

72424-0

72424-0

No. 72424-0

IN THE COURT OF APPEALS, DIVISION I  
OF THE STATE OF WASHINGTON

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NEIL RUSH,

Appellant,

v.

STEVEN JABLINSKE and JANE DOE JABLINSKE, and the marital community composed thereof, a Washington company; HARTFORD UNDERWRITERS INSURANCE COMPANY, a foreign insurance company, WILLIAM I. BLACKBURN and JANE DOE BLACKBURN, and the marital community composed thereof, dba TOP NOTCH TOWING

Respondents.

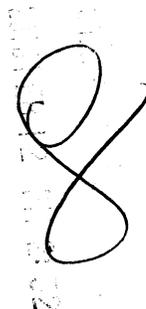
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**BRIEF OF RESPONDENTS**

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## I. INTRODUCTION

The dispute underlying this appeal is, ostensibly, about the value of an inoperable 1983 Mercedes to Plaintiff/Appellant Neil Rush, after Rush left the car outdoors at an acquaintance's property for over two years, supposedly for purposes of repair. After two years, the nonfunctioning car was towed; Rush refused to pay the towing fee to reclaim it; and instead, Rush hired a team of contingent fee attorneys to pursue the cause. Several years of litigation ensued over the supposed "harm" inflicted on Rush by his lost use of the inoperable car.

In fact, the history of this case reveals that the car itself actually did not matter to Rush in the slightest. When his attorneys initially won Rush the right to reclaim the car at no cost, Rush actually *declined* the opportunity. Instead, Rush, likely upon the guidance of his counsel, chose to embark on a more lucrative path. Instead of getting his car back, Rush pursued a bad faith insurance claim against his automobile insurer and conversion claims against Mr. Steven Jablinske—the perturbed landowner who arranged for the towing—and Mr. William Blackburn, the tow truck operator who towed, impounded, and eventually sold the car at auction. Later, Rush hastily amended his complaint, pasting on an additional claim against Mr. Blackburn's towing company under the Consumer Protection Act, Chapter 19.86 RCW (hereinafter "CPA").

Rush and his attorneys obtained what can only be called a “lucky break” when they entered a default judgment in the amount of \$71,000 against Mr. Blackburn based on the lost value of the inoperable car. More than \$60,000 of the judgment’s value arose directly from a conclusory allegation that a CPA violation had been committed. The judgment was entered without findings that are legally required for relief under the CPA. Apparently, there was not even a cursory review of the reasonableness of the attorney fees Rush’s attorneys requested, which would have revealed that large portions of the attorney fees awarded had been incurred by Rush in litigating other claims against other parties—the insurer and Mr. Jablinske—which had nothing at all to do with Mr. Blackburn.

When the judgment was reviewed in depth on a motion to vacate, the trial court determined the default judgment had to be vacated under CR 60(b), and that Mr. Blackburn must be given a chance to defend himself on the merits. Later, Mr. Blackburn won summary judgment dismissal of the CPA claim, because the merits of the claim were entirely in his favor.

In this appeal, the Appellant wants this Court to return him to the day when he obtained his “lucky break.” Appellant asks this Court to reinstate the default judgment against Mr. Blackburn, and to reverse the summary judgment order that dismissed the CPA claim against Mr. Blackburn.

Meanwhile, regardless of the results of this appeal, Mr. Rush has already recovered, from all three of the defendants, well over and above the value of his vehicle. Not only has Mr. Rush been made whole for the loss of an inoperable car, he has been made more than whole *three times over*. But Mr. Rush and his attorneys are not satisfied with that outcome. Hence, the present appeal. They wish for access to the additional benefits made available under the CPA: treble damages and attorney fees. This Court should reject what is a transparent attempt to grab for relief that should not be available on the facts presented.

Given the standards of review on appeal, Appellant is at a disadvantage with regard to his arguments for reversing the order vacating the \$71,000 default judgment. This Court will require the Appellant to show that the trial court abused its discretion when it vacated the default judgment. The standard is a high one. Appellant has not, and cannot, make a showing rising to that level. The trial court did not abuse its discretion when it gave Mr. Blackburn the opportunity to defend himself on the merits of Rush's claims.

Appellant will likewise be unsuccessful in his arguments to this Court against the order on summary judgment. The record, viewed in the light most favorable to the Appellant, permits no reasonable finding establishing all of the five elements necessary to establish a prima facie CPA claim.

Respondent Mr. Blackburn respectfully requests that this Court affirm both of the two trial court orders at issue in this appeal.

**II. RESTATEMENT OF ASSIGNMENTS OF ERROR & ISSUES IN THE CASE**

**A.** Did the trial court abuse its discretion by vacating a \$71,000 default judgment over the alleged “loss” of an abandoned junk vehicle, where over \$60,000 of the judgment arose from a meritless CPA claim?

1. Is a default judgment based upon incomplete, incorrect, or conclusory factual information subject to vacation under CR 60(b)(11)?

2. Was it improper for the trial court to consider the factors enunciated in White v. Holm in deciding a motion to vacate under CR 60(b)(11)?

3. Was the motion to vacate filed within a year of when the default judgment became final under CR 54(b)?

4. Was defendant Blackburn denied due process because the default judgment was inconsistent with the demands for relief set forth in the Second Amended Complaint?

**B.** Did the trial court properly dismiss the CPA claim on summary judgment?

1. Does the record show a genuine dispute of fact as to whether Mr. Blackburn committed an unfair or deceptive trade practice?

2. Does the record show a genuine dispute of fact as to whether the circumstances at issue demonstrate a public interest impact within the meaning of the CPA?

### **III. STATEMENT OF THE CASE**

**A. Background Facts.** In 1997, Plaintiff/Appellant Neil Rush purchased a 1983 Mercedes vehicle for the sum of \$8,500. (CP 465, 468.) By 2009, the vehicle had been driven over 184,000 miles. (CP 505.) On October 12, 2009, Rush left the vehicle with an acquaintance and car enthusiast, Doug Dunn, for some semi-professional restoration work. (CP 473.) That was the last time Rush drove the vehicle. (CP 474.) Rush allowed the license tabs to expire in 2010. (CP 238, 273, 580.)

Mr. Dunn was living at Richard Verheul's home in Lake Stevens, Washington. (CP 474-475.) Due to a lack of available parking space amid the old cars and other junk on the property, Dunn parked Rush's vehicle on a portion of adjacent property owned by Verheul's neighbor, Defendant Steven Jablinske. (CP 475.) This portion of Jablinske's property was subject to an Easement Agreement, which Dunn believed gave him the freedom to park the car there. (CP 52, 55-61.) Jablinske disagreed.

Almost two years later, on August 27, 2011, Jablinske contacted Top Notch Towing and authorized the towing of the vehicle parked on his property. (CP 503-504, 507-508.)

Top Notch Towing, owned by Defendant/Respondent William Blackburn, is properly licensed and registered with the Department of Licensing to legally tow, hold, and auction impounded vehicles. (CP 503.) Top Notch towed the car on the date of Jablinske's request, and held it at Top Notch's impound lot. As required by law, Top Notch then sent the vehicle owner, Rush, a "Notice of Vehicle Impound" within 24 hours of the impoundment. (CP 504, 513.) The Notice stated that a vehicle is considered abandoned if it is not claimed within 120 hours (5 days) from the time it was impounded. (CP 513.) In response to the Notice, Rush contacted Top Notch and was advised he needed to pay accumulated towing and storage fees of \$700 to recover his vehicle. (CP 486.) Rush chose not to pay the fee required to recover the vehicle. Rush later gave testimony admitting that he had the ability to pay the fee at the time of receiving the impound notice:

While not impossible, it would have been a hardship for me to retrieve my car from Top Notch . . . . (CP 486.)

On the fifth day after the towing, September 1, 2011, Top Notch sent Rush a "Custody and Sale of Abandoned Vehicle Notice," advising him that the vehicle would be sold at auction if it was not redeemed within 15 days (by September 16, 2011). (CP 504, 515-516.) Rush signed for receipt of the Notice by certified mail. (CP 515-516.) Instead of paying

the \$700 required to redeem his vehicle, Rush retained attorneys Watkins and McLean, who agreed to take his case on a contingent fee basis. (CP 486-487.)

Apparently, Rush then went to Top Notch to request a form that would allow him to request a Snohomish County District Court hearing on the legality of the impound. (CP 487.) A representative of Top Notch signed off on the form, verifying that the vehicle owner information was correct. (CP 504.) However, in giving Rush this form, Top Notch had no assurance that Rush would actually go forward and request a hearing. (CP 438-441, 504.) In fact, although towing companies are regularly asked for this form by disgruntled owners of impounded vehicles, it is extremely rare for the owners to actually request an impound hearing. (CP 438-439, 504.)

**B. The District Court Impound Hearing.** Rush's counsel obtained an impound hearing date of October 6, 2011. (CP 479.) Although the Snohomish County District Court Clerk gave a declaration that she mailed notice of that hearing date to Top Notch (CP 561), Mr. Blackburn never received that notice. (CP 505.) In any event, on the day before the scheduled hearing, Rush's counsel filed an ex parte motion for a continuance of the hearing date, advising the Court that "no one is available on October 6." (CP 494.) The hearing was continued to November 3, 2011. (CP 377.) There is nothing in the record establishing

that the Court Clerk, or anyone else, provided notice to Mr. Blackburn or Top Notch of the continued hearing date. Mr. Blackburn was not aware of the November 3, 2011 hearing date. (CP 505.)

The impound hearing did occur on November 3, 2011, in Snohomish County District Court. (CP 377.) Following the impound hearing, the District Court found that the towing was unjustified because the vehicle had been parked on the easement, and the terms of the easement did not foreclose Dunn from parking a vehicle there. (CP 289, 352-353, 622-623.) Damages were awarded against defendant Jablinske in favor of both Rush and Top Notch Towing. (CP 289, 291.) No findings were entered that Top Notch or Mr. Blackburn did anything improper. (CP 289, 291.) Rush sought an award of \$18,940 attorney's fees (CP 908) on the basis of an attorney's fees clause contained in the Easement Agreement that governed the property where his car had been parked. (CP 59.) The District Court properly denied Rush's motion for fees on the basis that Rush was not a party to the Easement Agreement, and therefore had no entitlement to fees under that agreement. (CP 291.)

**C. The Sale of the Vehicle at Public Auction.** Meanwhile, unaware that Rush was taking any further action relating to his vehicle after declining to pay the \$700 fee to reclaim it, Top Notch proceeded with the statutorily required procedures relating to abandoned vehicles. RCW 46.55.130 requires the tow truck operator to sell unclaimed abandoned

vehicles following expiration of a fifteen-day redemption period. After arranging for proper notice to Rush, by mail and publication (CP 250-251, 256), on October 11, 2011, Top Notch conducted an auction of twelve abandoned vehicles, including Rush's car. (CP 238, 253-258.)<sup>1</sup> There were no bidders for Rush's car at the auction, so Mr. Blackburn himself decided to purchase Rush's vehicle, as permitted by statute. (CP 255.) See RCW 46.55.130(2)(i).<sup>2</sup> It is Top Notch's practice to not pursue any form of deficiency judgment after purchasing abandoned vehicles. (CP 238.)

At the time Rush's vehicle was towed, and later sold, the vehicle was full of garbage and did not operate. (CP 238-239.) Mr. Blackburn opined that, based on its condition, the car had scrap value of a few hundred dollars. (CP 238-239, 259-276.)

Rush has stated that he last saw his vehicle on October 23, 2011. (CP 474.) That means he last saw the vehicle in Mr. Blackburn's scrapyards after the auction took place. Rush did not attempt to reclaim his

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<sup>1</sup> Mr. Blackburn complied with the statutory procedures for selling abandoned vehicles as set forth in RCW 46.55.130. He was not required to send notices to attorneys who claimed to have sent letters to Top Notch advising of their representation. Opening Brief of Appellant, at 5. In fact, Mr. Blackburn was unaware of Rush's representation by counsel.

<sup>2</sup> RCW 46.55.130(2)(i) provides: "If an operator receives no bid, or if the operator is the successful bidder at auction, the operator shall, within forty-five days, sell the vehicle to a licensed vehicle wrecker, hulk hauler, or scrap processor by use of the abandoned vehicle report-affidavit of sale, or the operator shall apply for title to the vehicle."

vehicle, and no one advised Top Notch or Mr. Blackburn that Rush was proceeding to an impound hearing. (CP 239, 505.)

Following the impound hearing, after obtaining a ruling in his favor that would allow him to reclaim his vehicle at no cost, Rush, with full knowledge that the car had been sold at auction, and that Mr. Blackburn had possession of it, again made no effort to reclaim the car. (CP 505.)

If what Rush truly wanted in this action was to get his car back, as he initially contended, he could have resolved this matter simply: by seeking to enforce the District Court's Order and reclaiming his vehicle from Top Notch's scrapyard, without paying the reclamation fee or any accrued storage fees, as the Order permitted. (CP 289.) Instead, it appears Rush was counseled to seek other, more valuable relief than the car itself. A flurry of litigation, all instigated by the towing of Rush's junk car, which continued to sit ignored in a scrapyard, then ensued.

**D. Proceedings in King County Superior Court.**

**1. Proceedings Prior to Entry of Blackburn Default Judgment.**

Rush commenced a superior court action in December 2011 against Jablinske and Top Notch for the lost value of the car, and against Respondent Hartford Underwriter Insurance Company ("Hartford"), Rush's automobile insurance carrier for the car, for wrongful denial of

coverage. (CP 3-11.) Later, Rush amended his complaint to add a CPA claim against Hartford only, for bad faith denial of coverage. (CP 18-27.)

Hartford had initially denied coverage on the basis that an impounded vehicle was not a covered loss under Rush's policy. (CP 797-798.) The insurer contended that Rush's counsel had deliberately created a "moral hazard" by not reclaiming the vehicle, and by intentionally stringing out the impound hearing beyond the 15-day statutory auction sale deadline, so that Top Notch would sell the car and establish a coverable loss for "conversion." (CP 800-803.) Nonetheless, Hartford paid Rush \$10,000 (less the \$250 deductible) for the loss of his car. (CP 279, 352-353.) This was a windfall to Rush—more than he had paid for the car in 1997, and far more than the present scrap value of the inoperable vehicle.

On the heels of this success, Rush's counsel then prepared and filed a Second Amended Complaint in January 2012, adding a conclusory CPA allegation against Top Notch. (CP 99-107.) Although Rush amended the complaint to add the CPA claim against Top Notch, Rush did not amend the prayers for damage sections of the complaint. That section of the Second Amended Complaint contained identical language pertaining to both defendant Jablinske and defendant Top Notch/Blackburn, to wit:

- A. Judgment against defendants Jablinske / Top Notch / Blackburn for conversion;
  - B. Judgment against defendants Jablinske / Top Notch / Blackburn in an amount to fairly compensate plaintiff for all special and general damages caused by the wrongful acts and omissions of the defendants;
  - C. Judgment against defendants Jablinske / Top Notch / Blackburn for attorney fees and costs as allowed by law; and
  - D. For such other relief as the Court deems just and equitable.
- (CP 106.)

In March 2012, Rush moved for and obtained a Default Judgment against Jablinske for the sum of \$11,838.70, based on Jablinske’s having wrongfully caused Rush’s car to be towed, which had led to its being sold at auction. (CP 108-110.) The amount of the judgment was based on a “blind” valuation by an insurance appraiser hired by Rush’s attorneys, who found that Rush’s vehicle should be valued at \$10,550—more than Rush had paid for the car 15 years earlier. (CP 89-90, 95.) The appraiser issued that opinion without ever seeing Rush’s vehicle or testing its condition or roadworthiness (and without observing that the car was

inoperable). (CP 475.)<sup>3</sup> Interest was also assessed on this “blind” valuation opinion. (CP 109.) Although there were additional parties and unresolved claims, the judgment did not include written findings, as required by CR 54(b), that “there is no just reason for delay and . . . an express direction for the entry of a judgment.” (CP 108-110.)

After Mr. Blackburn was served with the Second Amended Complaint, he had discussions with counsel for Hartford, who advised him that the insurance company would be paying Mr. Rush \$10,000 for the loss of his vehicle. (CP 239.) Believing that the insurance payment would make Rush more than whole, Mr. Blackburn, who is extremely unsophisticated with regard to legal proceedings, mistakenly believed he did not need to respond to the lawsuit. (CP 240.)

## **2. Entry of Default Judgment Against Blackburn.**

Unsatisfied with the Default Judgment against Jablinske in the sum of \$11,838.70, and the insurance payoff in the sum of \$10,000, in July 2012 Rush also moved for a default judgment against Mr. Blackburn/Top Notch. (CP 129-134.) Rush’s counsel’s declaration included the following conclusory allegation:

Defendant Top Notch violated several [sic] the Washington Consumer Protection Act when it unlawfully and deceptively, in the court [sic] of its

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<sup>3</sup> In arriving at a valuation opinion, Rush’s hired appraiser refused to consider a comparable sale of a similar make and model at the price of \$2,400, even though that comparable had 40,000 fewer miles than Mr. Rush’s vehicle. (CP 95.)

business, converted Plaintiff Rush's vehicle for profit.

(CP 147.) There were no facts alleged that addressed any of the required elements of a CPA claim, including the requirement of a showing of public interest impact. (CP 145-151.) Mr. Blackburn, still believing that this matter had been resolved by the \$10,000 payoff by Rush's insurance company, was not represented at the hearing on the motion.

The Court entered judgment against Blackburn/Top Notch in favor of Rush. As to the amount of the judgment, the items sought, and the items allowed by the Court were quite staggering:

a. The alleged value of the lost vehicle was based on the "blind" appraisal of \$10,550, including \$728.35 interest on that unliquidated sum. (CP 207.)

b. Rush added to the judgment the cost of obtaining the "blind" appraisal, \$1,931.25, which he designated as "Claims Dispute Resolution fees." (CP 170, 207.)

c. Based on his conclusory allegations as to a CPA violation, and nothing else, Rush's counsel added \$25,000 in treble damages, the maximum allowed under RCW 19.86.090. (CP 207.)

d. Rush's counsel also requested \$32,185 in attorney's fees, without stating any basis for an award of fees. (CP 148.) Presumably the fee recovery was sought under the unsubstantiated CPA claim. However, the voluminous billing sheets provided by

Rush's counsel made it clear that a substantial portion of these fees were attributable to the impound hearing, at which the Court had granted no relief against Top Notch. Other fees were incurred litigating with Hartford—again, legal efforts not directed toward Mr. Blackburn or Top Notch. Nonetheless, the entirety of Rush's legal team's fees were added to Mr. Blackburn's judgment. (CP 148, 169-195.)

e. Taxable costs included unrecoverable messenger fees and the District Court's "impound hearing fees" (which had already been awarded in the District Court Judgment). (CP 207.)

The total judgment against Mr. Blackburn/Top Notch on the lost vehicle, which was of extremely questionable value to begin with, was entered in the whopping sum of \$71,176.73. (CP 206-208.) Again, no CR 54(b) findings were entered in connection with the judgment entered against Mr. Blackburn. (CP 206-208.)

### **3. Proceedings After Entry of Mr. Blackburn's Judgment.**

Although Hartford paid Rush \$10,000 for his lost vehicle, Rush's counsel continued to litigate with Hartford seeking to recover punitive damages, emotional distress damages and attorney's fees for bad faith, totaling in excess of \$350,000. (CP 907-908.) In March 2013, Rush and Hartford filed cross motions for summary judgment. (CP 794-873.) Hartford asked Mr. Blackburn to submit a supporting declaration, which

Mr. Blackburn provided. (CP 239.) Mr. Blackburn described the poor condition of Rush's vehicle, and opined that it was worth about \$300. (CP 972-993.) During his communication with Hartford relating to the declaration, it was confirmed to Mr. Blackburn that Hartford had paid Rush's insurance claim. (CP 239.) Mr. Blackburn was still unaware that a judgment had been entered against Mr. Blackburn himself in the earlier proceeding.

The Court granted Hartford's summary judgment motion on April 26, 2013. (CP 998-999.) An "Order of Dismissal of All Claims Against Hartford" was later entered on July 30, 2013, the day Rush's claims against all remaining parties became final. (CP 1002-1003.)

Following the dismissal of his claims against Hartford, Rush pursued enforcement of both default judgments obtained against Jablinske and Mr. Blackburn. Jablinske elected to pay the judgment instead of incurring legal fees to overturn it. To date, Jablinske is making regular monthly payments to Rush to satisfy his \$11,838 judgment. (CP 476.)

To collect on the Blackburn default judgment, in August 2013 Rush's counsel filed an abstract of the judgment in Snohomish County Superior Court. (CP 277-278, 286-287.)

In October 2013, Mr. Blackburn was served with an order to appear for supplemental proceedings in Snohomish County. (CP 239, 281-284.) Not having the slightest idea what the order meant, he retained

undersigned counsel and learned, for the first time, that a default judgment had been entered against him for over \$71,000 based on the loss of Rush's car. (CP 239, 277-278.)

Immediately thereafter, undersigned counsel filed a Notice of Appearance in the King County matter. (CP 213-214.) After examining the abstract of judgment and the underlying King County Superior Court records on which the judgment was based, an Order to Show Cause was promptly obtained and served on Rush, along with a Motion to Revise or Vacate the default judgment. (CP 215-226, 228.) The motion was filed on October 23, 2013. (CP 215-226.)

**4. Blackburn Motion to Revise or Vacate Default Judgment.**

Mr. Blackburn's motion to vacate focused on the line items included in the default judgment that totaled \$71,176.73, despite being based on the loss of a junk car worth a few hundred dollars, at most. (CP 219-220.) Because the bulk of that judgment—the \$25,000 treble damages and more than \$32,000 in attorney fees—was based on a conclusory allegation that Mr. Blackburn had committed a CPA violation, Mr. Blackburn's motion was based on the catchall category of CR 60(b)(11) and case law supporting vacation under similar circumstances. (CP 222-224, 435-436.)<sup>4</sup>

As required by CR 60(e)(1), Mr. Blackburn's motion was supported by declarations of Mr. Blackburn and his counsel demonstrating facts that constituted defenses to both the CPA and conversion claims raised in Rush's complaint. (CP 237-276, 277-353.) As to the CPA claim specifically, Mr. Blackburn demonstrated that Rush had alleged no facts to support a claim that Top Notch had made any misleading or deceptive communication, nor that Top Notch's actions had the potential to, or did in fact, injure a substantial component of the consuming public. (CP 222-223, 436.)

At oral argument, the trial court focused on factors supporting vacation under CR 60(b)(11), as well as the "White factors," the four factors for vacation enunciated in White v. Holm, 73 Wn.2d 348, 352, 438 P.2d 581 (1968). (RP 11/13/13 at 5.) The Court found sufficient "irregularity" and "extraordinary circumstances" to warrant vacating the judgment under CR 60(b)(11). (RP 11/13/13 at 15; CP 443-444.) Not only this, the Court went further, additionally finding:

(a) "Substantial evidence" to support Mr. Blackburn having a "prima facie defense to the case" (RP 11/13/13 at 15; CP 443);

(b) Mr. Blackburn's failure to timely appear and answer arose from his genuine confusion concerning Hartford's decision to pay Rush the full amount of his claim, thus constituting mistake, inadvertence, surprise, or excusable neglect (RP 11/13/13 at 16; CP 444);

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<sup>4</sup> Blackburn also contended that the default judgment was subject to revision because neither that judgment nor the default judgment entered against Jablinske contained the findings required to make them final under CR 54(b). (CP 221-222; RP 11/13/13 at 5.)

(c) Mr. Blackburn acted with due diligence after his counsel reviewed the supplemental proceedings order and the underlying judgment on which it was based (RP 11/13/13 at 5-6, 16; CP 444); and

(d) There would be no substantial hardship to Rush, because vacating the default judgment “just puts the parties back at the beginning.” (RP 11/13/13 at 16; CP 444.)

The Court insisted that its Order must include all of its findings concerning the White factors. (RP 11/13/13 at 17; CP 444.) At no time in the proceedings did the Court mention CR 60(b)(1).

The Order Vacating Judgment was entered on November 14, 2013. (CP 443-444.)

**5. Blackburn’s Motion for Partial Summary Judgment.**

The vacation of the Order of Default and Default Judgment against Mr. Blackburn/Top Notch reinstated both the conversion claim and the CPA claims against them. After allowing Rush’s counsel to conduct extensive discovery, including examination of hundreds of Mr. Blackburn’s transaction files (RP 6/20/14 at 8), Mr. Blackburn moved for partial summary judgment, seeking dismissal of the CPA claim.<sup>5</sup>

In his motion, Mr. Blackburn asked the court to hold, as a matter of law, after viewing the facts in the light most favorable to Rush, that two

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<sup>5</sup> Mr. Blackburn recognized that there were issues of fact concerning his knowledge of the pending impound hearing at the time he auctioned Rush’s vehicle. Therefore, he did not seek summary dismissal of the conversion claim. By dismissing the CPA claim, however, the conversion claim, which involved the loss of a vehicle valued somewhere between \$300 and \$10,500, could be resolved in mandatory arbitration.

required elements of a CPA claim—(1) an unfair or deceptive practice and (2) a public interest impact—were not established. (CP 459-462, 769-770.) Specifically, Mr. Blackburn argued that this is a case which represents a confluence of rare occurrences that affected no one except Rush, and minimally at that. (RP 6/20/14 at 8.) Furthermore, whatever injury Rush suffered could have been avoided by reclaiming the vehicle or by enforcing the District Court’s order. (CP 462-463.) Moreover, there was nothing in the record that suggested that Mr. Blackburn had ever before sold an abandoned vehicle at auction before an impound hearing was completed, or that these unusual set of circumstances would likely be repeated. (RP 6/20/14 at 8, 14; CP 462.)

After hearing oral argument, Judge Doyle ruled as follows:

I don’t find that the public interest element of the Consumer Protection Claim is made, taking all of the evidence in the light most favorable to the nonmoving party. I don’t find that this is a situation that’s likely to be repeated or has been repeated. Mr. Blackburn’s actions in selling the vehicles to himself, as cited by Mr. Rush’s attorney Mr. Watkins, that’s not illegal. The issue is selling the vehicle before the impound hearing occurred in this case, and I find that it’s very unlikely to occur again. Therefore, the public interest impact element of a CPA claim is not met.

(RP 6/20/14 at 15.)<sup>6</sup> Following that oral ruling, the Court entered an Order Granting Defendant Blackburn’s Motion for Partial Summary

Judgment, dismissing the CPA claim. (CP 778-779.) The form of order complied with CR 56(h), designating all the evidence called to the attention of the trial court. (CP 778-779.)

**6. Settlement of the Conversion Claim.**

Following the dismissal of the CPA claim against Mr. Blackburn, the conversion claim against him, which had been transferred to mandatory arbitration (CP 779), was settled by a payment representing a compromise on the disputed value of Rush's vehicle.<sup>7</sup> (CP 1006-1007.) After that claim was dismissed with prejudice (CP 1006-1007), this appeal followed. (CP 781-793.)

**IV. ARGUMENT**

**A. Summary of Argument.**

Appellate courts generally defer to a trial court's decision to vacate a default judgment unless an abuse of discretion is manifestly evident. Colacurcio v. Burger, 110 Wn. App. 488, 494-95, 41 P.3d 506 (2002), review denied, 148 Wn.2d 1003 (2003).

In this case, the trial court's ruling vacating the default judgment was not a manifest abuse of discretion. The trial court recognized that the Blackburn judgment contained over \$60,000 in punitive damages and

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<sup>6</sup> It is unclear how Mr. Rush can contend that the Court ruled on summary judgment "[w]ithout stating its reasons." Brief of Appellant, at 2.

<sup>7</sup> Mr. Rush has thus been compensated for the loss of his vehicle by Hartford, by Mr. Jablinske, and by Mr. Blackburn.

attorney's fees based on an unsubstantiated and conclusory CPA claim. The trial court properly relied on CR 60(b)(11) and Caoette v. Martinez, 71 Wn. App. 69, 78, 856 P.2d 725 (1993), to vacate the judgment on that basis.

After determining there were sufficient grounds to vacate the judgment, the court additionally examined the factors for vacation enumerated in White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), and concluded that all of the factors had been met. While it may be unclear whether all the White factors *needed* to be assessed in a motion filed under CR 60(b)(11), there was clearly no error established by the trial court's consideration of these factors. Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005).

Because Mr. Blackburn's motion to vacate was filed within a year of when the default judgment became final, under CR 54(b) the decision to vacate could also be decided on the basis of mistake or excusable neglect (one of the White factors) and the grounds available under CR 60(b)(1).

Additionally, because the amount of the judgment far exceeded the amount prayed for in Rush's complaint, CR 54(c) and due process considerations suggested yet another basis on which to vacate Mr. Blackburn's judgment. Connor v. Universal Utils., 105 Wn 2d 168, 172, 712 P.2d 849 (1986).

Following vacation of the default judgment, the trial court examined the full depth of the CPA claim when addressing Mr. Blackburn's motion for partial summary judgment seeking dismissal of that claim. The trial court considered the required elements of a CPA claim, under Hangman Ridge Training Stable, Inc. v. Safeco Title Insurance Co., 105 Wn.2d 778, 719 P.2d 531 (1986), and concluded that the allegations against Mr. Blackburn, viewed in the light most favorably to Rush, affected no one except Rush. Rush could not establish a legislative declaration that a potential violation of the tow truck operator statute was a matter of public interest. Nor could Rush establish that the unique sequence of events presented in the case had ever occurred before, except for in this single, isolated incident. Therefore, the trial court properly concluded that there was no likelihood of repetition, and no public interest impact had been demonstrated.

For these reasons, both the Order to Vacate and the Order Granting Mr. Blackburn's motion for partial summary judgment should be affirmed.

**B. The Trial Court did not abuse its discretion by vacating the Order of Default and Default Judgment against Top Notch/Blackburn.**

**1. Standard of Review.**

Default judgments are disfavored, and therefore, a trial court should "exercise its authority 'liberally, as well as equitably, to the end that substantial rights be preserved and justice between the parties be

fairly and judiciously done.’’ Griggs v. Averbeck Realty, 92 Wn.2d 576, 582, 599 P.2d 1289 (1979) (quoting White v. Holm, 73 Wn.2d at 351). On appeal, a trial court’s disposition of a motion to vacate will not be disturbed unless it clearly appears that the trial court abused its discretion. Griggs, 92 Wn.2d at 582. Abuse of discretion means that the trial court exercised its discretion on untenable grounds or for untenable reasons, or that the discretionary act was manifestly unreasonable. Coggle v. Snow, 56 Wn. App. 499, 507, 784 P.2d 554 (1990). An appellate court is less likely to reverse a trial court decision that sets aside a default judgment than a decision which does not. Colacurcio 110 Wn. App. at 494-95.

Again, the primary concern before the trial court on a motion to vacate is whether the default judgment was just and equitable. This Court should evaluate the trial court’s decision by considering the unique facts and circumstances of this case. Showalter v. Wild Oats, 124 Wn. App. 506, 511, 101 P.3d 867 (2004). The trial court’s decision may be affirmed on any basis supported by the record. Ha v. Signal Elec. Inc., 182 Wn. App. 436, 446, 332 P.3d 991 (2014), review denied, 2015 Wash. LEXIS 112 (Feb. 4, 2015), citing Amy v. Kmart of Wash. LLC, 153 Wn. App. 846, 868, 223 P.3d 1247 (2009).

**2. CR 60(b)(11) Afforded Sufficient Grounds to Vacate the Default Judgment.**

CR 60(b)(11) allows relief from a judgment for “[a]ny other reason justifying relief from the operation of the judgment.” This rule is

identical to Federal Rule of Civil Procedure 60(b)(6). The United States Supreme Court has held that this rule “vests power in courts adequate to enable them to vacate judgments whenever such action is appropriate to accomplish justice.” Klapprott v. United States, 335 U.S. 601, 615, 93 L. Ed. 266, 277, 69 S. Ct. 384, 390 (1949), quoted in In Re Marriage of Flannagan, 42 Wn. App. 214, 221, 709 P.2d 1247 (1985), review denied, 105 Wn.2d 1005 (1986).

In Caoette v. Martinez, the Court affirmed vacating the entry of a default judgment based on a negligent entrustment claim when the plaintiff’s affidavit failed to provide facts regarding ownership of the vehicle. With respect to CR 60(b)(11), the Court held as follows:

In our judgment, that portion of the rule supports vacation of a default order and judgment that is based upon incomplete, incorrect or conclusory factual information.

Caoette, 71 Wn. App. at 78 (citing State v. Scott, 92 Wn.2d 209, 595 P.2d 549 (1979)); see also Friebe v. Supancheck, 98 Wn. App. 260, 268, 992 P.2d 1014 (1999) (interpreting Caoette as requiring the party seeking default judgment to set forth facts supporting, at a minimum, each element of a particular claim); Kaye v. Lowe’s HIW, Inc., 158 Wn. App. 320, 329-30, 242 P.3d 27 (2010) (citing Caoette for the rule that a plaintiff cannot rely on unanswered conclusory allegations of a claim to recover damages under that claim).

In this matter Judge Doyle recognized that over \$60,000 of the Blackburn judgment was based on a conclusory allegation that Mr. Blackburn's sale of the vehicle constituted a CPA violation. The balance of the judgment was based on a "blind appraisal," accrued interest on the opinion of value, unrecoverable appraisal fees, and additional costs already awarded in other proceedings.

Under these unique facts and circumstances, there were sufficient grounds to conclude that equity and justice demanded that Mr. Blackburn should be granted relief from the \$71,000 default judgment, and should be allowed to litigate the matter on the merits.

**3. The Trial Court Committed No Error In Addressing the White Factors.**

The case of White v. Holm, 73 Wn.2d 348, 438 P.2d 581 (1968), was decided based on language contained in former RCW 4.32.240, which preceded CR 60(b) and which specified grounds for vacation of a default judgment. Under White, when considering a motion to vacate, the trial court should determine whether the movant has demonstrated four factors:

The primary factors are: (1) the existence of substantial evidence to support, at least prima facie, a defense to the claim asserted; (2) the reason for the party's failure to timely appear, i.e., whether it was the result of a mistake, inadvertence, surprise or excusable neglect. The secondary factors are: (3) the party's diligence in asking for relief following notice of the entry of the default; and (4) the effect of vacating the judgment on the opposing party.

White, 73 Wn.2d at 352; see also Calhoun v. Merritt, 46 Wn. App. 616, 619, 731 P.2d 1094 (1986); Showalter, 124 Wn. App. at 511.

Notwithstanding the advent of CR 60(b), which presently covers the grounds and procedures for vacating all judgments, including default judgments, Washington courts still rely on the White factors as the governing principles applicable to a defendant's motion to vacate a default judgment. Topliff v. Chicago Ins. Co., 130 Wn. App. 301, 122 P.3d 922 (2005), review denied, 157 Wn.2d 1018 (2006).

In Topliff, the Court initially held that a default judgment was properly vacated pursuant to CR 60(b)(11) because of an irregularity. Topliff, 130 Wn. App. at 305-06. After finding grounds existed to warrant relief under CR 60(b)(11), the Court went on to analyze the White factors, including the existence of a meritorious defense. Id. at 308.<sup>8</sup> The submittals of Mr. Blackburn, establishing that there was no showing that Rush ever had a legitimate CPA claim, and that Mr. Blackburn could establish that he never received notice of the impound hearing, certainly supported the trial court's finding that at least a prima facie defense was established. See Pfaff v. State Farm, 103 Wn. App. 829, 835, 14 P.3d 837 (2000), review denied, 143 Wn.2d 1021 (2001) (holding that when a trial court considers whether a CR 60(b) movant has produced "facts

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<sup>8</sup> The requirement of establishing a meritorious defense is expressly incorporated into all CR 60 motions through CR 60(e)(1).

constituting a defense,” the trial court must take the evidence, and reasonable inferences therefrom, in the light most favorable to the movant, i.e., the defendant).

While it can certainly be argued that the trial court’s finding of facts supporting a defense along with equitable grounds under CR 60(b)(11) was sufficient, without more, to vacate the Blackburn judgment, the court’s decision to additionally examine the balance of the White factors was clearly not an error constituting an abuse of discretion. See Topliff, supra.

The court’s findings that Mr. Blackburn’s failure to appear was due to a mistaken understanding that Hartford’s payment would resolve the matter was reasonably within the court’s discretion. See Ha v. Signal Elec., 182 Wn. App. at 451. Likewise, the finding that Mr. Blackburn acted with due diligence by promptly filing his motion to vacate shortly after he became aware of the judgment was reasonable under the circumstances. Id. at 454.<sup>9</sup> Finally, it was reasonable to conclude that Rush, who had already received full compensation from Hartford, and a collectible judgment against Mr. Jablinske, suffered no prejudice by having to litigate his claims against Blackburn on their merits. Id. at 455.

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<sup>9</sup> CR 60(b) requires that all motions “shall be made within a reasonable time.” CR 60(b). Consideration of due diligence is thus appropriate on a motion filed under any subsection of CR 60(b), including CR 60(b)(11).

Rush recognizes that motions filed under CR 60(b)(11) are not subject to a one year time limitation. CR 60(b). So as to benefit from a one-year time limitation, Rush therefore wishes to construe Mr. Blackburn's motion as a CR 60(b)(1) motion. Accordingly, Rush contends that the trial court's mere consideration of "mistake, inadvertence, surprise or excusable neglect" in this matter automatically converted Mr. Blackburn's CR 60(b)(11) motion into a CR 60(b)(1) motion, which Rush claims wasn't available to Mr. Blackburn based on the passage of more than one year. Rush ignores the facts that Mr. Blackburn never sought relief under CR 60(b)(1), and that the trial court entered no findings whatsoever with regard to CR 60(b)(1).

It was not error for the trial court to consider the White factors on a motion filed under CR 60(b)(11). Topliff, supra.

**4. The Motion to Vacate Could Have Been Decided on the Basis of CR 60(b)(1).**

Rush contends that the motion to vacate could not have been brought or decided under CR 60(b)(1) because it was not brought within one year of when the default judgment was entered. Mr. Rush loses sight of the fact that at the time Mr. Blackburn's default was entered, there were pending unadjudicated claims against Hartford.

CR 54(b) governs the finality of judgments where lawsuits involve multiple claims and multiple parties. See also Fluor Enters. Inc. v. Walter Constr. Ltd., 141 Wn. App. 761, 766-67, 172 P.3d 368 (2007). Without

written findings supporting a determination “that there is no good reason for delay,” neither the Blackburn default judgment nor the Jablinske default judgment could be considered final judgments for purposes of appealability or enforceability, until the remaining claims against Hartford were resolved. Both of these judgments were subject to revision. CR 54(b).

The order dismissing all of Rush’s claims against Hartford was entered on July 30, 2013. Until that order was entered, neither the Jablinske judgment nor the Blackburn judgment could be considered final.<sup>10</sup>

Mr. Blackburn’s motion to vacate was filed on October 23, 2013, within three months of his default judgment becoming final. Accordingly, the motion could have been filed under CR 60(b)(1), on the basis of “mistake, inadvertence, surprise, excusable neglect or irregularity in obtaining a judgment or order.” CR 60(b)(1). Because there was a sufficient basis in the record to support such findings in this case, this Court could affirm Judge Doyle’s decision on that basis as well. Ha, 182 Wn. App. at 446.

**5. Mr. Blackburn was denied due process because the default judgment was inconsistent with the demands for relief set forth in the Complaint.**

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<sup>10</sup> In his opposition to the motion to vacate, Rush conceded that his judgment against Mr. Blackburn did not become final until claims against Hartford were dismissed. (CP 361-362.)

A court has no jurisdiction to grant relief beyond that was sought in the complaint. Ware v. Phillips, 77 Wn.2d 879, 884, 468 P.2d 444 (1970) citing State ex rel Adams v. Superior Court, 36 Wn.2d 868, 872, 220 P.2d 1081 (1950). CR 54(c) provides:

A judgment by default shall not be different in kind from *or exceed in amount that prayed for in the demand* for judgment.

CR 54(c) (emphasis added); see also Trinity Universal Ins. Co. of Kan v. Ohio Cas. Ins. Co., 176 Wn. App. 185, 312 P.3d 976 (2013), review denied, 179 Wn.2d 1010 (2014).

Washington courts recognize that a defendant has the right to allow a default to be taken against him, secure in the knowledge that the judgment will not exceed the demand in the complaint. Conner v. Universal Utils., 105 Wn.2d 168, 172, 712 P.2d 849 (1986). Entry of a judgment inconsistent with the demand of the complaint is considered to be a denial of procedural due process of law, in violation of Article One, Section 3 of the Washington Constitution. Ware, 77 Wn.2d at 884; Conner, 105 Wn.2d at 173.

Rush's demands for relief against Blackburn set forth in the Second Amended Complaint did not mention punitive damages or attorney's fees under the CPA.<sup>11</sup> Furthermore, the demand for damages

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<sup>11</sup> The demand for CPA damages was expressly reserved for Hartford. (CP 105-107.)

against Blackburn was identical with the demand for damages against Jablinske. At the time Mr. Blackburn was served with the Second Amended Complaint, the default judgment had already been entered against Jablinske, for the sum of \$11,838.70.

Based on what was available in the court record at the time, Mr. Blackburn would have had every reason to expect that a default judgment against him would not have exceeded the amount of the Jablinske judgment. The entry of a judgment that included over \$60,000 in additional line items was a violation of Mr. Blackburn's due process rights. That judgment should be considered void. Ware, 777 Wn.2d at 884-85. And because it was void, it was certainly not an abuse of discretion for the trial court to vacate it.

**C. The Trial Court Properly Dismissed the CPA Claim on Summary Judgment.**

**1. Standard of Review.** When reviewing a summary judgment order, the appellate court undertakes the same inquiry as the trial court. Thompson v. Peninsula Sch. Dist., 77 Wn. App. 500, 504, 892 P.2d 760 (1995). Summary judgment is proper when there are no genuine issues of material fact and the moving party is entitled to a judgment as a matter of law. CR 56(c). The moving party bears this burden of proof. LaPlante v. State, 85 Wn.2d 154, 158, 531 P.2d 299 (1975). "A material fact is one upon which the outcome of the litigation depends." Barrie v. Hosts of Am., Inc., 94 Wn.2d 640, 642, 618 P.2d 96 (1980). The

nonmoving party cannot rely on speculation but must assert specific facts to defeat summary judgment. Seven Gables Corp. v. MGM/UA Entm't Co., 106 Wn.2d 1, 13, 721 P.2d 1 (1986). All facts and inferences are considered in the light most favorable to the nonmoving party. Ashcraft v. Wallingford, 17 Wn. App. 853, 565 P.2d 1224 (1977).

## **2. Requisites for a CPA Claim.**

To prevail on a CPA claim, a plaintiff must show each of the following elements: (1) an unfair or deceptive practice; (2) in trade or commerce; (3) that impacts the public interest; (4) which causes injury to the party in his business or property; and (5) which injury is causally linked to the unfair or deceptive act. Indus. Indem. Co. v. Kallevig, 114 Wn.2d 907, 920-21, 792 P.2d 520 (1990). Failure to meet any one of these elements under the CPA is fatal to the claim. Sorrel v. Eagle Healthcare, 110 Wn. App. 290, 298, 38 P.3d 1024 (2002), review denied, 147 Wn.2d 1016 (2002).

In this matter, Rush had no consumer or business relationship with Top Notch wherein he was “vulnerable to exploitation.” Goodyear Tire & Rubber Co. v. Whiteman Tire, 86 Wn. App. 732, 744-45, 935 P.2d 628 (1997) (citing Hangman Ridge, 105 Wn.2d at 790), review denied, 133 Wn.2d 1033 (1998). While that might not be fatal to his CPA claim, Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (2009), reconsideration denied, Rajvir v. Farmers Ins. Co., 2009 Wash. LEXIS

1183 (2009), Rush nevertheless had the burden to establish both (1) an unfair or deceptive trade practice and (2) a public interest impact, along with injury and causation. As explained by the Supreme Court:

The purpose of the CPA is to ‘protect the public.’ - RCW 19.86.920. ‘[I]t is the likelihood that additional plaintiffs have been or will be injured in exactly the same fashion that changes a factual pattern from a private dispute to one that affects the public interest.’ Hangman Ridge, 105 Wn.2d at 790, 719 P.2d 531. ‘[T]here must be shown a real and substantial potential for repetition, as opposed to a hypothetical possibility of an isolated unfair or deceptive act’s being repeated.’

Michael v. Mosquera-Lacy, 165 Wn.2d 595, 604-05, 200 P.3d 695 (2009); see also Dwyer v. J.I. Kislak Mortgage, 103 Wn. App. 542, 548, 13 P.3d 240 (2000) (“The CPA should not be construed to prohibit practices reasonably related to the development and preservation of business, or which are not injurious to the public interest”); see also RCW 19.86.920.

### **3. The Record Does Not Show Top Notch Committed an Unfair or Deceptive Act or Practice.**

Rush cannot create an issue of material fact by simply alleging that Mr. Blackburn’s actions constituted an unfair or deceptive trade practice. Where there is no dispute about what the parties did, “whether the conduct constitutes an unfair or deceptive act can be decided as a question of law.” Peterson v. Kitsap Cmty Fed. Credit Union, 171 Wn. App. 404, 425, 287 P.3d 27 (2012), quoting Leingang v. Pierce County Med. Bureau, Inc., 131 Wn.2d 133, 150, 930 P.2d 288 (1997).

The CPA does not define the term “unfair,” but the interpretative case law has established guiding criteria. For example, in Blake v. Fed. Way Cycle Ctr, 40 Wn. App. 302, 698 P.2d 578 (1985), review denied, 104 Wn.2d 1005 (1985), the Court was guided by the following three criteria utilized by the Federal Trade Commission to determine whether a practice or act is “unfair”:

(1) Whether the practice, without necessarily having been previously considered unlawful, offends public policy as it has been established by statutes, the common law or otherwise -- whether, in other words, it is within at least the penumbra of some common-law, statutory, or other established concept of unfairness; (2) whether it is immoral, unethical, oppressive, or unscrupulous; (3) whether it causes substantial injury to consumers (or competitors or other business men).

Blake, 40 Wn. App. at 310 (quoting Federal Trade Comm’n v. Sperry & Hutchinson Co., 405 U.S. 233, 244 n.5, 92 S. Ct. 898, 31 L. Ed. 2d 170 (1972)). Current federal law suggests a “practice is unfair [if it] causes or is likely to cause substantial injury to consumers which is not reasonably avoidable by consumers themselves and not outweighed by countervailing benefits.” Federal Trade Commission Act of 1914, 15 U.S.C. § 45(n), quoted in Klem v. Wash. Mut. Bank, 176 Wn.2d 771, 787, 295 P.3d 1179 (2013).

The CPA does not define the term “deceptive,” but “implicit in that term is ‘the understanding that the actor misrepresented something of material importance.’” Hiner v. Bridgestone/Firestone Inc., 91 Wn. App.

722, 730, 959 P.2d 1158 (1998), rev'd on other grounds, 138 Wn.2d 248 (1999), cited in Stephens v. Omni Ins. Co. 138 Wn. App. 151, 166, 159 P.3d 10 (2007), aff'd, Panag v. Farmers Ins. Co. of Wash., 166 Wn.2d 27, 204 P.3d 885 (2009).

In this matter, Top Notch's actions were neither "unfair" nor "deceptive." Top Notch followed the procedures set forth by statute. Top Notch gave proper notice that Rush's vehicle would be auctioned after the 15-day redemption period expired. The fact that Top Notch provided a form to Rush that would enable him to request an impound hearing did not establish that a hearing would be scheduled. There was no promise, express or implied, that a sale would be delayed indefinitely while Rush's counsel strung out the impound hearing process. Top Notch had no notice that an impound hearing had been requested, or that Plaintiff's counsel unilaterally had the proceedings continued until after the scheduled auction date. Even if the court concludes that Top Notch should have known about the hearing because Rush requested a hearing form, Top Notch's conduct did not have the capacity to deceive a "substantial portion of the public." See Hangman Ridge, 105 Wn.2d at 785-86.

The Court can conclude, as a matter of law, that Mr. Blackburn committed no unscrupulous act, and that he made no misrepresentations, with or without an intent to deceive. Furthermore, any injury allegedly suffered by Rush could have been reasonably avoided by (1) redeeming

the vehicle for a nominal sum, (2) confirming with Mr. Blackburn that a hearing was scheduled or re-scheduled, or (3) seeking enforcement of the District Court's order, which would have required Top Notch to release the vehicle, still in Mr. Blackburn's possession, to Mr. Rush without charge.

The court can find, as a matter of law, that there was no unfair or deceptive act.

**4. The Trial Court Correctly Concluded that Public Interest Impact Was Not Established.**

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 interest 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.

**a. No Per Se CPA Violation Can Be Established.**

Rush contends that Mr. Blackburn "violated several towing statutes" by conducting a sale of Rush's vehicle six weeks after notice of sale was provided to Rush. Brief of Appellant, at 15-18.<sup>12</sup> However, there

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<sup>12</sup> Rush contends that Mr. Blackburn admitted that he "could not legally sell Rush's vehicle until he learned the [District] Court's decision." Brief of Appellant, at 16.

is no express provision contained in RCW 46.55.120, the statute governing such sales, that prohibits a tow truck operator from selling an abandoned vehicle in the manner done by Mr. Blackburn. In fact, state law mandates that unclaimed abandoned vehicles be sold at auction promptly after the 15-day redemption period expires:

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 . . . .

RCW 46.55.130 (emphasis added).

Rush seeks in this appeal, as he sought below before the trial court, to persuade the Court that asking a tow truck operator for an impound hearing form is the same as “reclaiming” the vehicle, for purposes of the statute. There is nothing in the statutory scheme to support that contention. Although the tow truck operator statute’s definition section does not specifically define what it means to “reclaim” or “redeem” an impounded vehicle, the redemption provision makes plain that in order to reclaim or redeem the vehicle, one must pay the operator’s redemption fee:

The vehicle . . . shall be released upon the presentation to any person having custody of the vehicle of commercially reasonable tender sufficient to cover the costs of towing,

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However, the record in this case contains no such admission because Mr. Blackburn didn’t know the District Court had scheduled a hearing.

storage, or other services rendered during the course of towing, removing, impounding, or storing any such vehicle.

RCW 46.55.120(1)(f) (emphasis added). The undisputed actions taken by Rush in this case establish that he deliberately declined to reclaim his vehicle, despite being offered more than one opportunity to do so, and despite his admission that he did have the financial wherewithal to do so.

In any event, whether or not Mr. Blackburn's actions violated the tow truck operator statute, there is nothing contained in that statute, RCW Chapter 46.55, that declares a violation of any of its provisions either (1) constitutes a violation of the CPA or (2) impacts the public interest. The statute's failure to include such a declaration is meaningful in light of a clear legislative trend toward specifically identifying CPA violations, as seen within a variety of statutes.<sup>13</sup> The redemption statute was revised by the Legislature as recently as 2013, by which time this legislative trend was already in full swing. LAWS OF WASHINGTON, ch. 150, sec. 1 (2013). There is no language in the statute that implies or suggests that a CPA claim could be pursued for a tow truck operator's failure to comply with

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<sup>13</sup> In recent years, state lawmakers have specifically declared the violation of many consumer protection statutes to constitute an "unfair or deceptive act in trade or commerce," or an "unfair trade practice." Examples of such statutes include: RCW 19.09.340 (charitable solicitations) (1973); RCW 19.105.500 (camping clubs) (1982); RCW 19.102.020 (chain distribution schemes) (1973); RCW 19.110.170 (business opportunities) (1981); RCW 18.28.185 (debt adjustment) (1979); RCW 18.39.350 (embalming) (1982); RCW 58.19.270 (land development) (1973); RCW 63.10.050 (consumer leases) (1983); RCW 64.36.170 (time-share offerings) (1983). See also RCW 61.24.135 (deed of trust act) and RCW 19.100.190 (Franchise Investment Protection Act).

the impound requirements. Unless there is a specific legislative declaration of a public interest, the public interest requirement of the CPA is not per se satisfied, even if the defendant is engaging in an act or practice that could be considered unfair or deceptive. Haner v. Quincy Farm Chems., 97 Wn.2d 753, 762, 649 P.2d 828 (1982).

**b. There Was No Evidence That the Unusual Circumstances of this Case Are Capable of Repetition.**

There is nothing in the record to suggest that Top Notch's actions in this matter injured anyone besides the Plaintiff Rush, or that they might have the capacity to injure some other person or persons in the future. RCW 19.86.093(3). This was an isolated transaction involving unique circumstances. To begin with, it is extremely rare that unlawful impound hearings are sought involving abandoned vehicles, and even more rare that a court makes a finding or concludes that a towing was illegal. It is also extremely unusual for the owner of an illegally towed vehicle to elect not to redeem his or her vehicle, and to allow the car to be auctioned after receiving notice of a scheduled sale. And the scheduling mishap in this case is also unlikely of repetition, involving an ex parte continuation of the impound hearing, without notice of the continuance being given to the tow operator in question, and which caused the impound hearing to occur after the scheduled sale. It is also unlikely to be repeated that the attorney who obtained the hearing continuance ex parte would then fail to provide notice of the hearing continuance to the tow truck operator.

Even if the Court concludes that Mr. Blackburn should be charged with constructive notice that an impound hearing was in fact requested, and that it was improper to sell the vehicle before the hearing was continued and then completed, Rush did not establish that this unique sequence of events ever occurred before, or would ever be likely to occur again after the sale of Rush's vehicle. There is no basis in the record to conclude that these unique circumstances, and the scheduling and notice errors that Rush and his attorneys were complicit in creating, are capable of repetition.

That was the basis on which Judge Doyle assessed the facts and concluded, as a matter of law, that the isolated set of circumstances "were very unlikely to occur again," and the "public interest impact of a CPA claim is not met." (RP 6/20/14 at 15). This Court should reach the same conclusion.

In the trial court and continuing in this appeal, Rush seeks to shift focus from the material facts of the case—the sale of the vehicle before the impound hearing was completed—to facts that are and were immaterial to Blackburn's motion for partial summary judgment, such as the number of abandoned cars Mr. Blackburn sells at auctions, the identity of the purchasers, and the amounts paid at the auction.

With regard to whether Top Notch properly conducted the auction of abandoned vehicles, RCW 46.55.130(2)(i) provides, in pertinent part:

If an operator receives no bid, or if the operator is the successful bidder at auction, the operator shall, within forty five days sell the vehicle . . . or apply for title of the vehicle.

Therefore, as Judge Doyle recognized, it was certainly not illegal for Mr. Blackburn to bid and purchase at the auction. Mr. Blackburn is permitted to sell a dozen, or even hundreds of vehicles at the same time, because it would be impractical for a tow truck operator to be required to advertise for, and set up an auction for just one or two cars.

The trial court properly recognized that regardless of how many vehicles Mr. Blackburn has sold and purchased, in only one case—this one—has he sold a vehicle before an impound hearing was completed. That single action, which resulted from a genuine miscommunication, affected no one except Mr. Rush.

## V. CONCLUSION

This appeal is not about whether Mr. Blackburn's sale of the vehicle at the time he sold it was lawful or proper. To the extent the propriety of the sale at the time it was held was once at issue in this dispute, that issue was resolved when Mr. Rush compromised and settled his conversion claim against Mr. Blackburn. This appeal is about whether Mr. Blackburn committed a CPA violation. The trial court properly concluded he did not.

