ¶ 1. Therefore, it was a misrepresentation for Kaiser to claim that his partner would be working in the owner’s interest or would be somehow saving the owner from their financially distressed situation. Also, it was a misrepresentation to call Tina Worthey and another partner, Kyle Yarborough, experienced real estate professionals who would be helping people facing foreclosure. CP at 1037, ¶ 1 (i) and (k). The uncontradicted evidence in the State’s Motion for Partial Summary Judgment established that neither partner was experienced, and that their services did not help or save anyone. CP at 636; 629 at n.5; 263 (118:7-20).

Kaiser similarly gives a partial and misleading version of the Court’s finding regarding the False Names solicitations. Brief of App. at 34. The Court did not find that Kaiser violated the CPA by simply using the names John Morris and Nick Johnson in his advertisements. Kaiser’s advertisement had these made-up people promising to “buy

owners' property or otherwise assist owners." CP at 1037, ¶ 1 (l). The State's uncontradicted evidence is that Kaiser's ads used the first person narrative for these fictitious characters where they promised such things as "tell me where to send the money (I'll do all the running around so you don't have to)." CP at 137; 629-630; 646-647. Kaiser was not creating a brand, like Aunt Jemima, he was using fictional names to conceal his identity and to make affirmative representations that he could later deny when convenient to the negotiations. *Id.* The false name advertisements are the only ones in which Kaiser makes a straightforward offer to buy the property.

**9. Kaiser violated the CPA by Acting As Both Trustee and Beneficiary of the Partial Interest Land Trusts.**

Kaiser argues that he did not violate the CPA simply by "being" both the trustee and beneficiary of a trust because he did not take any *action* in his capacity as trustee. Brief of App. at 41-42. Kaiser took many actions as trustee—he signed Real Estate Excise Tax Affidavits and lied about the transfer of property, CP at 1277, ¶ 4 (unchallenged finding that Kaiser falsified real estate excise tax affidavits); he created the transactions and placed himself as the trustee and never made actual effort to ensure that the co-beneficiary understood the terms of the agreements they had signed, CP at 1279, ¶ 18; he withheld the documents containing

the terms of the deal, CP at 1279, ¶ 16; and he never explained to his co-beneficiaries that they did not have a loan, CP at 1278, ¶¶ 13-14. Kaiser became trustee in order to have complete control over the land trust and to make a profit as the beneficiary. As the Trial Court found, these were unfair or deceptive acts and that ruling should be affirmed.

**B. Arguments Relating to the Trial Court's Findings of Fact and Conclusions of Law**

**1. The Standard of Review for the Trial Court's Findings Is Substantial Evidence and the Trial Court's Credibility and Persuasiveness Determinations Are Controlling.**

Kaiser only challenges certain findings of the Trial Court's Findings of Fact and Conclusions of Law, therefore, the unchallenged findings are considered verities on appeal. *Robel v. Roundup Corp.*, 148 Wn.2d 35, 42, 59 P.3d 611 (2002). The standard of review for the findings he has challenged is whether there was substantial evidence and whether those findings support the conclusions of law. *Dorsey v. King County*, 51 Wn. App. 664, 668-69, 754 P.2d 1255 (1988). Substantial evidence is defined as enough to persuade a rational fair-minded person that the premise is true. *Thompson v. Hanson*, 142 Wn. App. 53, 60, 174 P.3d 120 (2007). Appellate courts defer to the trier of fact on conflicting testimony, persuasiveness of the evidence and credibility of the witnesses. *Id.* Appellate courts need only consider evidence favorable to the

prevailing party. *Bland v. Mentor*, 63 Wn.2d 150, 155, 385 P.2d 727 (1963).

Thus, to prevail, Kaiser must show that there is no evidence in the record sufficient to persuade a rational, fair-minded person that a premise is true, and he must do that relying on the Trial Court's determinations of credibility and persuasiveness. Kaiser has not met this burden.

**2. The Trial Court Did Not Err in Allowing Kaiser's Victims to Testify About Their Partial Interest Deals.**

Kaiser argues that the Trial Court should not have considered evidence regarding the witnesses' confusion over their contract terms without first finding those contracts ambiguous. Brief of App. at 44; citing *Nat'l Bank of Wash. v. Equity Investors*, 81 Wn.2d 886, 913, 506 P.2d 20 (1970).

The Trial Court found Kaiser's contracts ambiguous. It also found that Kaiser took steps to conceal the terms of his contracts. The Court found that Kaiser used "multiple, complex and sometimes contradictory documents." CP at 1280, ¶ 21 (c). It also found that Kaiser "regularly does not provide copies of the documents homeowners have signed" and that Kaiser's notaries do not provide copies, thus concealing the terms of the transactions from the homeowners. CP at 1279, ¶ 16. In addition, it found that Kaiser solicited his transactions using misrepresentations that

he was providing services to save the homes of people facing foreclosure. CP at 1036, ¶ 1.

The Court in *Nat'l Bank of Wash. v. Equity Investors* qualified its holding as inapplicable in the presence of fraud, deceit, or coercion. 81 Wn.2d at 912 (“One cannot, *in the absence of fraud, deceit, or coercion* be heard to repudiate his own signature voluntarily...”) (emphasis added). In *Nat'l Bank*, the escrow papers and transaction at issue were signed and executed by a sophisticated businessman who sought and received the advice of his attorney and chose to sign the papers after a significant period of reflection. *Id.* at 911. Each victim who signed Kaiser’s contracts, by contrast, was a low-income homeowner facing tax foreclosure who was confused and uninformed about the transaction. RP (Jan. 14, 2009) at 6-10; CP at 1278, ¶¶ 5, 13-14, 21. Kaiser presented himself as someone who was saving the home. *Id.* Each victim faced the imminent loss of his or her property, possibly resulting in homelessness for his family. Because Kaiser often approached his victims mere days prior to the tax auction, none of them had time for more than a cursory glance at the documents that Mr. Kaiser had already explained to them were necessary if the victim wanted his help in saving the property. CP at 1280, ¶ 21. The evidentiary limitations expressed by *Nat'l Bank* do not apply to a consumer protection action where the signors are vulnerable

consumers deceived into signing unconscionable contracts. Therefore, the Trial Court properly heard and considered the testimony of the State's partial interest deal witnesses and its findings based thereon should be affirmed.

**3. Kaiser's Partial Interest Deals Are Unfair Because They (1) Offend Public Policy in a General Sense, (2) Are Immoral, Unethical, Oppressive, or Unscrupulous, and (3) Cause Substantial Injury to Consumers.**

Whether a specific act or practice is unfair or deceptive is a question of law. *Panag* at 166 Wn.2d at 47. Under the CPA, an act or practice is unfair if it (1) offends public policy in a general sense; (2) is immoral, unethical, oppressive, or unscrupulous; or (3) causes substantial injury to consumers, competition, or other businesses. *Magney v. Lincoln Mut. Sav. Bank*, 34 Wn. App. 45, 57, 659 P.2d 537, review denied, 99 Wn.2d 1023 (1983) (citing *Federal Trade Comm'n. v. Sperry & Hutchinson Co.*, 405 U.S. 233, 244, 92 S.Ct. 898, 31 L. Ed. 2d 170 (1972)). There is no need to establish all three prongs of the unfairness test in order to find an act or practice unfair. *Fabri v. United Technologies Int'l, Inc.*, 387 F.3d 109, 123 (2nd Cir. 2004); *Robinson v. Toyota Motor Credit Corp*, 201 Ill.2d 403, 775 N.E.2d 951, 961 (Ill. 2002); see also *Votto v. Am. Car Rental, Inc.*, 273 Conn. 478, 871 A.2d 981 (Conn. 2005). The Federal Trade Commission (FTC) has found that taking advantage of

disparate knowledge, when the cost of disclosure to the business is miniscule, is an unfair act.<sup>9</sup> See *Pfizer Inc.*, 81 F.T.C. 23 (1972); *International Harvester Co.*, 104 F.T.C. 949 (1984). The FTC defines unfairness as existing where there is substantial injury to consumers that could not be reasonably avoided and is not outweighed by countervailing benefits to consumers or competition. See 15 U.S.C. § 45(n). Unfairness is a broader standard than deception. See *Sperry & Hutchinson*, 405 U.S. at 244-45; see also *Patterson v. Beall*, 19 P.3d 839, 847 (Okla. 2000).

Kaiser's objection to the Court's findings of unfairness is that the trial court failed to "properly frame the issue of the alleged unfairness." Brief of App. at 45. The State established that Kaiser's victims did not know the true terms of the contracts they were signing and this testimony was properly heard by the Trial Court. CP at 1278, ¶ 13; RP (Jan. 14, 2009) at 9-10. Most of Kaiser's victims thought Kaiser was offering a loan to pay off the taxes that the victim would simply repay over time. CP at 1278, ¶ 13. Kaiser's misrepresentations and omissions that allowed his victims to so conclude are unscrupulous, unethical, and immoral.

Kaiser also argues that his victims received a benefit from their deals with Mr. Kaiser—namely, that they were able to live in their homes and receive between 50-75% of the proceeds upon sale of the home. Brief

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<sup>9</sup> The CPA specifically authorizes the Court to consider federal law analysis, particularly decisions of the Federal Trade Commission. RCW 19.86.920.

of App. at 46. This simply did not happen. The Trial Court found, and Kaiser did not challenge, each of the following facts: (1) that Kaiser does not pay the victims anything for their homes, CP at 1277, ¶ 5; (2) that all of Kaiser's partial interest deals are in default, CP at 1278, ¶¶ 8; (3) that when the transactions are in default the former owners are no longer entitled to proceeds or to occupy the property, CP at 1280, ¶ 18 (g); (4) that Mr. Kaiser therefore receives the home and its equity without ultimately having paid any money, CP at 1278, ¶ 9, 21 (f); and (5) that these homeowners believed they were saving their home, but were actually stripped of all ownership interest and did not even have a right of first refusal to re-purchase if they had the money to do so. CP at 1278, ¶ 11. Finally, under another unchallenged finding of fact, it is undisputed that Kaiser never actually sold properties back to the victims. CP at 1279, ¶ 15; RP (Jan. 14, 2009) at 9.

Kaiser does not benefit anyone except himself. In most cases, Kaiser's victims owned houses worth at least \$50,000 to \$150,000.<sup>10</sup> Given the mechanics of state tax auctions, none of the victims owed more than 10% of this value in taxes and therefore, but for Kaiser's intervention, all would likely have received *something* for their homes to jumpstart their future housing plans. Instead, Kaiser took their equity and, while his

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<sup>10</sup> RP (Dec. 9, 2008) at 113:13; RP (Dec. 9, 2008, Vol. II) at 96:16, 123:6-15, 159:7-23, 195:19-22; 112:1-3, 122:6-15, 158:8-9.

victims had not yet been evicted, the Trial Court did not find Kaiser's reasons for allowing them to stay in the homes credible.<sup>11</sup> See CP at 1283, ¶ 31 (“[T]he reason Kaiser does not evict is not due to any benign intention or recognition of hardship it would cause...he does not evict people in partial interest deals because he does not want to submit his deals to the scrutiny of the Courts.”).

The standards for unfairness are designed to give trial courts the maximum flexibility in seeking justice. The Trial Court, after hearing hours of witness testimony, made the above findings and held that Kaiser's contracts and partial interest deals were unfair. The victims were all indisputably and substantially injured.<sup>12</sup> Mr. Kaiser's acts were immoral, unethical, and oppressive and committed against those least equipped to defend themselves during particularly difficult times in their lives. To affirm, this Court need only find, looking at the evidence most favorable to the State, that a fair-minded, rational person would be persuaded by this evidence.

**4. The Trial Court's Oral Ruling and Written Findings Sufficiently Indicate That the Four Other Deals Affect the Public Interest.**

A trial court must make findings of fact and conclusions of law

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<sup>11</sup> This finding was also not challenged on appeal, and as such, is a verity.

<sup>12</sup> The Trial Court awarded over \$3 million in restitution for harm caused to consumers and Kaiser has not challenged that finding.

sufficient to suggest the factual basis for the ultimate conclusions. *Lawrence v. Lawrence*, 105 Wn. App. 683, 686, 20 P.3d 972 (2001). Required findings must be sufficiently specific to permit meaningful review. *In re C.R.B.*, 62 Wn. App. 608, 618, 814 P.2d 1197 (1991). In the authority cited by Kaiser, *Howell v. Kraft*, 10 Wn. App. 266, 517 P.2d 203 (1973), the trial court made no written findings, instead relying upon its oral ruling. The oral ruling was unclear as to the existence of the required elements of a claim. Here, between the Trial Court's oral ruling and its nine pages of written findings, there is no such ambiguity.

In its written Findings, the Trial Court found: (1) that all four other deals done by Kaiser where the homeowner was facing tax foreclosure were unfair and deceptive in violation of the CPA, and (2) that Kaiser's acts affect the public interest because they are in the course of his business, evince a pattern and generalized course of conduct, have a substantial potential for repetition, and affect many consumers. CP at 1281, ¶ 22, 24. Kaiser argues that because paragraph 22 uses the phrase "above enumerated acts" before the paragraphs discussing the "four other deals," that the Trial Court failed to make the same finding for those other deals. A careful reading of the Trial Court's oral ruling eliminates any such distinction.

The Trial Court clearly references the public interest element multiple times in its oral ruling and does not differentiate between the facts for partial interest deals and the facts involved in the “four other deals.” RP (Jan. 14, 2009) at 5–10. The Trial Court stated that “all individuals came in and testified that they were in distress, they didn’t have funds to pay,” RP (Jan. 14, 2009) at 6:11–14, and then found that the “State has proved all claims of the Consumer Protection Act,” RP (Jan. 14, 2009) at 8:15–16, and continued by finding, “I also find that the public interest was affected because it was in the course of his business, that evinced a pattern of generalized course of conduct, there was substantial for repetition, and in fact, repetitious, and in fact, affected many consumers.” RP (Jan. 14, 2009) at 9:9–15. Mr. Kaiser asks this Court to draw an arbitrary distinction within the Trial Court’s oral ruling between the partial interest deals generally and the “four other deals” specifically. However, the Trial Court discussed *all* witnesses, including those involved in the “four other deals”—it did not limit its ruling or its findings to only those who discussed clear cut partial interest deals. Therefore, the Trial Court affirmatively found that the “four other deals” also met the public interest element.<sup>13</sup>

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<sup>13</sup> In a footnote, Kaiser also objects to the Order Granting Injunctive Relief, Brief of App. at 48, n. 36. However Kaiser did not designate this order under RAP 5.3 and he offers no authority, and no argument in enough detail to allow a response.

**5. The State Requests Its Attorney's Fees on Appeal pursuant to RAP 18.1(b) and RCW 19.86.080(1).**

Under the Consumer Protection Act, the prevailing party is entitled to an award of attorneys' fees and costs. RCW 19.86.080. Accordingly, if the State prevails in this appeal, it requests an award for attorneys' fees and costs, the sum of which will be made certain in a declaration by the State's counsel upon order by the Court.

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**V. CONCLUSION**

For the foregoing reasons the Trial Courts Order Granting Plaintiff's Motion for Partial Summary Judgment and its Findings of Fact and Conclusions of Law should be affirmed.

RESPECTFULLY SUBMITTED this 30<sup>th</sup> day of December, 2009.

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NOS. 63111-0-I

**COURT OF APPEALS, DIVISION I  
STATE OF WASHINGTON**

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.

DECLARATION OF  
SERVICE

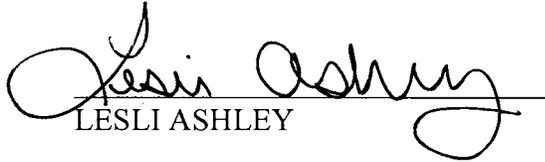
FILED  
COURT OF APPEALS DIV. #1  
STATE OF WASHINGTON  
2009 DEC 30 PM 1:02

LESLI ASHLEY declares as follows:

I certify that on December 30, 2009, I sent a copy of the Opening Brief of Respondent State of Washington, via email PDF attachment to David Corbett, Attorney for Appellants, to [David@davidcorbettlaw.com](mailto:David@davidcorbettlaw.com). Mr. Corbett has agreed to accept service of pleadings in this matter via email. A copy of the Opening Brief of Respondent State of Washington was also mailed via US Mail to David Corbett, 2106 N. Steele Street, Tacoma, WA 98406.

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge and belief.

Executed in Seattle, WA, this 30<sup>th</sup> day of December, 2009.

  
LESLI ASHLEY