

No. 72424-0

COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NEIL RUSH.

Appellant,

v.

TOP NOTCH TOWING, a Washington company, and WILLIAM I.  
BLACKBURN,

Respondents.

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OPENING BRIEF OF APPELLANT

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## I. INTRODUCTION AND SUMMARY

Respondent Top Notch and its owner William I. Blackburn (“Top Notch”) towed and impounded Appellant Neil Rush’s (“Rush”) Mercedes. Statutory notice was provided to Top Notch and an Impound Hearing was scheduled in the District Court.

Before the District Court had a chance to rule on the illegality of the impound and ordered the car returned to Rush, Top Notch “auctioned” Rush’s automobile to itself for \$1.00.

Rush sued Top Notch and obtained a default judgment for conversion and violation of the Consumer Protection Act (“CPA”). Rush was awarded the value of his car, the attorney fees he had incurred in the meaningless Impound Hearing and CPA treble damages.

More than a year after the default judgment was entered, Rush’s attorney contacted Top Notch to collect on the judgment. Top Notch did not respond.

After ignoring, 1) Rush’s hand delivered written notice of the Impound Hearing, 2) a letter of representation by Rush’s attorneys, 3) two written notices from the District Court Clerk of the Impound Hearing, 4) service of two separate Summonses and Complaints, and 5) a letter from Rush’s counsel regarding the default judgment, Top Notch brought a Motion to Vacate Rush’s judgment based on CR 60(b)(11).

Although more than a year had passed since the default judgment was entered, the Honorable Judge Theresa B. Doyle, in violation of the express language of CR 60(b)(1), granted Top Notch's Motion finding "Defendant Blackburn's failure to timely appear in the action, and answer the Complaint, was due to **mistake and excusable neglect** arising from Plaintiff's insurer's agreement to compensate Plaintiff for the loss of his vehicle." (emphasis added) The court also granted Top Notch relief under CR 60(b)(11) based on "extraordinary circumstances" not identified in its Order.

After Rush's default judgment had been vacated and the case was re-set for trial, Top Notch moved for Partial Summary Judgment seeking dismissal of Rush's CPA claims. Without stating its reasons the court dismissed Rush's CPA claim with prejudice.

This appeal followed.

## **II. ASSIGNMENTS OF ERROR**

1. The Superior Court erred in vacating Rush's default judgment based on Civil Rule 60(b)(1) more than a year after the Judgment was entered.
2. The Superior Court erred in vacating Rush's default judgment based on Civil Rule 60(b)(11) where no "other reason justifying relief from the operation of the judgment" existed.
3. The Superior Court erred in dismissing Rush's CPA claim on Partial Summary Judgment where genuine issues of material fact existed related to Top Notch's wrongful sale of Rush's vehicle to itself for \$1.00.

## **III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

This appeal raises the following questions of law:

1. Did the trial court have the authority, based on Civil Rule 60(b)(1), to vacate a default judgment based on excusable neglect after one-year had passed since its entry?
2. Did the trial court have the authority, based on Civil Rule 60(b)(11), to vacate a default judgment where no extraordinary circumstances existed?
3. Did the trial court have the authority to dismiss a CPA claim where genuine issues of material fact existed?

## **IV. STATEMENT OF THE CASE**

### **A. The tow, the impound and the illegal \$1.00 auction.**

On Saturday, August 27, 2011 at 4:45 p.m. Rush's 1983 Mercedes Benz, license number 786 – WZM was illegally towed, at the request of Steven Jablinske ("Jablinske") and taken to Top Notch's impound lot. At

the time of the unlawful taking, the vehicle was properly parked on a private property easement with permission. CP 237-238.

On Monday, August 29, 2011 Top Notch mailed a Notice of Impound to Rush's Mountlake Terrace residence. CP 238.

Approximately 4 days after the vehicle was impounded Rush contacted Top Notch and was told that he would have to pay \$700 before it would release his vehicle. At the same time Rush also contacted his attorneys to assist him in recovering his vehicle. CP 579.

On Friday, September 2, 2011 Rush's attorneys faxed a letter of representation to Blackburn asking that all communications be made through the law firm. CP 377.

On Wednesday, September 7, 2011 Rush received, and signed for, a certified letter and Notice of Vehicle Impound from Top Notch. CP 238.

On Friday, September 9, 2011 Rush, and his partner Carol Gilbert, hand delivered an Impound Hearing Request Form to Top Notch's manager (Blackburn's daughter), Nicole Blackburn, who signed the form and made a copy for Top Notch's files. That same afternoon Rush took the executed Hearing Request Form to the Everett District Court, paid a \$73.00 hearing fee and filed the Impound Hearing Request with the Court Clerk. CP 572.

On September 14, 2011 the Clerk of the Everett District Court

mailed via regular mail Notices of Civil Hearing to Top Notch, Steven Jablinske (the person who requested the tow) and Rush. CP 561.

On October 11, 2011 Blackburn sold Rush's vehicle (and 11 other impounded vehicles) to himself at "auction" for \$1.00 each. Although Blackburn had Rush's, and Rush's attorneys' contact information for more than a month prior to the sale, he failed to notify them that an auction was going to take place. CP 503-505.

On November 3, 2011 Rush, his attorneys and Jablinske appeared and presented evidence at an Impoundment Hearing in the Everett District Court pursuant to RCW 46.55 *et seq.* Blackburn failed to appear at the hearing. CP 377.

On November 15, 2011 the Honorable Tam T. Bui, Judge of the Everett District Court, issued a Memorandum Decision finding that Defendant Jablinske's private impoundment of Rush's Mercedes violated RCW 46.55.120. The court ruled

Under RCW 46.55.120(3)(e), Mr. Rush is entitled to the filing fee of \$73.00, and reasonable damages for loss of the use of his vehicle from 8/27/2011 - 10/11/2011, at \$25 per day, in the amount of \$1,150.00. CP 377.

Jablinske was ordered to pay Top Notch the impoundment charges incurred and Rush was allowed to redeem his vehicle from Top Notch without the payment of any costs. Shortly after Judge Bui entered her

Order Rush and his attorneys learned for the first time that Blackburn had sold Rush's vehicle to himself for \$1.00. CP 377, 382 ,383.

**B. The lawsuit - the default judgment against Top Notch and Blackburn.**

On December 16, 2011 Rush filed a lawsuit in King County Superior Court against his auto insurance company ("Hartford"), Jablinske and William I. Blackburn and Jane Doe Blackburn dba Top Notch Towing alleging that Top Notch had wrongfully sold his vehicle. CP 1-17, 146 .

On December 27, 2012 Rush filed his First Amended Complaint in King County Superior Court against William I. Blackburn and Jane Doe Blackburn dba Top Notch Towing again alleging that Top Notch had wrongfully sold his vehicle. CP 18-30, 146.

On January 4, 2012 copies of Rush's First Amended Complaint and Summons were served upon Defendant William I. Blackburn dba Top Notch Towing. CP 7, 8, 9, 10.

Blackburn/Top Notch was required to answer Rush's First Amended Complaint by January 25, 2012 and, as he did with the Impound Hearing Notice, simply ignored the Summons and failed to appear, plead or otherwise defend the lawsuit after proper service. CP 196-205.

On January 19, 2012 Rush filed his Second Amended Complaint in the King County Superior Court against William I. Blackburn dba Top

Notch Towing again alleging that Blackburn had wrongfully sold Rush's vehicle but also alleging a cause of action for Consumer Protection Act violations. CP 113-121.

Rush's Second Amended Complaint alleged, in part:

5.2 On August 27, 2011, defendant Top Notch took custody and control of Rush's 1983 Mercedes Benz automobile and towed it to its tow yard.

5.3 Defendant Top Notch wrongfully sold Rush's 1983 Mercedes Benz automobile at public auction prior to the issuance of Judge Bui's Impoundment Hearing Order. At the time of the auction, Top Notch had notice of the pending hearing.

5.4 Although plaintiff Rush's attorneys have demanded the immediate return of the above-referenced automobile, to date, defendant Top Notch has failed and refused to return plaintiff's 1983 Mercedes Benz automobile.

5.5 Top Notch's sale of the automobile when the hearing was pending was an unfair and deceptive act or trade practice, constituting a violation of the Consumer Protection Act. CP 113-121.

On May 6, 2012 copies of Rush's Second Amended Complaint and Summons were served upon Defendant William I. Blackburn dba Top Notch Towing. CP 125, 126.

Blackburn/Top Notch were required to answer Rush's Second Amended Complaint by May 26, 2012 but again simply ignored the Summons and failed to appear, plead or otherwise defend the lawsuit after proper service. CP 196-205, 206-208.

On March 26, 2012 a default judgment was entered against Jablinske. CP 108-110.

On July 20, 2012 a default judgment was entered against Blackburn/Top Notch. CP 206-208.

On July 26, 2013 Rush dismissed his claims against his automobile insurer, Hartford. CP 1002-1003, 1004-1005.

**C. The vacation of Rush's default judgment against Top Notch/Blackburn.**

On August 20, 2013 Rush's attorneys sent a letter to Blackburn/Top Notch enclosing a copy of the default judgment and demanding payment. Top Notch simply ignored the letter. CP 379 .

Thereafter, Rush began collection on his Default Judgment by bringing Supplemental Proceedings in the Snohomish County Superior Court. It was not until October 6, 2013, the date Top Notch was served with Supplemental Proceeding pleadings, did it make any response in this case. CP 379. On October 31, 2013 Top Notch/Blackburn brought a Motion to Vacate the Default Judgment. CP 215-226.

On November 13, 2013 the trial court vacated the default Judgment entered against Top Notch/Blackburn finding:

1. There is substantial evidence to support at least a prima facie defense to Plaintiff's claims for conversion and a Consumer Protection Act violation;

2. Defendant Blackburn's failure to timely appear in the action, and answer the Complaint, was due to mistake and excusable neglect arising from Plaintiff's insurer's agreement to compensate Plaintiff for the loss of his vehicle;

3. Defendant Blackburn acted with due diligence after learning about the entry of the default judgment; and

4. No substantial hardship will result to Plaintiff by having to litigate his claims on the merits.

The Court further finds that there are existing sufficient extraordinary circumstances to warrant relief under CR 60(b)(11).

CP 443-446, 445-446.

**D. The dismissal of Rush's CPA claim against Top Notch/Blackburn.**

Thereafter Top Notch/Blackburn moved for Partial Summary Judgment seeking dismissal of Rush's CPA claim. CP 451-452.

Top Notch did not dispute that 1) Rush paid all fees and followed all statutory requirements to challenge the illegal impound of his vehicle in Court, 2) before he purchased Rush's vehicle for \$1.00, Rush's attorneys notified Blackburn that they were representing Rush, 3) the District Court Clerk mailed Blackburn written notice of the Impoundment Hearing, 4) Blackburn wilfully failed to attend the Impoundment Hearing, 5) the District Court ruled in Rush's favor finding that the impound was illegal and the vehicle should be returned to Rush without cost, and 6)

Blackburn had auctioned countless other impounded vehicles to himself, his daughter, his nephew and his sister in similar sham sales for \$1.00 each. CP 453-464.

On June 20, 2014 the court granted Top Notch's Motion for Partial Summary Judgment stating:

“After due consideration of the matter, the Court finds that, as to Plaintiff's Consumer Protection Act Claim, there is no genuine issue as to any material fact and that Defendant is entitled to judgment as a matter of law. NOW, THEREFORE, IT IS ORDERED that Defendant's Motion for Partial Summary Judgment against Plaintiff be, and it is granted and that partial summary judgment be entered in favor of Defendant Blackburn, dismissing Plaintiff's Consumer Protection Act Claim with prejudice.”

CP 778-780.

This appeal followed. CP 781-793.

## V. ARGUMENT

### A. Standard of Review/vacation of default judgment.

There is no doubt that the judicial system prefers to resolve disputes on their merits rather than by default. However, if that were the only concern, there would be a rule that every default judgment could be vacated on motion of the defaulted party. That is not the rule.

“We also value an organized, responsive, and responsible judicial system where litigants acknowledge the jurisdiction of the court to decide their cases and comply with court

rules. As our Supreme Court recently noted, litigation is inherently formal. All parties are burdened by formal time limits and procedures.”

*TMT Bear Creek Shopping Ctr., Inc. v. Petco Animal Supplies, Inc.*, 140 Wn. App. 191, 199-200, 165 P.3d 1271 (2007) (citations omitted)

Our courts’ policy of disfavoring default judgments is constrained by applicable court rules, namely CR 60(b). In ruling on a motion to vacate, the trial court is accorded broad discretion. “Resolution of a motion to vacate a default judgment is addressed to the sound discretion of the trial court. We will not disturb the trial court’s disposition unless it clearly appears that the court abused its discretion or its exercise of discretion was manifestly unreasonable or based on untenable grounds or reasons.” *Hwang v. McMahon*, 103 Wn. App. 945, 949-50, 15 P.3d 172 (2000). Here, Judge Doyle based her decision on “tenable grounds” under CR 60(b)(11) to vacate Rush’s default judgment. Accordingly, that decision should be reversed. *See Mayer v. Sto Indus., Inc.*, 156 Wn.2d 677, 684, 132 P.3d 115 (2006) (trial court abuses its discretion when it bases its decision on “untenable grounds” or “untenable reasons,” which occurs when a court “relies on unsupported facts” or “applies the wrong legal standard”).

**B. Top Notch may not rely on CR 60(b)(1).**

Although Top Notch did not seek relief under CR 60(b)(1) in its Motion, the court listed, *sua sponte*, this rule as its first basis for vacating Rush's default judgment:

"Defendant Blackburn's failure to timely appear in the action, and answer the Complaint, **was due to mistake and excusable neglect** arising from Plaintiff's insurer's agreement to compensate Plaintiff for the loss of his vehicle;" (emphasis added).

When applicable, CR 60(b)(1) gives the trial court discretion to relieve a party from final judgment on the basis of:

(1) Mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order;

However, CR 60(b) also provides that a motion to vacate, "shall be made within a reasonable time **and for reasons (1), (2), or (3) not more than 1 year after the judgment**, order, or proceeding was entered or taken." (emphasis added). While a Superior Court often has authority to enlarge the time limitations in the Court Rules, CR 60(b) is a specifically designated exception to this rule: The Court "may not extend the time for taking any action under 60(b)." CR 6. In the case of *Friebe v. Supancheck*, 98 Wn.App. 260, 267, 992 P.2d 1014 (1999), the court noted that the defendant's failure to appear and subsequent default judgment "may be attributed only to mistake, inadvertence, or excusable neglect under CR 60(b)(1), and relief under that section is precluded due to the one-year

time limit.” The court in *Lee v. Western Processing Co., Inc.*, 35 Wn.App. 466, 468-469, 667 P.2d 638 (1983) agreed:

A motion to vacate a default judgment under CR 60(b)(1) must be brought within 1 year after the judgment was entered. . . Lee waited for the 1-year period to elapse before obtaining a writ of garnishment on January 19, 1981, thus denying Western the opportunity to base its motion on CR 60(b)(1)

Here, Rush’s default judgment was entered against Top Notch on July 20, 2012. Top Notch did not file its Motion to Vacate until October 29, 2013, over one year later. Accordingly, Top Notch was not entitled to vacation of the judgment for any of the grounds provided in CR 60(b)(1): mistakes, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment.

**1. There is nothing improper about waiting a year to execute a default judgment.**

Washington Courts have firmly established that waiting a year to enforce a default judgment for exactly this reason is a legitimate tactic in our adversarial system. *Friebe v. Supancheck*, 98 Wn.App. 260, 267, 992 P2d. 1014, 1017 (1999). “The Supanchecks suggest that the Freibes attempted a legal ‘sleight of hand’ in waiting over one year to collect on the default judgment. But waiting more than a year to execute a judgment is not characterized as unfair or deceptive.” *Id. Accord, Allison v. Boondock's, Sundecker's & Greenthumb's, Inc.*, 36 Wn. App. 280, 285-86, 673 P.2d 634 (1983): “Although Allison's counsel used the civil rules to

her advantage, e.g., in waiting more than a year to execute the judgment, we decline to characterize such action as unfair or deceptive.”

**C. Top Notch may not rely on CR 60(b)(11).**

The trial court improperly determined that vacating Rush’s judgment was proper under the catchall language of CR(b)(11). The use of CR 60(b)(11) “should be confined to situations involving extraordinary circumstances *not covered by any other section of the rule.*” *Yearout v. Yearout*, 41 Wn. App. 897, 902, 707 P.2d 1367 (1985) (emphasis added). The court’s Order states, “The Court further finds that there are existing sufficient extraordinary circumstances to warrant relief under CR 60(b)(11).” However, no specific extraordinary circumstances were listed as the basis of the court’s ruling.

Because Top Notch did not establish the existence of extraordinary circumstances that warranted the trial court’s exercise of discretion under CR 60(b)(11), the trial court based its decision on untenable grounds.

**D. The court improperly dismissed Rush’s CPA claim on Partial Summary Judgment.**

**1. Standard of Review for Summary Judgment.**

Appellate review of a trial court’s decision on summary judgment is *de novo*. *Jones v. Allstate Ins. Co.*, 146 Wn.2d 291, 300-01, 45 P.3d 1068 (2002). The appellate court performs the same inquiry as the trial court. *Id.*

The court considers the facts and the inferences from the facts in a light most favorable to the nonmoving party. *Id.* The court may not grant summary judgment unless the pleadings, affidavits, and depositions establish that there is no genuine issue of material fact and that the moving party is entitled to judgment as a matter of law. *Id.*

**a. Top Notch/Blackburn violated several towing statutes and committed unfair and deceptive acts.**

RCW 46.55.120 sets forth a detailed procedure for one who seeks to challenge the validity of an impound. It required Blackburn to provide notice to Rush of his owner's right to redeem the vehicle and wait until the Court issued its Order regarding the legality of the impound:

- (2)(a) The registered tow truck operator shall give to each person who seeks to redeem an impounded vehicle, or item of personal property registered or titled with the department, written notice of the right of redemption and opportunity for a hearing, which notice shall be accompanied by a form to be used for requesting a hearing . . . The registered tow truck operator shall maintain a record evidenced by the redeeming person's signature that such notification was provided.
- (b) Any person seeking to redeem an impounded vehicle under this section has a right to a hearing in the district or municipal court for the jurisdiction in which the vehicle was impounded to contest the validity of the impoundment or the amount of towing and storage charges . . . Upon receipt of a timely hearing request, the court shall proceed to

hear and determine the validity of the impoundment.

- (3)(a) The court, within five days after the request for a hearing, shall notify the registered tow truck operator, the person requesting the hearing . . . , and the person . . . authorizing the impound in writing of the hearing date and time.

(. . .)

- (c) At the conclusion of the hearing, the court shall determine whether the impoundment was proper, whether the towing or storage fees charged were in compliance with the posted rates, and who is responsible for payment of the fees . . .
- (e) If the impoundment is determined to be in violation of this chapter, then the registered and legal owners of the vehicle or other item of personal property registered or titled with the department shall bear no impoundment, towing, or storage fees . . . In addition, the court shall enter judgment in favor of the registered and legal owners of the vehicle, or other item of personal property registered or titled with the department, for the amount of the filing fee required by law for the impound hearing petition as well as reasonable damages for loss of the use of the vehicle during the time the same was impounded against the person or agency authorizing the impound.

Blackburn admits that if he knew, or should have known, that an Impoundment Hearing was set in the District Court, he should have attended the hearing, and he could not legally sell Rush's vehicle until he learned the Court's decision. But Blackburn claims that he did not receive

notice from the District Court Clerk of the Impoundment hearing. The Clerk's Declaration directly contradicts Blackburn's testimony.

Only the jury can resolve this factual dispute. In deciding this Motion, and at the time of trial, the trier of fact may consider how Blackburn's failure to appear or defend this lawsuit after being served with a Summons on two separate occasions, weighs upon his credibility on this issue. Clearly, if he received Notice of the hearing and ignored the Court proceeding, he violated RCW 46.55.120 and committed an unfair and deceptive act by selling Rush's vehicle to himself for \$1.00 when he lacked the statutory authority to do so.

RCW 46.55.130 states in relevant part:

- (1) If, after the expiration of fifteen days from the date of mailing of notice of custody and sale required in RCW 46.55.110(3) to the registered and legal owners, **the vehicle remains unclaimed . . .**, then the registered tow truck operator having custody of the vehicle shall conduct a sale of the vehicle at public auction . . .

This statute allows a registered tow truck operator to sell a vehicle in its possession only if the vehicle remains "unclaimed." A reasonable jury could conclude that Rush was in the process of redeeming / claiming his vehicle through the Court system when Blackburn ignored the Impound Hearing Notice and sold the vehicle to himself. Such conduct by

Blackburn violated RCW 46.55.130 and constitutes an unfair and deceptive act.

**2. The CPA must be liberally construed to ensure that its beneficial purposes are served.**

“The Washington Legislature passed the Consumer Protection Act for a laudable purpose: to protect Washington citizens from unfair and deceptive trade and commercial practices. *Dwyer v. J.L. Kislak Mortgage Corp.*, 103 Wn. App. 542,547-48, 13 P.3d 240 (2000), *rev. denied*, 143 Wn.2d 1024 (2001) (citations omitted). Accordingly, the CPA “shall be liberally construed [so] that its beneficial purposes may be served.” RCW § 19.86.920. *See also Hangman Ridge v. Safeco Title*, 105 Wn.2d 778, 785, 719 P.2d 531 (1986) (“This court continues to give effect to the intended broad construction of these terms.”); *Hockley v. Hargitt*, 82 Wn.2d 337, 350, 510 P.2d 1123 (1973); *State Farm v. Hunyh*, 92 Wn. App. 454,458,962 P.2d 854 (1998) (“The CPA is to be liberally construed to serve its purpose, *i.e.*, to protect the public, and foster fair and honest competition.”).

**3. Each of the five requisite elements for a CPA claim are present in this case.**

A CPA claim consists of the following five elements, and *only* the following five elements: (1) an unfair or deceptive act or practice; (2) occurring in the conduct of trade or commerce; (3) that affects the public

interest; (4) injury to plaintiffs business or property; and (5) causation. *See, e.g., Hangman Ridge*, 105 Wn.2d at 785,787, 792. All five CPA elements exist here.

**a. Unfair or Deceptive Act or Practice.**

This first element for a CPA claim can be satisfied by establishing that the practice or conduct in question constitutes either of two alternatives: that the conduct is deceptive, or that the conduct is unfair. *See, e.g., Blakev. Federal Way Cycle*, 40 Wn. App. 302, 310-11, 698 P.2d 578 (1985) (discussing unfairness as distinct from deceptiveness). Here, the conduct about which Rush complains – failing to wait for a determination as to the legality of an impound and “auctioning” the Rush vehicle to itself in a sham proceeding - plainly satisfies the *deceptive* conduct alternative for this first CPA element.

The following facts are either uncontroverted or facially apparent:

(i) Rush’s vehicle was legally parked on private party; (ii) Rush and the District Court provided Top Notch with written notice of the Impoundment Hearing; (iii) Top Notch was required by statute to wait to auction Rush’s vehicle until the District Court rendered its decision, and (iv) Top Notch, in violation of the Impoundment statute, sold Rush’s vehicle to itself for \$1.00.

To satisfy the “deceptive” element, a plaintiff need not establish an

intent to deceive. Nor, for that matter, need a plaintiff establish actual deception. Rather, to satisfy the “deceptive” element, a plaintiff need merely establish that the conduct has the *capacity to deceive* a substantial portion of the public. *E.g.*, *Hangman Ridge*, 105 Wn.2d at 785 (citations omitted); *accord Bowers v. Transamerica Title Ins.*, 100 Wn.2d 581,592, 675 P.2d 193 (1983). This purposefully low threshold reflects the beneficial purposes underlying the CPA, including the desire to deter deceptive conduct *before* injury occurs. *See Hangman Ridge*, 105 Wn.2d at 785 (citing 60 Wn. L. Rev; 925, 944 (1985) (“purpose of the capacity to deceive test is to deter deceptive conduct before injury occurs.”). In application, the “capacity to deceive” test essentially involves deciding whether reasonable people *could be* misled by the conduct or practice at issue. *See, e.g., Dwyer*, 103 Wn. App. at 547 (holding statement had the capacity to deceive because “a reasonable consumer *could* believe [the] declaration [in question] to mean [something that was not true]” (emphasis added).

Top Notch gave the impression when it accepted the hand delivered documents seeking an Impoundment Hearing from Rush that it would do nothing to interfere with his ownership of the vehicle. It broke that implied promise when it went through the “sham” auction process before the District Court rendered its decision.

Such conduct falls squarely within the “capacity to deceive” test. *E.g., Hangman Ridge*, 105 Wn.2d at 785; *Bowers*, 100 Wn.2d at 592; *Dwyer*, 103 Wn. App. at 547.

**b. Top Notch’s misconduct occurred in the conduct of trade or commerce.**

The CPA specifies that “[t]rade” and “commerce” includes not only “the sale of ... services,” but “any commerce **directly or indirectly** affecting the people of the State of Washington.” RCW § 19.86.010(2) (emphasis added). “Prior rulings by [the Washington Supreme Court] have broadly interpreted this provision to include every person conducting unfair acts in **any** trade or commerce.” *Nordstrom, Inc. v. Tampourlos*, 107 Wn.2d 735, 740, 733 P.2d 208 (1987) (emphasis added) (citing *Short v. Demopolis*, 103 Wn.2d 52,61,691 P.2d 163 (1984)).

Top Notch and Blackburn were clearly engaged in trade and commerce in Washington in connection with their towing business and “auction” scheme. Such facts easily satisfy the “trade or commerce” requirement.

**c. Top Notch’ conduct had the capacity to affect the public.**

“[W]hether the public has an interest in any given action is to be determined by the trier of fact from several factors, depending upon the context in which the alleged acts were committed.” *Hangman Ridge*, 105

Wn.2d at 789-90. Although the factors applicable vary and can depend on whether the situation involves a public transaction or a private dispute, no one factor is dispositive, nor is it necessary that all be present. *Id.* at 790-911. Instead, “[t]he [exemplar] factors ... represent indicia of an effect on public interest from which a trier of fact could reasonably find public interest impact.” *Id.* at 791 (emphasis added).

Under these guiding principles, the public interest element is satisfied here as a matter of law. The numerous factors that support such a conclusion include that: (i) the misconduct was performed in the course of the business activities of Top Notch/Blackburn; (ii) their acts are part of a pattern of conduct, as illustrated by the fact that on the day of the Rush transaction Top Notch auctioned 11 other cars **to itself** for \$1.00; (iii) they engaged in similar activities against other members of the Washington public, both before and after the Rush transaction; (iv) there is a great likelihood of continued repetition; (v) substantially the same “auctions” were conducted after impounds of other Washington citizens’ vehicles, thus affecting a great many people; and (vi) Top Notch/Blackburn each holds a substantially superior position because there is no cost for ignoring impound hearings in the past or in the future.

While each of the foregoing constitutes “indicia of an effect on public interest from which a trier of fact could reasonably find public

interest impact,” *Hangman Ridge*, 105 Wn.2d at 791, the requisite public interest is clearly established through the one unlawful transaction.

**d. Top Notch’s deceptive conduct caused plaintiff injury and damages.**

The fourth and fifth elements of a CPA claim are established by showing *either* causally-related injury *or* causally-related damages. *E.g.*, *Hangman Ridge*, 105 Wn.2d at 792. “[U]nder the CPA, injury is distinguished from damages.” *Sorrel v. Eagle Healthcare, Inc.*, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002) (citing *Mason v. Mortgage America, Inc.*, 114 Wn.2d 842, 854, 792 P.2d 142 (1990)). *See also Nordstrom*, 107 Wn.2d at 740 (“[injury] requirement is based on RCW [§] 19.86.090, which uses the term ‘injured’ rather than suffering ‘damages’). The injury element of a CPA claim is met “if the consumer’s property interest or money is *diminished* because of the unlawful conduct *even if the expenses caused by the statutory violation are minimal.*” *Mason*, 114 Wn.2d at 854 (emphasis added).

Here, the evidence establishes that the injury requirement is satisfied as a matter of law. Rush retained attorneys and incurred attorney fees, paid court hearing fees and lost the value of his Mercedes.

## VI. CONCLUSION

For the foregoing reasons, Rush’s default judgment against top

Notch/Blackburn should be reinstated. The court below erroneously vacated the judgment based on CR 60(b)(1) in violation of the express language of the rule finding Top Notch's failures to appear was excusable neglect. The court's vacation of the Rush default judgment based on unidentified extraordinary circumstances is also untenable.

In the alternative, the dismissal of Rush's CPA claim against Top Notch should be reversed and remanded to the trial court for further proceedings.

RESPECTFULLY SUBMITTED this 15th day of January, 2015.

LAW OFFICES OF MICHAEL T. WATKINS

The image shows two handwritten signatures in black ink. The signature on the left is a stylized, cursive signature that appears to be 'M. Watkins'. The signature on the right is also cursive and appears to be 'W. Watkins'.

Michael T. Watkins, WSBA No. 13677  
Counsel for Appellant

DECLARATION OF SERVICE

I certify that on January 15, 2015, I caused to be filed with the Court of Appeals, Division I, via messenger, the foregoing Opening Brief of Appellant (and copy), and caused to be delivered, via messenger, true and accurate copies to:

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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 Mountlake Terrace, Washington, this 15<sup>th</sup> day of January, 2015.

  
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Sonia Chakalo

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