

**FILED**

JUN 05 2018

COURT OF APPEALS  
DIVISION III  
STATE OF WASHINGTON  
By \_\_\_\_\_

No. 97576-1

No. 358429

COURT OF APPEALS, DIVISION III  
OF THE STATE OF WASHINGTON

---

DUANE YOUNG, Appellant,

vs.

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

---

APPELLANT'S BRIEF

---

Attorneys for Appellant

BRIAN G. CAMERON, WSBA #44905  
Cameron Sutherland, PLLC  
421 W. Riverside Ave., Ste. 660  
Spokane, WA 99201  
TEL. (509) 315-4507

KIRK D. MILLER, WSBA #40025  
Kirk D. Miller, P.S.  
421 W. Riverside Ave., Ste. 660  
Spokane, WA 99201  
TEL. (509) 413-1494

**TABLE OF CONTENTS**

TABLE OF CONTENTS..... i

TABLE OF AUTHORITIES ..... i

A. ASSIGNMENTS OF ERROR..... 3

    Issues Pertaining to Assignments of Error..... 4

B. STATEMENT OF THE CASE..... 4

C. SUMMARY OF ARGUMENT ..... 8

D. ARGUMENT..... 11

    A. Mr. Young Is Not Required to Show Actual Reliance or Actual  
    Deception to Prove His CPA Claim..... 14

    B. Toyota’s False Advertising in Its Nationwide Marketing  
    Campaigns Had the Capacity to Injure Other Persons Besides Mr.  
    Young..... 18

    C. Toyota’s False Representations in Its Nationwide Advertising  
    Constitute “False, Deceptive, or Misleading” Statements or  
    Representations Under the ADPA. .... 24

    D. The Legislature’s Declaration of “Vital” Public Interest in the  
    “Distribution, Sale, and Lease of Vehicles” Does Not Cease to Exist  
    When a Plaintiff Does Not Bring a Private Cause of Action for  
    Damages Under the ADPA. .... 27

    E. Mr. Young Is Entitled to an Award of Costs and Fees. .... 30

E. CONCLUSION..... 30

**TABLE OF AUTHORITIES**

**Cases**

*Anderson v. Valley Quality Homes*, 84 Wn. App. 511 (1997)..... 27, 28

*Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778  
(1986)..... 11, 14, 19, 21, 22, 30

*Klem v. Wash. Mutual Bank*, 176 Wn.2d 771 (2013) ..... 21, 27, 30

*Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133 (1997) ... 17

*Lyons v. U.S. Bank Nat'l Ass'n*, 181 Wn.2d 775 (2014) ..... 17

*Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173 (2007)..... 25

*Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 (2013).... 7, 11, 12, 14,  
15, 16, 17, 18, 20, 27, 29

<i>Sherwood v. Bellevue Dodge</i> , 35 Wn. App. 741 (1983) ...	25, 26, 27, 28, 29
<i>State v. Ralph Williams' N. W. Chrysler Plymouth</i> , 87 Wn.2d 298 (1976)	
.....	18, 25
<i>Tallmadge v. Aurora Chrysler Plymouth</i> , 25 Wn. App. 90 (1979) .....	7, 11
<i>Testo v. Russ Dunmire Oldsmobile</i> , 16 Wn. App. 39 (1976) .....	11, 14
<i>Thornell v. Seattle Serv. Bureau, Inc.</i> , 184 Wn.2d 793 (2015).....	18

**Statutes**

RCW 19.86 .....	4, 7, 21, 28
RCW 19.86.020 .....	11, 12, 19, 20
RCW 19.86.090 .....	11, 30
RCW 19.86.093 .....	8, 9, 12, 19, 20, 21, 23, 24
RCW 43.22 .....	28
RCW 43.42.440 .....	28
RCW 46.70.005 .....	3, 4, 8, 10, 13, 22, 27, 28, 29, 30
RCW 46.70.180 .....	10, 12, 13, 22, 24, 25, 26, 29
RCW 46.70.190 .....	10, 27
RCW 46.70.310 .....	22, 28
RCW 46.70.900 .....	10, 22, 24, 25, 26

**Other Authorities**

Black's Law Dictionary 59 (8th ed. 2004).....	12, 15, 22, 23
---	----------------

**Rules**

RAP 18.1 .....	30
----------------	----

**Regulations**

WAC 308-66-152.....	15
---------------------	----

### A. ASSIGNMENTS OF ERROR

1. The Superior Court erred in requiring Mr. Young to show actual deception from and reliance upon Toyota's false advertising to prove his Consumer Protection Act (CPA) claim.
2. The Superior Court erred in ruling that Toyota's false statements in its nationwide advertising campaigns did not have the capacity to affect persons other than Mr. Young.
3. The Superior Court erred in finding that Toyota's false representations in its nationwide advertising did not constitute "false, deceptive, or misleading" statements or representations in vehicle advertising as prohibited by Washington's Automobile Dealer Practices Act (ADPA).
4. The Superior Court erred in ruling that the Legislature's express declaration of public interest in "the distribution, sale, and lease of vehicles in the state of Washington," RCW 46.70.005, could not substantiate the "public interest" element of Mr. Young's CPA claim.

### **Issues Pertaining to Assignments of Error**

1. Is a consumer required to show that he or she was actually deceived by and relied upon a Defendant's false advertising to substantiate a Consumer Protection Act claim under RCW 19.86, *et seq.*?
2. Did Toyota's false advertising in its nationwide marketing campaigns have the capacity to injure other persons besides Mr. Young?
3. Does the Automobile Dealer Practices Act's (ADPA's) prohibition against false representations in vehicle advertising include false representations regarding vehicle features in nationwide advertising campaigns?
4. Is the Legislature's declaration that "the distribution, sale, and lease of vehicles in the state of Washington vitally affects the general economy of the state and the public interest and the public welfare," RCW 46.70.005, extinguished by the ADPA's statute of limitations for purposes of establishing the "public interest" element of a CPA Claim?

### **B. STATEMENT OF THE CASE**

In July 2013, Appellant Duane Young began shopping online for a new mid-sized pickup truck. (CP 68-69). He was particularly interested in the specifications advertised for the 2014 Toyota Tacoma "Limited."<sup>1</sup>

---

<sup>1</sup> Tacoma "Limited" refers to models equipped with an options package Toyota calls the "Limited Package."

Among the premium options of the “Limited Package,” Toyota promised an “auto dimming rearview mirror with outside temperature gauge and HomeLink® universal transceiver.” (CP 74-75). Toyota’s aggregated price for options in the “Limited Package” was \$7,660. (CP 74).

Based on the specifications advertised on Toyota’s website, including the premium features of the Tacoma’s “Limited Package,” Mr. Young decided to buy a 2014 Tacoma equipped with a “Limited Package.” (CP 87-89). After visiting multiple dealerships, Mr. Young settled on a new 2014 Tacoma “Limited” that was offered by Foothills Auto Center in Burlington, Washington, which he purchased over the phone. (CP 90-91). On or about October 30, 2013, he flew up to Burlington to complete the sale and drive his new Tacoma back to his home in Eugene, Oregon. (CP 91-92). The “Monroney label” (i.e., window sticker listing vehicle specifications), like Toyota’s website, also stated that the vehicle was equipped with an “Auto-dimming Mirror w/ Monitor<sup>2</sup> and Outside Temperature Gauge and HomeLink Universal Transceiver.” (CP 96-99).

On his drive back to Eugene, Mr. Young noticed that he couldn’t locate the temperature gauge that was ostensibly integrated with the

---

<sup>2</sup> According to Toyota, the integrated monitor advertised on its “Monroney label” also did not exist. As Toyota later explained, “the ‘integrated backup camera display’ was relocated from the inside rearview mirror to the audio head unit’s 6.1” display screen.”

rearview mirror. (CP 108). After he arrived home, he attempted to program the integrated mirror and “turn on” the temperature gauge without success. (CP 109). At first, Mr. Young thought the mirror might be broken, but after a few days, he concluded that his vehicle was not equipped as advertised. (CP 109).

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

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

(CP 113-114).

The letter did not mention that Toyota’s nationwide online and print media also falsely advertised the “auto dimming rearview mirror with outside temperature gauge and HomeLink® universal transceiver.” (CP 114). Toyota’s letter also indicated that the company “would like to compensate you with a cash reimbursement of \$100.” (CP 114). Mr. Young declined the \$100 offer and instead contacted Toyota. (CP 115).

After several rounds of negotiations, Toyota finally offered to install the integrated mirror as it was originally advertised, but Toyota insisted that it would not include an equivalent three-year/36,000 mile-warranty that covered all other components of his new Tacoma. (CP 116, 125). In effect,

Toyota was offering no warranty on the component; only the after-market parts manufacturer's 90-day warranty would apply. (CP 125, 127, 129).

Mr. Young declined Toyota's offer and, having exhausted his options with the company, sought legal counsel. (CP 131). He first retained an attorney limited to practice in Oregon to investigate the matter. (CP 131). Ultimately, he was referred to present counsel in Washington to carry forward with his case. (CP 131-132).

In all of this, Toyota has never disputed that the representations it made in its advertising were false. (CP 408). Toyota has also acknowledged that it sold at least 59 Tacoma "Limited" vehicles in Washington, none of which had all of the features that Toyota advertised in its "Limited Package." (CP 303). This number does not include countless consumers throughout Washington and beyond who might have been exposed to or injured by Toyota's false advertising,<sup>3</sup> but who did not ultimately purchase a 2014 Tacoma "Limited." (CP 303).

Following a bench trial beginning on July 31, 2017, the trial court entered its Memorandum Opinion on November 1, 2017, ruling that Mr. Young had failed to substantiate his CPA claims under RCW 19.86, *et seq.*, because he did not establish that 1) he or other consumers were actually

---

<sup>3</sup> In cases of false advertising, out-of-pocket expenses are recoverable, such as the cost of parking, driving, or making a trip to the store to buy something, or traveling to a dealership in response to false advertisements. *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 64 (2013)(citing cases); *Tallmadge v. Aurora Chrysler Plymouth, Inc.*, 25 Wn. App. 90 (1979) (costs associated with traveling to dealership in response to false advertisements).

deceived by Toyota's false advertising, or that 2) he or other consumers actually relied upon Toyota's false statements. (CP 416). Therefore, the court concluded, Mr. Young had failed to show that Toyota's false representations in its nationwide advertising "had the capacity to deceive a substantial portion of the public,"<sup>4</sup> and so his CPA claim must fail. (CP 416). The court additionally ruled that the statute of limitations had run on private claims for damages under the ADPA, and so the Legislature's declaration that "the distribution, sale, and lease of vehicles in the state of Washington vitally affects the general economy of the state and the public interest and the public welfare," RCW 46.70.005, was extinguished for purposes of Mr. Young's CPA claim. (CP 419). Mr. Young thereafter filed his timely appeal.

### **C. SUMMARY OF ARGUMENT**

This Court should reverse the ruling of the lower court and find that Toyota's false advertising of its motor vehicles violated the CPA for several reasons:

First, the lower court erred in requiring Mr. Young to show actual deception by and reliance upon Toyota's false advertising to prove his CPA claim. Higher courts have consistently held that whether or not a consumer

---

<sup>4</sup> The standard set forth in RCW 19.86.093(3) requires a Plaintiff to show that a prohibited practice "(a) injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons."

is actually deceived by or has relied upon false advertising are not factors in determining whether or not a defendant has engaged in “unfair or deceptive acts or practices” under the CPA. Whether or not Mr. Young was actually deceived when he decided to purchase the falsely advertised vehicle is also not a factor in showing injury and causation. It is enough that Toyota misrepresented the features of its advertised vehicles and failed to deliver those features to Mr. Young and other consumers who purchased those vehicles.

Second, the lower court erred in ruling that Toyota’s false statements in its nationwide advertising campaigns did not have the capacity to affect persons other than Mr. Young. The basis of the lower court’s ruling, that Mr. Young failed to establish that an “unfair or deceptive act or practice” had occurred (i.e., because Mr. Young failed to show that he and other consumers were actually deceived by and relied upon Toyota’s false advertising), and therefore he could not show injury to other persons under RCW 19.86.093(3), is premised on the same erroneous requirements that Mr. Young show actual deception by, and actual reliance upon, Toyota’s false advertising.

Third, the lower court erred in finding that Toyota’s indisputably false representations in its nationwide advertising did not constitute “false, deceptive, or misleading” statements or representations in vehicle

advertising. Such false representations are prohibited by Washington's ADPA, which declares it unlawful to "cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading, including but not limited to the following [non-exclusive examples of prohibited conduct]." RCW 46.70.180(1). The plain language of the statute, reinforced by the Legislature's mandate that "[a]ll provisions of [the ADPA] shall be liberally construed to the end that deceptive practices or commission of fraud or misrepresentation . . . may be prohibited and prevented," RCW 46.70.900, speaks for itself.

Fourth, the lower court erred in ruling that the Legislature's express declaration of public interest in "the distribution, sale, and lease of vehicles in the state of Washington," RCW 46.70.005, could not substantiate the "public interest" element of Mr. Young's CPA claim, because Mr. Young did not raise a private cause of action under the ADPA within its one-year statute of limitations. RCW 46.70.190. (CP 419.) Because the parties in this case have discovered limited authority directly on point, Mr. Young urges this Court to publish its Opinion on this issue for the benefit of future litigants, legal practitioners and scholars, and judicial authorities.

Finally, pursuant to RCW 19.86.090, Mr. Young is entitled to recovery of his costs and fees as the prevailing party in this action. He therefore requests an award of costs and fees pursuant to RAP 18.1.

#### **D. ARGUMENT**

Washington's CPA broadly prohibits "unfair or deceptive acts or practices in the conduct of any trade or commerce." RCW 19.86.020. In order to prevail on a private CPA claim, "a plaintiff must establish five distinct elements: "(1) unfair or deceptive act or practice; (2) occurring in trade or commerce; (3) public interest impact; (4) injury to plaintiff in his or her business or property; (5) causation." *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 780 (1986). To establish the first element, that an unfair or deceptive act or practice has occurred, "[a] claimant need not prove reliance or deceptive misrepresentation but only that the actions have a tendency or capacity to deceive a substantial portion of the public." *Tallmadge v. Aurora Chrysler Plymouth*, 25 Wn. App. 90, 93, 605 P.2d 1275, 1277 (1979). "Whether a plaintiff-consumer has been actually deceived is irrelevant" to establishing that an unfair or deceptive act or practice has occurred. *Testo v. Russ Dunmire Oldsmobile*, 16 Wn. App. 39, 51, (1976). In evaluating whether or not false advertising has a tendency to deceive courts must look "not to the most sophisticated [consumers], but rather to the least." *Panag*, 166 Wn.2d at 60.

Similarly, “[t]o establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s “business or property.” *Id.* at 63-64.

The third element of a CPA claim, public interest impact, was codified in 2009 under RCW 19.86.093, which states: “In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interests because it: (1) Violates a statute that incorporates this chapter; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons.” RCW 19.86.093.

In this case, there is no dispute that Toyota falsely advertised the features of its 2014 Tacoma “Limited” models in its nationwide online and print advertising. (CP 408). By common definition, false advertising has the capacity to injure other persons. See, e.g., Black’s Law Dictionary 59 (8th ed. 2004) (defining “advertising” as “1. The action of drawing the public’s attention to something to promote its sale.”). False advertising of motor vehicles is expressly prohibited by the ADPA, RCW 46.70.180(1). The Legislature has expressly declared a “vital” public interest in

preventing misrepresentations in the sale of motor vehicles. RCW 46.70.005. This Legislatively declared public interest in vehicle sales does not simply cease to exist in a CPA context simply because a consumer does not or cannot bring a private cause of action for damages under the ADPA.

Within this context, Mr. Young clearly established each element of his CPA claim. That is:

1) Toyota admits that it falsely advertised the features of its 1014 Tacoma “Limited” models, which is inherently *unfair and deceptive*, regardless of Mr. Young’s actual deception or actual reliance on the false advertising;

2) Toyota’s false advertising was used to promote sales of its motor vehicles in *trade or commerce*;

3) Toyota’s false representations in its nationwide advertising *had the capacity to injure anyone* who purchased a falsely advertised vehicle, as well as consumers who were subjected to the false advertising, and plainly violated the ADPA, RCW 46.70.180(1), which includes a *legislatively declared public interest impact* at RCW 46.70.005; and

4) Toyota’s failure to deliver what it promised in its nationwide advertising *proximately injured Mr. Young* and all others who did not receive the falsely advertised features of the 2014 Tacoma “Limited.”

For these reasons, and for the arguments in sections supra, Mr. Young appeals to this Court to reverse the lower court and rule that he has substantiated each element of his CPA claim.

**A. Mr. Young Is Not Required to Show Actual Reliance or Actual Deception to Prove His CPA Claim.**

The lower court erred in deciding that Mr. Young must show that he was actually deceived by Toyota's false advertising, and that his failure to do so was a dispositive factor in the court's ruling against him as to whether or not Toyota had engaged in unfair or deceptive acts or practices. (CP 411-412, 416). Higher courts have long held that "whether a plaintiff-consumer has been actually deceived is irrelevant" to establishing that an unfair or deceptive act or practice has occurred. *Testo v. Russ Dunmire Oldsmobile*, 16 Wn. App. 39, 51, (1976). "Rather, if he can show that the defendant's actions possessed a tendency or capacity to mislead, an unfair or deceptive act is proved." *Id.* The purpose of the "capacity-to-deceive test is to deter deceptive conduct *before* injury occurs." *Hangman Ridge*, 105 Wn.2d at 785 (1986) (emphasis added).

In evaluating whether or not a particular act or practice is unfair or deceptive, a court should not look to the most sophisticated consumers, but rather to the "least sophisticated consumer." *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27, 50 (2009). "Deception exists 'if there is a

representation, omission or practice that is likely to mislead” such a consumer. *Id.* “A communication may be deceptive by virtue of the ‘net impression’ it conveys, even though it contains truthful information.” *Id.* In this case, there is no dispute that Toyota’s nationwide advertising of vehicle features that did not exist was false. (CP 416). False information is, by common definition, inherently deceptive. See, e.g., Black’s Law Dictionary 635 (8th ed. 2004) (defining “false” as “2. Deceitful, lying”). Advertising vehicle features in the national marketplace is likely to lead consumers, especially the least sophisticated among them, to believe that those features exist on the advertised vehicles. Toyota’s false advertising is therefore “likely to mislead” the “least sophisticated consumer.” *Panag*, 166 Wn.2d at 50.

In both its online advertising and print materials, Toyota specifically and falsely states that the “Limited” package offered and sold to Mr. Young included an “auto dimming rearview mirror with outside temperature gauge and HomeLink® universal transceiver.” (CP 71, 74-79). Elsewhere on its website, Toyota includes generalized, fine-print “gotcha” disclaimers, which are prohibited by WAC 308-66-152<sup>5</sup> in faded-gray micro-font, far

---

<sup>5</sup> See WAC 308-66-152(3)(a)(iii) (declaring it “false, deceptive, or misleading” to advertise with words that are not “clear and conspicuous . . . in a type size which shall be sufficiently large to be read with reasonable ease and shall be made in relatively close proximity to each of the terms which require that that the disclosures be made; disclosures shall be made

removed from its falsely stated features. (CP 77-78). Washington courts have established that “a communication may contain accurate information yet be deceptive,” and that “a communication may be deceptive by virtue of the ‘net impression’ it conveys, even though it contains truthful information.” *Panag*, 166 Wn.2d at 50 (citing cases involving “fine-print” disclaimers or disclosures). In these respects, the CPA places the burden on Toyota to ensure that consumers like Mr. Young are not misled by its advertising; the CPA does not require consumers to dig deep and decipher fine print regarding what Toyota is offering and what it will actually deliver.

Toyota also falsely advertised the same nonexistent features in its print advertising, including certain Monroney labels that were attached to Mr. Young’s and others’ vehicles at the point of sale. These Monroney labels did not include any disclaimers, faded fine-print or otherwise. (CP 96-99).

In this case, the majority of the lower court’s analysis focuses almost entirely on whether or not Mr. Young, whom the court considers to be “one of the more savvy, better-informed, and well-researched customer[s] I have ever come across,” (CP 411), was actually deceived by Toyota’s false advertising. (CP 410-416). In effect, the lower court put Mr. Young on

---

in such color and contrast so as not to be obscured by other words or pictures appearing in the advertisement.”

trial regarding his “credibility” regarding whether or not he actually believed he would receive the falsely advertised features, taking for granted that Toyota unleashed its indisputably false advertising on the nationwide marketplace. (CP 410-416). The lower court’s consideration of Mr. Young as “one of the more savvy, better informed, and well-researched customer[s] that I have ever come across,” in evaluating whether or not Mr. Young was actually deceived, especially as a standard for whether or not Toyota’s false advertising had the capacity to deceive other consumers, was inapt. (CP 411-412).

Not only does the court’s focus on Mr. Young’s conduct instead of Toyota’s contradict longstanding authority regarding the irrelevancy of actual deception and actual reliance in such an inquiry, but also “[w]hether undisputed conduct is unfair or deceptive is a question of law, not a question of fact.” *Lyons v. U.S. Bank Nat’l Ass’n*, 181 Wn.2d 775, 786 (2014); *accord Panag*, 166 Wn.2d at 47 (“Whether a particular act or practice is ‘unfair or deceptive’ is a question of law.” (citing *Leingang v. Pierce County Med. Bureau, Inc.*, 131 Wn.2d 133, 150, (1997))).

The lower court also erred in deciding that Mr. Young was required to prove that he and other consumers actually relied on Toyota’s false advertising to establish an unfair or deceptive act or practice has occurred, and that his failure to do so was another dispositive factor in the court’s

ruling against him. (CP 409, 416, 419). Again, higher courts have long held that “[a] claimant need not prove consumer reliance to establish an unfair or deceptive practice. A claimant must prove that the conduct has the capacity or tendency to deceive.” *State v. Ralph Williams’ N. W. Chrysler Plymouth*, 87 Wn.2d 298, 317 (1976); *see also Thornell v. Seattle Serv. Bureau, Inc.*, 184 Wn.2d 793, 802 (2015) (“While elements of other claims involving deception or unfair acts typically include reliance . . . this court rejected the principle that reliance is necessarily an element of plaintiff’s CPA claim”). In addition, the court’s finding that, based on its analyses of Mr. Young’s actual deception and actual reliance, “I cannot conclude, more probably than not, that Mr. Young’s reliance on a mistaken website is the proximate cause of his decision to purchase the Toyota Tacoma Limited Package and, therefore caused him damages,” is also flawed. (CP 419). “To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s “business or property.” *Panag*, 166 Wn.2d at 63-64.

**B. Toyota’s False Advertising in Its Nationwide Marketing Campaigns Had the Capacity to Injure Other Persons Besides Mr. Young.**

The lower court erred in ruling that, because Mr. Young 1) failed to show that he was actually deceived by Toyota’s false advertising and 2)

failed to prove that he and other consumers relied on Toyota's false advertising, Mr. Young therefore failed to show that Toyota's false advertising in its nationwide marketing campaigns had the capacity to deceive a substantial portion of the public." (CP 416).

Although the lower court declines to distinguish whether its "capacity to deceive" analysis pertains to the first (unfair or deceptive act or practice) or third (public interest impact) of a CPA claim, (CP 408), the Supreme Court has established that such an inquiry pertains to the first element.<sup>6</sup> *Hangman Ridge*, 105 Wn.2d 778 (1986) ("The unfair or deceptive act or practice element of a private cause of action under the Consumer Protection Act is satisfied if the conduct complained of has the capacity to deceive a substantial portion of the public, regardless of the defendant's intent to deceive."). *Id.* at 532. The test for whether or not prohibited conduct is injurious to the public interest, the third element of a CPA claim, was established in RCW 19.86.093 in 2009.<sup>7</sup>

In its ruling, the lower appears to apply the "capacity to deceive" standard from *Hangman Ridge* (i.e., first element) to the "capacity to injure

---

<sup>6</sup> The Supreme Court has established five elements that a Plaintiff must satisfy to substantiate a CPA claim, including 1) unfair or deceptive act or practice, 2) occurring in trade or commerce, 3) public interest, 4) proximate causation, and 5) injury to business or property. *Hangman Ridge*, 105 Wn.2d 778 (1986).

<sup>7</sup> "In a private action in which an unfair or deceptive act or practice is alleged under RCW 19.86.020, a claimant may establish that the act or practice is injurious to the public interests because it: (1) Violates a statute that incorporates this chapter; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." RCW 19.86.093.

other persons” (i.e., third element) standard in RCW 19.86.093. In so doing, the lower court essentially concluded that, 1) because Mr. Young failed to prove that he or anyone else was actually deceived by or relied upon Toyota’s false advertising, he could not establish that Toyota had engaged in “unfair or deceptive acts or practices” (i.e., first element) under RCW 19.86.020. (CP 416). Because he failed to show that Toyota’s false advertising was an “unfair or deceptive act or practice,” RCW 19.86.093, the lower court reasoned, he failed to show that Toyota’s false representations in its nationwide advertising “injured other persons,” RCW 19.86.093(3)(a), or “had the capacity to injure other persons,” RCW 19.86.093(3)(b).

In addition, the court’s finding that, based on its analyses of whether or not Mr. Young’s actual deception and actual reliance, “I cannot conclude, more probably than not, that Mr. Young’s reliance on a mistaken website is the proximate cause of his decision to purchase the Toyota Tacoma Limited Package and, therefore caused him damages,” is also flawed. (CP 419). “To establish injury and causation in a CPA claim, it is not necessary to prove one was actually deceived. It is sufficient to establish the deceptive act or practice proximately caused injury to the plaintiff’s “business or property.” *Panag*, 166 Wn.2d at 63-64. It is undisputed that Toyota falsely advertised features of its 2014 Tacoma “Limited” models, which Toyota failed to deliver to Mr. Young and at least 58 other consumers in

Washington, plus countless other consumers across the United States. But for Toyota's failure to deliver the advertised features, Mr. Young and other consumers would not have been deprived of the use and benefit of the same.

As addressed above, the lower's courts reasoning, premised upon the court's conclusion that Mr. Young failed to show actual deception by or reliance upon Toyota's false advertising, is inconsistent with the standards set forth in RCW 19.86.093, which do not require a showing of actual deception or actual reliance of consumers to establish a public interest impact.

Notwithstanding the "capacity to deceive" standard employed by the lower court, to show that an act or practice is injurious to the public interest under RCW 19.86, *et seq.*, a plaintiff must show that the conduct "(1) Violates a statute that incorporates this chapter [RCW 19.86, *et seq.*]; (2) Violates a statute that contains a specific legislative declaration of public interest impact; or (3)(a) Injured other persons; (b) had the capacity to injure other persons; or (c) has the capacity to injure other persons." *Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 804 (2013) (citing RCW 19.86.093).

Under RCW 19.86.093(2), a consumer may satisfy the CPA's public interest element through "a showing that a statute has been violated which contains a specific legislative declaration of public interest impact." *Hangman Ridge*, 105 Wn.2d at 791; RCW 19.86.093. The *Hangman Ridge* court specifically lists Washington's Automobile Dealer Practices Act

(ADPA), at RCW 46.70.005, as one example of such a statute. *Hangman Ridge*, 105 Wn.2d at 791. The ADPA provides that it is unlawful for a motor vehicle dealer or manufacturer to “cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading, including but not limited to the following: [non-exclusive list of prohibited practices].” RCW 46.70.180(1). The Legislature mandates that determinations of what constitutes “false, deceptive, or misleading” communications “be liberally construed.” RCW 46.70.180(1); RCW 46.70.900. The statute further provides that “any violation of this chapter is deemed to affect the public interest and constitutes a violation of chapter 19.86 RCW [Washington’s CPA].” RCW 46.70.310.

At its most basic level, the purpose and function of advertising is to compel as many prospective customers as possible toward a purchase or concept. By common definition, false advertising has the capacity to injure other persons. See, e.g., Black’s Law Dictionary 59 (8th ed. 2004) (defining “advertising” as “1. The action of drawing the public’s attention to something to promote its sale.”). It follows that falsely advertising vehicle features in nationwide print and online promotional claims, “*had* the

capacity to injure other persons” besides Mr. Young. RCW 19.86.093(3)(b).

In addition to the public interest impact under RCW 19.86.093(2), the undisputed facts of this case establish that Mr. Young, like countless other purchasers, bought a falsely advertised 2014 Tacoma “Limited,” which *actually injured* him and all similarly situated individuals by advertising and selling products and features that did not exist and were never delivered. (CP 90-91). Toyota disseminated its false advertising through its nationwide website, print and point-of-sale materials at individual dealerships, and in some cases, the window stickers attached to the vehicles themselves, which *had the capacity* to injure anyone who was exposed to these false communications. This is because, at its most basic level, the purpose and function of advertising are to compel as many prospective customers as possible toward a purchase or concept. See, e.g., Black’s Law Dictionary 59 (8th ed. 2004) (defining “advertising” as “1. The action of drawing the public’s attention to something to promote its sale.”). False advertising therefore has an inherent capacity to injure all persons who are exposed to it. *Id.* It follows that Defendant TMS’s false advertising on its nationwide website, print and point-of-purchase materials, window stickers, and other media “*had the capacity* to injure other persons” beyond just Mr. Young. RCW 19.86.093(3)(b). On this additional basis, the undisputed facts satisfy the third element of Mr. Young’s CPA claim by

establishing that Defendant TMS's nationwide dissemination of its false advertising "had the capacity" to injure other consumers who were exposed to and/or acted upon the false representations. RCW 19.86.093(2).

**C. Toyota's False Representations in Its Nationwide Advertising Constitute "False, Deceptive, or Misleading" Statements or Representations Under the ADPA.**

The lower court erred in deciding that Toyota's indisputably false representations regarding vehicle features in its nationwide advertising were not prohibited by RCW 46.70.180(1), which declares it unlawful to "cause or permit to be advertised, printed, displayed, published, distributed, broadcasted, televised, or disseminated in any manner whatsoever, any statement or representation with regard to the sale, lease, or financing of a vehicle which is false, deceptive, or misleading, including but not limited to the following [non-exclusive examples of prohibited conduct]." RCW 46.70.180(1). (CP 418). In conjunction with the Legislature's mandate that "[a]ll provisions of [the ADPA] shall be liberally construed to the end that deceptive practices or commission of fraud or misrepresentation . . . may be prohibited and prevented," RCW 46.70.900, it strains credulity that such an expansive prohibition against false advertising in motor vehicle sales does not apply to false advertising of motor vehicle features in Toyota's nationwide marketing campaign. Indeed, higher courts throughout Washington have applied the prohibitions of RCW 46.70.180 broadly. *See,*

*e.g.*, *Sherwood v. Bellevue Dodge*, 35 Wn. App. 741 (1983) (unsecured vehicle dealer's non-judicial repossession of a vehicle was an unlawful act or practice in the sale of motor vehicles under RCW 46.70.180, although it was not a practice specifically enumerated in the statute); *State v. Ralph Williams' N.W. Chrysler Plymouth*, 87 Wn.2d 298, 309, fn. 6 (false advertising of prices, warranties, defects, practices, and other issues prohibited); *and see Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 198 (2007) (Madsen, J. dissenting) (RCW 46.70.180 applies to misleading consumers regarding a business and occupation tax being a legal obligation of the customer).

Within the context of consumer protection-related law, such inclusiveness is consistent with courts' acknowledgement that:

It is impossible to frame definitions which embrace all unfair practices. There is no limit to human inventiveness in this field. Even if all known unfair practices were specifically defined and prohibited, it would be necessary at once to begin over again.

*Klem v. Wash. Mutual Bank*, 176 Wn.2d 771, 786 (2013)  
(citing cases).

Narrow interpretations regarding the application of RCW 46.70.180(1) would be inconsistent with “the legislative mandate for a liberal construction,” as mandated by the ADPA at RCW 46.70.900. In

interpreting and applying the ADPA, the Legislature mandates that “[A]ll provisions of this chapter shall be liberally construed to the end that deceptive practices or commission of fraud or misrepresentation in the sale, lease, barter, or disposition of vehicles in this state may be prohibited and prevented.” RCW 46.70.900.

Courts have routinely applied the plain language of the ADPA to unfair and deceptive acts and practices that are not specifically enumerated in RCW 46.70.180. In *Sherwood*, 35 Wn.App. 741 (1983), for example, the court found that a dealership’s tortious conversion of a vehicle also violated RCW 46.70.180, affirming that “[w]hile an unsecured party’s non-judicial repossession of a motor vehicle was not specifically included in RCW 46.70.180’s list of unlawful acts or practices, the statutory recitation of unlawful practices is not exclusive.” *Id.* at 746-47. The court accordingly held that the dealership’s tortious conduct violated the ADPA.

In this case, there is no dispute that Toyota falsely advertised the features included with its 2014 Tacoma “Limited” models. (CP 416). The expansive language of RCW 46.70.180(1), in conjunction with the liberal construction mandate of RCW 46.70.900, plainly include the kind of false advertising of vehicle features in nationwide advertising that Toyota engaged in in this case. To the extent that the lower court concluded otherwise, (CP 418), the lower court was in error.

**D. The Legislature’s Declaration of “Vital” Public Interest in the “Distribution, Sale, and Lease of Vehicles” Does Not Cease to Exist When a Plaintiff Does Not Bring a Private Cause of Action for Damages Under the ADPA.**

The lower court erred in ruling that, because a private cause of action for damages under the ADPA was barred by a one-year statute of limitation, RCW 46.70.190, the Legislature’s express declaration of public interest in “the distribution, sale, and lease of vehicles in the state of Washington,” RCW 46.70.005, could not substantiate the public interest element of Mr. Young’s CPA claim. (CP 419). This conclusion conflicts with prevailing authority, which holds that “a claim under the Washington CPA may be predicated upon a per se violation of statute, an act or practice that has the capacity to deceive substantial portions of the public, or an unfair or deceptive act or practice not regulated by statute but in violation of public interest.” *Klem v. Wash. Mut. Bank*, 176 Wn.2d 771, 787 (2013). This is also inconsistent with innumerable cases in which courts have relied on such statutory declarations of public interest to substantiate CPA claims, even when plaintiffs did not or could not raise private causes of action under associated statutes. *See, e.g., Anderson v. Valley Quality Homes*, 84 Wn. App. 511 (1997); *Sherwood*, 35 Wn. App. 741, (1983); *Panag*, 166 Wn.2d 27 (2009). Simply stated, the fact that the Legislature has memorialized the public interest in motor vehicle sales under RCW 46.70.005 does not mean that those interests cease to exist in the context of a CPA claim.

*Anderson v. Valley Quality Homes*, 84 Wn. App. 511, is one such example. In this case, a family bought a mobile home in August 1991 and filed a lawsuit almost two years later, in June 1993, alleging violations of the CPA. *Id.* at 513-14. The family did not bring an action under RCW 43.22, *et seq.*, which does not provide a private cause of action. *Id.* Notwithstanding the fact that the plaintiffs could not file suit under the RCW 43.22, *et seq.*, the *Anderson* court specifically relied on RCW 43.42.440, which states that that a failure to remedy any beaches of that chapter “is a violation of the consumer protection act,” to find a *per se* CPA violation under RCW 19.86, *et seq.* *Id.* at 516 (citing *Hangman Ridge*, 105 Wn.2d at 787). The ADPA has a similar provision, which states: “Any violation of this chapter is deemed to affect the public interest *and constitutes a violation of chapter 19.86 RCW*,” RCW 46.70.310 (emphasis added).

In *Sherwood*, 35 Wn. App. 741 (1983), a married couple brought a claim against a vehicle dealership for conversion, CPA violations, and intentional infliction of emotional distress. *Id.* at 744. Although these consumers did not bring a private cause of action for damages under the ADPA, the *Sherwood* court specifically relied on the legislative declaration of public interest in RCW 46.70.005 to substantiate the public interest element of the CPA. *Id.* at 746. Finding that, “[w]hile an unsecured vehicle dealer's nonjudicial nonconsensual repossession of a motor vehicle was not

specifically included in RCW 46.70.180's list of unlawful acts or practices, the statutory recitation of unlawful practices is not exclusive," the court ruled that the dealership's violation of the ADPA, in conjunction with its legislative declaration of public interest, fulfilled the public interest element of the plaintiffs' CPA claim. *Id.* at 747.

Even in the seminal case of *Panag v. Farmers Ins. Co. of Wash.*, 166 Wn.2d 27 (2009), the *Panag* court explicitly relied on the Legislature's declaration of public interest in Washington's Collection Agency Act, even though the Plaintiffs had not brought a private cause of action under that statute, to substantiate the public interest element of the Plaintiffs' CPA claim. In so doing, the *Panag* court found that "[t]he strong public policy underlying state and federal law regulating the practice of debt collection also applies where collection practices do not fall within the laws' prohibitions. That the collection of subrogation claims is beyond the scope of the CAA does not mean deceptive subrogation collection practices are exempt from suit under the broader scope of the CPA." *Id.* at 54. The same is true of the "strong public policy" regarding vehicle sales expressed in RCW 46.70.005 - the fact that recovering damages for Toyota's false advertising is beyond the reach of the ADPA, at least for Mr. Young, does not mean that the public interest is somehow extinguished in the context of a CPA claim.

Whether or not Mr. Young brought an ADPA claim for Toyota's false advertising, it is undisputed that Toyota falsely advertised its motor vehicles, in which the Legislature has declared a "vital" public interest. RCW 46.70.005. Under *Klem*, this substantiates the public interest element of Mr. Young's CPA claim as "an unfair or deceptive act or practice not regulated by statute but in violation of public interest." *Klem*, 176 Wn.2d at 787. This is consistent with one of the primary purposes of the CPA to provide "an efficient and effective method of filling the gaps" in the common law and statutes," *Id.* at 54, as well as the fundamental purpose of the CPA, which is to protect the general public by means of the CPA as a whole. *Hangman Ridge Training Stables v. Safeco Title Ins. Co.*, 105 Wn.2d 778, 788 (1986).

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

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

**E. CONCLUSION**

Based upon the legal authorities and arguments herein presented, Mr. Young respectfully requests that this Court reverse the decision of the Superior Court below and rule in favor of his claims or remand with instructions.

DATED this 4<sup>th</sup> day of June, 2018.

Respectfully submitted,



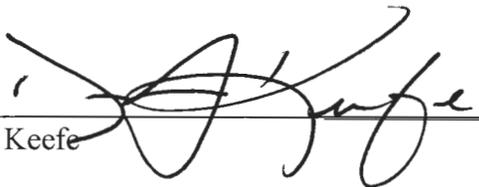
Brian G. Cameron, WSBA #44905  
*Attorney for Petitioner*

**CERTIFICATE OF SERVICE**

The undersigned hereby certifies under penalty of perjury under the laws of the state of Washington that on the 4<sup>th</sup> day of June, 2018, I caused the foregoing Appellant’s Brief to be served on the following in the manner indicated:

Michael Mallow Rachel Staus David Carpenter 555 W. Fifth Ave., Ste 4000 Los Angeles, CA 90013	<input checked="" type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA EXPRESS DELIVERY
Robin E. Wechkin 701 Fifth Ave Ste 4200 Seattle, WA 98104	<input checked="" type="checkbox"/> VIA REGULAR MAIL <input type="checkbox"/> VIA CERTIFIED MAIL <input type="checkbox"/> HAND DELIVERED <input type="checkbox"/> VIA EXPRESS DELIVERY

SIGNED in Spokane, WA, this 4<sup>th</sup> day of June, 2018.

  
\_\_\_\_\_  
Dan Keefe