No. 46442-0-II

IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II

JAMES SWAIN, Individually

Appellant,

v.

SUREWAY, INC., a Washington Corporation

Respondent.

OPENING BRIEF OF APPELLANT

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I. ASSIGNMENTS OF ERROR

Assignments of Error

Issue No. 1: The trial court erred as a matter of law when it denied the appellant's[1] motion for a mistrial after the respondent[2] repeatedly referenced an arbitration proceeding during testimony before a jury on a trial de novo.

Issue No. 2: The trial court erred as a matter of law when it dismissed Swain's claims against Sureway under the Automotive Repair Act ("ARA") and the Consumer Protection Act ("CPA").

Issues Pertaining to Assignments of Error

Issue No. 1:

a. Whether a trial court errs as a matter of law if it fails to give effect to the plain language of Mandatory Arbitration Rule ("MAR") 7.2(b)(1) and MAR 7.2(b)(2)[3] when it denies a motion for a mistrial; and

b. Whether a trial court has discretion to deny a motion for a mistrial under MAR 7.2(b)(1) and MAR 7.2(b)(2) when a witness repeatedly references an arbitration proceeding during testimony before a jury on a trial de novo.

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[1] Hereinafter referred to as "Swain."

[2] Hereinafter referred to as "Sureway."

[3] MAR 7.2(b)(1) provides: "The trial de novo *shall* be conducted as though no arbitration proceeding had occurred. *No reference shall* be made to the arbitration award, in any pleading, brief, or other written or oral statement to the trial court or jury either before or during trial, *nor, in any jury trial, **shall** the jury be informed that there has been an arbitration proceeding* (emphasis added)."

MAR 7.2(b)(2) provides: "Testimony given during the arbitration proceeding is admissible in subsequent proceedings to the extent allowed by the Rules of Evidence, *except that the testimony shall not be identified as having been given in an arbitration proceeding* (emphasis added)."

Issue No. 2:

a. Whether an automotive repair facility's form that purports to be a written estimate and authorization for repair complies with the ARA when:

1. The form does not include a description of the specific repairs requested by the customer;

2. The form does not include a choice of alternatives specified in the ARA;

3. The form does not clearly and accurately record the parts and labor provided by the automotive repair facility; and

4. The form expressly states that it is a warehouse receipt.

b. Whether an automotive repair facility is required to comply with the written estimate and authorization for repair requirement under the ARA when:

1. The customer's motor vehicle is not taken to the automotive repair facility's regular place of business; and

2. The automotive repair facility obtains from an automotive dealership a key to a customer's motor vehicle for purposes of automotive repair without the customer's knowledge and without first obtaining the customer's oral or written authorization.

c. Whether a third-party insurance company that merely pays for the cost of repair to a motor vehicle under a liability claim may be

considered a "customer's designee" under the ARA for purposes of compliance with the written estimate and authorization for repair requirement under the ARA when the motor vehicle owner does not authorize or approve of such a designation.

d. Whether a trial court errs in dismissing a claim based upon an unlawful act or practice under the ARA when an automotive repair facility charges a customer for unnecessary repairs to a motor vehicle.

e. Whether an automotive repair facility's failure to properly repair the brakes to a customer's motor vehicle is an "unnecessary repair" under the ARA when the repair service is not consistent with specifications established by the manufacturer of the motor vehicle.

f. Whether an automotive repair facility that fails to comply with the written estimate and authorization for repairs requirement under the ARA is an unfair and deceptive act or practice for the purpose of applying the CPA.

g. Whether an automotive repair facility that performs an "unnecessary repair" to a customer's motor vehicle under the ARA is an unfair and deceptive act for the purpose of applying the CPA.

II. INTRODUCTION

This case was a trial de novo from mandatory arbitration and it was tried before a jury on May 28, 2014, through June 5, 2014. CP 27. Swain's claims against Sureway were for negligent auto repairs, violations of the ARA, violations of the CPA, fraud and intentional misrepresentation, and

fraudulent omissions. CP 1-7. Before submitting the case to the jury, the trial court partially granted Sureway's motion to dismiss all of Swain's claims as a matter of law. CP 27; RP (IV) 4-17. The claim that survived and was submitted to the jury was Swain's claim against Sureway for negligent auto repairs. CP 27; RP (III) 111. The jury returned a special verdict finding that Sureway had negligently repaired Swain's vehicle and awarded Swain $1,080.72. CP 27.

This appeal arises from: (1) the trial court's denial of Swain's motion for a mistrial under MAR 7.2(b)(1) and MAR 7.2(b)(2) after Robert (Bob) Merritt ("Merritt")[4] repeatedly referenced an arbitration proceeding during testimony before a jury on a trial de novo; and (2) the trial court's dismissal under CR 50(a)(1)[5] of Swain's claims for violations of the ARA and the CPA against Sureway after Swain presented all of his evidence and rested his case-in-chief. CP 27.

Swain timely appealed the trial court's denial of his motion for a mistrial and its dismissal of his claims against Sureway under the ARA and the CPA. CP 65. Thereafter, Sureway timely filed a notice of appeal seeking cross review of the "trial court's ruling on and admission of

[4] As owner of Sureway, Merritt testified on behalf of Sureway.

[5] CR 50(a)(1) provides in relevant part: "If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim...that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment."

evidence regarding the testimony of Mike Harbor[6] about the Automotive Repair Act, about that Statute's requirements, and about whether the Statute had been violated."[7] Sureway's Notice of Appeal to Division Two of the Court of Appeals.

III. STATEMENT OF THE CASE[8]

Litigation arose from automotive repairs performed by Sureway to Swain's vehicle when it was damaged in a collision caused by another driver on December 13, 2006. CP 2-4. The other driver was 100% liable for the collision and he was insured by United Services Automobile Services ("USAA"). CP 2. Swain was insured by Grange. CP 2.

Based upon a recommendation by the dealership where Swain purchased his vehicle, Swain elected to have his vehicle repaired by Sureway. CP 2; RP (III) 37. Swain's vehicle was subsequently towed to the dealership. RP (III) 35. Sureway took possession of Swain's vehicle from the dealership by obtaining a copy of a key for it for the purpose of moving the vehicle to Sureway's regular place of business. RP (III) 38. Sureway took possession of the vehicle without Swain's knowledge or consent. RP (III) 38.

Two days after Swain picked up his repaired vehicle from Sureway, the wheel to the driver's side of the vehicle suddenly locked up

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[6] Swain's witness was not Mike Harbor as named in Sureway's notice of appeal, but Darrell M. Harber, hereinafter referred to as "Harber."

[7] Sureway did not designate as clerk's papers for transmittal to the Court its notice of appeal.

[8] This case has a long procedural history. Swain states those facts that are relevant to the issues he raises on review.

while he was traveling on Interstate 5 at highway speed. CP 3; RP (III) 46-48. Swain's vehicle ran off the roadway onto the median and came to a stop. CP 3; RP (III) 46-48.

The vehicle was towed to Stroud's Auto Rebuild, where Harber determined that the vehicle had not been properly and completely repaired by Sureway and that the vehicle was not safe as a normal means of transportation. CP 3; RP (II) 20-29; RP (III) 49-51.

On August 27, 2007, Swain filed a complaint in an initial lawsuit for personal injury and for property damage against the adverse driver and for bad faith, breach of contract, and violations of the CPA against Grange.[9] CP 13-14. On March 21, 2008, the trial court granted Grange's motion for summary judgment and dismissed Swain's claims against it. CP 13.

Thereafter, Swain amended his complaint to add Sureway as a party defendant for negligent auto repairs. CP 14. Subsequently, Swain and the adverse driver entered into a stipulation to dismiss Swain's claim against the adverse driver and his wife. CP 13. The order of dismissal was entered on June 1, 2009. CP 13.

Upon deposition of Merritt in the initial action, Swain discovered that Sureway does not comply with the written estimate and authorization for repairs requirement under the ARA. CP 14. Specifically, Sureway does not provide to its customers a written price estimate that complies with the ARA prior to providing parts and labor and it does not obtain the proper

[9] Pierce County Superior Court Cause No. 07-2-11494-2. CP 14.

authorization from its customers prior to providing parts or labor, also a requirement by the ARA. CP 14.

Additionally, Sureway is required under the ARA to accurately record the cost of labor on its repair invoices. CP 14. Sureway conceded at the deposition that it does not accurately record labor hours on its repair invoices and it does not advise its customers of this fact. CP 14. Based upon the admissions against interest by Sureway in the deposition, Swain moved for and was granted a voluntary dismissal on his first action against Sureway, which was a claim only for negligent auto repairs. CP 14.

Thereafter, Swain filed the instant action against Sureway alleging additional claims. CP 14. In addition to negligent auto repairs, Swain's claims against Sureway included violations of the ARA; violations of the CPA; fraud and intentional misrepresentation; and fraudulent omissions. CP 14.

This matter was subsequently transferred to arbitration; an arbitration hearing was held; and the arbitrator ruled in favor of Sureway. CP 32-41. Swain timely requested a trial de novo before a jury. CP 32-41.

The trial de novo was held from May 28, 2014 through June 5, 2014. CP 27. A jury was selected. CP 27. Witnesses were sworn and testified; exhibits were admitted. CP 27.

During the trial, Harber[10] testified on a more probable than not basis that Sureway failed to comply with the manufacturer specifications with respect to the repair of Swain's vehicle's brake caliper. CP 23; RP

[10] Swain's expert.

(III) 6-9. Harber opined on a more probable than not basis that the brake caliper fell off of the wheel because it was not torqued to 85 foot pounds. CP 23; RP (III) 6-9. Had the caliper bolts been torqued to manufacturer specifications, a bolt would not have fallen off and caused the front wheel of Swain's vehicle to lock up, thereby endangering his person. CP 23; RP (III) 6-9.

After Swain rested his case-in-chief on June 2, 2014, Sureway moved for judgment as a matter of law as to all of Swain's claims. CP 27 RP (III) 99. The trial court denied Sureway's motion with respect to Swain's claim against Sureway for negligent auto repair. CP 27; RP (III) 111. The following day, the trial court granted Sureway's motion to dismiss the remainder of Swain's claims against Sureway. CP 27.

On June 4, 2014, during cross-examination of Merritt on behalf of Sureway, Merritt repeatedly referenced the arbitration proceeding before the jury. CP 27; RP (V) 15, 18. Swain immediately moved for a mistrial under the mandatory arbitration rules that prohibit reference or testimony about an arbitration proceeding before a jury on a trial de novo. CP 27, RP (VI) 4-6. The trial court denied Swain's motion for a mistrial based on the court's discretion. CP 27, RP (VI) 6.

Swain's only surviving claim for negligent auto repairs was submitted to the jury on May 27, 2014. CP 27. The jury returned a special verdict in favor of Swain in the amount of $1,080.72. CP 27.[11]

[11] Thereby improving Swain's position on the trial de novo from the arbitration award.

On June 13, 2014, judgment was entered by the trial court on the jury verdict. CP 27. Swain timely appealed the trial court's denial of his motion for a mistrial and for the trial court's dismissal of his ARA and CPA claims against Sureway. CP 65.

IV. STANDARD OF REVIEW, LEGAL AUTHORITIES, AND ARGUMENT

A. THE TRIAL COURT ERRED AS A MATTER OF LAW ON A TRIAL DE NOVO WHEN IT DENIED SWAIN'S MOTION FOR A MISTRIAL UNDER MAR 7.2(b)(1) AND MAR 7.2(b)(2) BECAUSE THE TRIAL COURT FAILED TO GIVE EFFECT TO THE PLAIN LANGUAGE OF THE MANDATORY ARBITRATION RULES

1. STANDARD OF REVIEW

Generally, a decision granting or denying a motion for a mistrial is discretionary with the trial court. *Anderson v. Dobro*, 63 Wn.2d 923, 928, 389 P.2d 885 (1964). This principle is subject to the limitation that when an order granting or denying a motion for a mistrial is predicated upon rulings as to the law, no element of discretion is involved. *Worthington v. Caldwell*, 65 Wn.2d 269, 278, 396 P.2d 797 (1964). Review of the application of a court rule or statute to the facts is de novo. *Twitchell v. Kerrigan*, 175 Wn. App. 454, 461, 306 P.3d 1025 (2013). "[D]e novo review applies to a trial court's application of the mandatory arbitration rules." *Id.* Interpreting the MARs is a matter of law that is reviewed de novo. *Manius v. Boyd*, 111 Wn. App. 764, 766-67, 47 P.3d 145 (2002).

The issue with respect to the trial court's denial of Swain's motion for a mistrial is whether the trial court, in its interpretation of MAR

7.2(b)(1) and 7.2(b)(2), failed to give effect to the plain language of the rules when it decided to deny Swain's motion for a mistrial after Sureway repeatedly referenced an arbitration proceeding during testimony before a jury on a trial de novo.

The foregoing issue involves a question of law; no element of discretion is involved; and therefore, abuse of discretion that generally applies to a trial court's decision to grant or to deny a motion for a mistrial is not the applicable standard. The standard of review for this issue is de novo.

2. LEGAL AUTHORITIES AND ARGUMENT

Courts interpret the mandatory arbitration rules as though they were drafted by the legislature and construe these rules consistent with their purpose. *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518, 525, 79 P.3d 1154 (2003). The court's objective is to carry out the legislature's intent. *Arborwood Idaho LLC v. City of Kennewick,* 151 Wn.2d 359, 367, 89 P.3d 217 (2004). Washington courts strictly interpret the mandatory arbitration rules. *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518 at 529. In giving effect to the language of the statute, courts must not render any portion meaningless. *Twitchell v. Kerrigan,* 175 Wn. App. 454, 461, 306 P.3d 1025 (2013). "[T]he court should assume that the legislature means exactly what it says. Plain words do not require construction." *Id.* (*citing City of Kent v. Jenkins,* 99 Wn. App. 287, 290, 992 P.2d 1045 (2000)). If a

statute is unambiguous, the court's inquiry is at an end. *Twitchell v. Kerrigan,* 175 Wn. App. 454 at 461.

Presumptively, the use of the word "shall" in a statute is imperative and operates to create a duty rather than to confer discretion. *Clark County Sheriff v. Dep't of Soc. & Health Servs.*, 95 Wn.2d 445, 448, 626 P.2d 6 (1981). "Generally, the use of the word shall is considered a command and operates to create a duty absent any evidence of legislative intent to the contrary." *I-5 Truck Sales & Service Co., v. Underwood,* 32 Wn. App. 4, 9, 645 P.2d 716 (1982) (*citing State ex rel. Nugent v. Lewis,* 93 Wn.2d 80, 82, 605 P.2d 1265 (1980)).

The mandatory arbitration rules at issue on review is MAR 7.2(b)(1) and MAR 7.2(b)(2).

MAR 7.2(b)(1) provides:

> The trial de novo *shall* be conducted as though no arbitration proceeding had occurred. *No reference shall* be made to the arbitration award, in any pleading, brief, or other written or oral statement to the trial court or jury either before or during trial, ***nor, in any jury trial, shall the jury be informed that there has been an arbitration proceeding*** (emphasis added).

MAR 7.2(b)(2) provides:

> Testimony given during the arbitration proceeding is admissible in subsequent proceedings to the extent allowed by the Rules of Evidence, ***except that the testimony shall not be identified as having been given in an arbitration proceeding*** (emphasis added).

"The trial de novo must be conducted as though no arbitration proceedings had ever occurred. RCW 7.06.050; MAR 7.2(b)(1). The

arbitration proceedings are sealed. MAR 7.2(a). ***Absolutely no reference may be made to any aspect of the arbitration, even the fact that it existed, [b]efore, during or after the de novo trial.*** MAR 7.2(b)(1) (emphasis added)." *In re Smith-Bartlett,* 95 Wn. App. 633, 641, 976 P.2d 173 (1999).

In 2003, the Washington State Supreme Court addressed the trial de novo appeal process from mandatory arbitration under RCW 7.06 in *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518. According to the court, the trial de novo process under MAR is as follows:

> Once a party requests a trial de novo, though, the clerk must seal the arbitration award. MAR 7.1(a). The trial de novo is then "conducted *as though no arbitration proceeding had occurred.*" MAR 7.2(b)(1) (emphasis added).[12] ***No pleading, brief, statement (written or oral) during the trial de novo may refer to the arbitration proceeding.***[13] *Id.* The right to a jury trial is maintained, RCW 7.06.070 (contrary to private arbitration), and if it is so exercised, ***the jury cannot be informed that an arbitration proceeding occurred prior to trial.***[14] MAR 7.2(b)(1). Subject to the rules of evidence, testimony from the arbitration proceeding may be admissible ***so long as there is no indication that the testimony came from the arbitration proceeding.***[15] MAR 7.2(b)(2).
>
> We believe the trial de novo process is exactly what the rule says it is: a trial that is conducted as if the parties had never proceeded to arbitration. The entire case begins anew. The arbitral proceeding becomes a nullity, and it is relevant *solely* for purposes of determining whether a party has failed to improve his or her position, in which case attorney fees are mandated.

Malted Mousse, Inc. v. Steinmetz, 150 Wn.2d 518 at 528.

During cross-examination of Merritt on behalf of Sureway, Merritt referenced the arbitration proceeding before the jury. RP (V) 15, 18.

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[12] Emphasis in the court's opinion.
[13] Emphasis added.
[14] Emphasis added.
[15] Emphasis added.

Swain immediately moved for a mistrial. RP (VI) 4. The following colloquy took place between Swain's counsel and the trial court:

THE COURT: Ms. Bullis, you have a comment.

MS. BULLIS: No, Your Honor. I have a motion.

THE COURT: All right.

MS BULLIS: Motion for mistrial under MAR Rule 7.2(b)(1). And it is explicit. The term uses "shall not mention in front of the jury an arbitration proceeding." Mr. Merritt did it twice. The first time he mentioned it, I was taken aback and caught a little off guard. And I apologize to the Court for my distraction at that time because I was trying to figure out the best way to deal with this issue. And then I continued again on cross, and then he mentioned an arbitration proceeding. And that's when I ended my cross because I --- I just don't know how to deal with that issue.

And then checking this, it is very clear that there can be no reference or testimony before the jury that there has been an arbitration proceeding.

THE COURT: Is my memory accurate in thinking that the reference to arbitration from Mr. Merritt occurred only during your cross-examination?

MS BULLIS: That is the Court's recollection, but the rule does not limit it to cross-examination. It just says no testimony shall be used.

THE COURT: I understand. The motion is denied. It appeared to me that Mr. Merritt was confused about previous proceedings, that is to say a lawsuit versus arbitration, what claims were filed and when, what claim or claims were dismissed and when, whether his deposition pertained to an arbitration or to a lawsuit.

My observation was that he was confused. And his comment regarding an arbitration was in the context of expressing his confusion. He was confused by the questions posed by Plaintiff's counsel during cross-examination. So in the Court's view, the statement about the arbitration was not intended in any way, shape, or form by the Defendant to deliberately introduce the subject of arbitration in front of a jury in an effort to poison this trial in any way. I am confident that it was inadvertent. I am confident that there is little, if any, prejudice to the Plaintiff's case.

I believe that if there is any prejudice to the introduction of testimony about previous proceedings, that there would be more prejudice to the Plaintiff's case for the jury to know, as they have been told through counsel -- through Plaintiff's counsel's questioning that there was a lawsuit once filed and then subsequently dismissed to the extent that there is any prejudice to the Plaintiff's case from that. And I don't think there would be much prejudice. I think that is a greater level of prejudice than the mention of an arbitration.

In any event, I see this as elicited by Plaintiff's counsel, and again, inadvertently mentioned by Mr. Merritt. I do not see this as the sort of problem or error that would require a mistrial to be ordered. I am declining to order that.

MS BULLIS: May I respond for the record, Your Honor?

THE COURT: Go ahead.

MS BULLIS: ...with respect for the motion for a mistrial, it doesn't set a requirement that it be intentional. It just says, "it shall not be done." My witnesses and my experts were coached and trained, do not use those terms. And the statute does not say whether or not there is prejudice. And the term "shall" means --- with all due respect to the Court, does not seem to give the Court discretion to determine the intent of Mr. Merritt.

The statute is clear. It says, "shall" from any testimony, whether it be cross or direct. It doesn't mention inadvertence or state of mind or anything to that effect. And it doesn't mention anything about prejudice to a party. It just says – I will read the statute into the record. "The trial de novo shall be conducted as though no arbitration proceedings had occurred. No reference shall be made to the arbitration award in any pleading, brief, or other written or oral statement to the trial court or jury either before or during trial." And this is the part we are relying on: "Nor in my [sic][16] jury trial shall the jury be informed that there has been an

[16] any

arbitration proceeding." It does not go to an award or anything. The mention of the arbitration proceeding.

THE COURT: Does the rule say that if the word "arbitration" comes up in front of a jury that the Court shall declare a mistrial? It doesn't say that, counsel. And the Court has considered all the circumstances here. I have made a record of what my observations were, so that if an appellate court reviews this trial record, they will have the benefit of this Judge's observations of what occurred. In the exercise of my discretion, I am denying the motion for a mistrial.

MS BULLIS: Thank you, Your Honor.

RP (VI) 4-6.

The court erred as a matter of law when it failed to give effect to the plain language of MAR 7.2(b)(1) and MAR 7.2(b)(2) when it decided to deny Swain's motion for a mistrial. The foregoing mandatory arbitration rules are clear and unambiguous that on a trial de novo, "[a]bsolutely no reference may be made to any aspect of the arbitration, even the fact that it existed, [b]efore, during or after the de novo trial. MAR 7.2(b)(1) (emphasis added)." *In re Smith-Bartlett*, 95 Wn. App. 633 at 641; *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518 at 528. After Sureway repeatedly referenced an arbitration proceeding before the jury, the trial court did not have discretion under the mandatory arbitration rules to deny Swain's motion for a mistrial.

B. THE TRIAL COURT ERRED AS A MATTER OF LAW WHEN IT DISMISSED SWAIN'S CLAIMS UNDER THE AUTOMOTIVE REPAIR ACT AND THE CONSUMER PROTECTION ACT

After Swain presented all of his evidence and rested his case-in-chief on June 2, 2014, Sureway moved under CR 50(a)(1) for a directed verdict or judgment as a matter of law on Swain's claims for negligent auto repairs, violations of the ARA, violations of the CPA, fraud and intentional misrepresentation, and fraudulent omissions.[17] CP 17; RP (III) 99.

CR 50(a)(1) provides in relevant part:

> If, during a trial by jury, a party has been fully heard with respect to an issue and there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party with respect to that issue, the court may grant a motion for judgment as a matter of law against the party on any claim...that cannot under the controlling law be maintained without a favorable finding on that issue. Such a motion shall specify the judgment sought and the law and the facts on which the moving party is entitled to the judgment.

On June 2, 2014, the trial court denied Sureway's motion for judgment as a matter of law on Swain's claim for negligent auto repairs. CP 17, 27; RP (III) 111. On June 3, 2014, the trial court granted Sureway's motion for judgment as a matter of law on Swain's claims for violations of the ARA, violations of the CPA, fraud and intentional misrepresentation, and fraudulent omissions. CP 27. Swain timely

[17] Motions for directed verdict were renamed motions for judgment as a matter of law effective September 17, 1993. *Litho Color, Inc. v. Pac Emp'rs Ins. Co.*, 98 Wn. App. 286, 298 n.1, 991 P.2d 638 (1999). *See Hizey v. Carpenter*, 119 Wn.2d 251, 271-72, 830 P.2d 646 (1992).

appealed the trial court's decision to dismiss his claims against Sureway for violations of the ARA and the CPA. CP 65.

1. STANDARD OF REVIEW

An appellate court reviews a motion for judgment as a matter of law de novo. *Davis v. Microsoft Corp.*, 149 Wn.2d 521, 530-31, 70 P.3d 126 (2003); *Joy v. Dep't of Labor & Indus.*, 170 Wn. App. 614, 619, 285 P.3d 187 (2012). In determining whether a fact exists for judgment as a matter of law, the court must accept the truth of the non-moving party's evidence and draw all reasonable inferences in the light most favorable to the party against whom the motion is made. *Douglas v. Freeman,* 117 Wn.2d 242, 247, 814 P.2d 1160 (1991); *Queen City Farms, Inc. v. Cent. Nat'l Ins. Co. of Omaha,* 126 Wn.2d 50, 98, 882 P.2d 703 (1994).

A trial court properly grants judgment as a matter of law when, viewing the evidence and all inferences in a light most favorable to the nonmoving party, substantial evidence does not exist to support the nonmoving party's claims. *Schmidt v. Coogan.* 162 Wn.2d 488, 491, 173 P.3d 273 (2007). Substantial evidence is the quantum of evidence sufficient to persuade a rational, fair-minded person of the truth of a declared premise. *Wenatchee Sportsman Ass'n v. Chelan County,* 141 Wn.2d 169, 176, 4 P.3d 123 (2000).

2. LEGAL AUTHORITIES AND ARGUMENT

a. THE AUTOMOTIVE REPAIR ACT

In Washington, automotive repair is a regulated industry under RCW 46.71. CP 18. This statute mandates how those repair facilities must act, what they must disclose when a consumer brings his or her vehicle into the facility for repairs, and what they may not do.[18] CP 18.

The ARA is strictly construed. *Garth Parberry Equip. Repairs, Inc. v. James,* 101 Wn.2d 220, 224-25, 676 P.2d 470 (1984); *Webb v. Ray,* 38 Wn. App. 675, 678, 688 P.2d 534 (1984). In particular, full effect must be given to the plain language of the ARA "even where the results sometimes seem harsh to the mechanic's interests." *Kyle v. Williams,* 139 Wn. App. 348, 357, 161 P.3d 1036 (2007). *See also Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.,* 75 Wn. App. 89, 93, 876 P.2d 948 (1994) *(citing State v. Pike,* 118 Wn.2d 585 at 591 and *I-5 Truck Sales & Serv. Co. v. Underwood,* 32 Wn. App. 4 at 11). CP 19.

I. Swain Presented Sufficient Evidence that Sureway Failed to Comply with the Written Estimate and Authorization for Repair Requirement under the ARA and the Trial Court Erred as a Matter of Law when it Dismissed Swain's Claims under the ARA[19]

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[18] "Automotive repair facility" or "repair facility" means any person, firm, association, or corporation who for compensation engages in the business of automotive repair or diagnosis, or both, of malfunctions of motor vehicles subject to licensure under chapter 46.16A RCW and repair and refinishing auto-body collision damage as well as overall refinishing and cosmetic repairs. RCW 46.71.011(3). CP 18. RCW 46.16A regulates the registration of motor vehicles. CP 18.

[19] There are several issues pertaining to the assignment of error with respect to the trial court's dismissal of Swain's claims against Sureway for violations of the ARA. For clarity, Swain will individually address the issues. As a result, there will be duplication or overlap of legal authorities and argument.

a. ISSUES PRESENTED

1. Whether an automotive repair facility's written form that purports to be a written estimate and authorization for repair complies with the ARA when:

a. The form does not include a description of the specific repairs requested by the customer;

b. The form does not include a choice of alternatives specified in the ARA;

c. The form does not clearly and accurately record the parts and labor provided by the automotive repair facility; and

d. The form expressly states that it is a warehouse receipt.

2. Whether an automotive repair facility is required to comply with the written estimate and authorization for repair requirement under the ARA when:

a. The customer's motor vehicle is not taken to the automotive repair facility's regular place of business; and

b. The automotive repair facility obtains from an automotive dealership a key to a customer's motor vehicle for purposes of automotive repair without the customer's knowledge and without first obtaining the customer's oral or written authorization.

b. LEGAL AUTHORITIES

While the ARA has been in existence since 1977, it was not construed in a published opinion until 1982 in *I-5 Truck Sales & Service Co., v. Underwood,* 32 Wn. App. 4, 645 P.2d 716 (1982).

I-5 Truck Sales & Service Co. addresses the section of the ARA requiring a repairman to furnish the customer with a written estimate of the costs of repairs before work is commenced.[20] The ARA states that the repairman *shall* provide the customer with either a written price estimate or a choice of three written alternatives. *Id.*, 32 Wn. App. 4 at 9 (emphasis added). "Generally, the use of the word shall is considered a command and operates to create a duty absent any evidence of legislative intent to the contrary." *Id.*, (*citing State ex rel. Nugent v. Lewis,* 93 Wn.2d 80, 82, 605 P.2d 1265 (1980)). In *I-5,* the court held that it is the repairman who has the duty of furnishing a written cost estimate to the customer. *I-5 Truck Sales & Service Co.* 32 Wn. App. 4 at 10.

The ARA *requires*[21] the *repair facility* to provide the customer with a written estimate of the cost of repair or obtain oral or written authorization for the repairs. RCW 46.71.025.[22] *Kyle v. Williams,* 139 Wn.

[20] In *I-5 Sales & Service Co.,* subsection (1) of the ARA provided: If the price is estimated to exceed fifty dollars, the automotive repairman shall, prior to the commencement of supplying any parts or the performance of any labor, provide the customer a written estimate..." The ARA was subsequently amended to change the dollar amount from $50 to $100.

[21] RCW 46.71.025(1) provides in relevant part: "...*shall* provide the customer or the customer's designee with a written price estimate..." (emphasis added).

[22] RCW 46.71.025 provides in relevant part: "[A] repair facility prior to providing parts or labor *shall* provide the customer or the customer's designee with a written price estimate of the total cost of the repair, including parts and labor, or where collision repair is involved, aftermarket body parts or nonoriginal equipment manufacturer body

App. 348 at 354 (emphasis added). CP 18.

Under the ARA, a written estimate *shall not* be required when the customer's motor vehicle or component *has been brought to an automotive repair facility's regular place of business* without face-to-face contact between the customer and the repair facility. RCW 46.71.025(3)[23] (emphasis added). CP 18. Face-to-face contact means actual in-person discussion between the customer or his or her designee and the agent or employee of the automotive repair facility authorized to intake vehicles or components. RCW 46.71.025(3). CP 18.

However, *prior to providing parts and labor*, the repair facility *must obtain either the oral or written authorization of the customer or the customer's designee.* RCW 46.71.025(3) (emphasis added). CP 18. The repair facility or its representative *shall* note on the estimate or repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing the

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parts, if applicable or offer..." three alternatives: (1) "I request an estimate in writing before you begin repairs. Contact me if the price will exceed this estimate by more than ten percent." (2) "Proceed with repairs but contact me if the price will exceed $...." (3) "I do not want a written estimate." RCW 46.71.025(1) (emphasis added).

[23] RCW 46.71.025(3) provides: A written estimate shall not be required when the customer's motor vehicle or component has been brought to an automotive repair facility's regular place of business without face-to-face contact between the customer and the repair facility. Face-to-face contact means actual in-person discussion between the customer or his or her designee and the agent or employee of the automotive repair facility authorized to intake vehicles or components. However, prior to providing parts and labor, the repair facility must obtain either the oral or written authorization of the customer or the customer's designee. The repair facility or its representative shall note on the estimate or repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing the repairs.

repairs. RCW 46.71.025(3) (emphasis added). CP 18.

c. ARGUMENT

Swain claimed that Sureway violated the ARA by not providing him with a written estimate as required under the ARA before beginning repairs to his vehicle, nor did Sureway obtain his oral authorization before beginning repairs to his vehicle. CP 2-3. Sureway's written "Authorization for Repair"[24] form ("form") merely required Swain to sign a form that states, "I hereby authorize the above repair work to be done along with necessary materials."[25] CP 21; Exhibit 1. The form does not provide a section "above" describing the nature of the repair work to be done, nor does it list the necessary materials. CP 21; Exhibit 1.

Additionally, Sureway's form does not include a choice of the three alternatives to the written estimate specified in RCW 46.71.025(1). Exhibit 1. Furthermore, the form does not describe the problem reported by Swain or the specific repairs requested by Swain. CP 21; Exhibit 1. The form that Sureway represents as an "Authorization for Repair" is in fact, and by its own terms, a warehouse receipt – "This document is a warehouse receipt as required under RCW 62A.7." CP 21; Exhibit 1.

Sureway argued that it was not required to provide Swain with an estimate for repair because USAA was going to pay for the repairs, not Swain. RP (III) 122. RCW 46.71.025 requires the repair facility by use of

[24] Exhibit 1.
[25] Presumably parts and labor.

the language "shall" to provide the customer with a written estimate that includes parts and labor, among other requirements. CP 22.

Additionally, during oral argument on Sureway's motion to dismiss, Sureway argued that under RCW 46.71.025(3), a written estimate shall not be required when the customer's motor vehicle or component has been brought to an automotive repair facility's regular place of business without face-to-face contact between the customer and the repair facility. CP 22; RP (III) 121. Face-to-face contact means actual in-person discussion between the customer or his or her designee and the agent or employee of the automotive repair facility authorized to intake vehicles or components. RCW 46.71.025(3). CP 22; RP (III) 121.

Sureway's argument that it was not required to provide Swain with a written estimate because his vehicle was brought to Sureway's regular place of business and face-to-face contact did not take place between them fails because Swain's vehicle was not brought to Sureway; it was towed to the dealership where he purchased the vehicle. RP (III) 35. Without Swain's knowledge or consent, Sureway requested that the dealership provide it with a key to Swain's vehicle so that it could be moved to Sureway's regular place of business for purposes of repair. RP (III) 38. Swain did not give Sureway the key to his vehicle because he did not want any repairs done to his vehicle. RP (III) 38. Swain testified that he wanted a second opinion with respect to repairs to the vehicle. RP (III) 38.

Even if we were to assume that Sureway did not have to comply with the initial written estimate requirement under the ARA because there had not been face-to-face contact between Sureway and Swain, Sureway still violated the ARA because it was required to obtain either the oral or written authorization of the customer or the customer's designee before providing parts and labor. RCW 46.71.025(3). CP 18. The repair facility or its representative shall note on the estimate or repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing the repairs. RCW 46.71.025(3). CP 18. Sureway produced no evidence that absent face-to-face contact with Swain, it noted on a written estimate or on a repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing repair. CP 22. Sureway's failure to obtain either the oral or written authorization from Swain prior to providing parts and labor was a violation of the ARA.

In a light most favorable to Swain and accepting the truth of his evidence, Sureway's form does not comply in any manner with the written estimate or authorization for repair requirement under RCW 46.71.025 and RCW 46.71.025(1). Absent face-to-face contact, Sureway failed to obtain the oral or written authorization of Swain before providing parts and labor, which it is required to do by RCW 46.71.025(3). The trial court

erred as a matter of law in dismissing Swain's claims against Sureway under the ARA because the trial court failed to strictly construe the ARA and to give full effect to the plain language of RCW 46.71.025, RCW 46.71.025(1), and RCW 46.71.025(3) "even where the results sometimes seem harsh to the mechanic's interests." *Kyle v. Williams,* 139 Wn. App. 348 at 357.

II. Swain Presented Sufficient Evidence that he Disputed Sureway's Affirmative Defense that USAA acted as Swain's Agent with Regard to Accepting the Written Estimate Requirement under the ARA and the Trial Court Erred as a Matter of Law when it Dismissed Swain's Claims under the ARA

a. ISSUE PRESENTED

Whether a third-party insurance company that merely pays for the cost of repair to a motor vehicle under a liability claim may be considered a "customer's designee" under the ARA for purposes of compliance with the written estimate and authorization for repair requirement under the ARA when the vehicle owner does not authorize or approve of such a designation.

b. LEGAL AUTHORITIES

Under the ARA, a written estimate *shall not* be required when the customer's motor vehicle or component *has been brought to an automotive repair facility's regular place of business* without face-to-face contact between the customer and the repair facility. RCW 46.71.025(3) (emphasis added). CP 18. Face-to-face contact means actual in-person discussion between the customer or his or her designee and the agent or

employee of the automotive repair facility authorized to intake vehicles or components. RCW 46.71.025(3). CP 18.

However, prior to providing parts and labor, the repair facility must obtain either the oral or written authorization of the customer or the customer's designee. RCW 46.71.025(3). CP 18. The repair facility or its representative *shall* note on the estimate or repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing the repairs. RCW 46.71.025(3) (emphasis added). CP 18.

c. ARGUMENT

During oral argument regarding Sureway's motion to dismiss, Sureway argued that USAA, as the third-party insurance company, was Swain's designee with respect to the repairs:

Ms. Smetka: What was USAA but [sic] was Mr. Swain's designee for purposes of getting the repair work done. The act does not require, in these circumstances, that Mr. Swain be provided with an estimate – which he wasn't going to be paying for. Somebody else was paying for it. And they got it, and they provided to him as well.

CP 21; RP (III) 122.

Such an argument was disingenuous. CP 21. The ARA requires in writing on the estimate or authorization for repair the name, address, and telephone number, if available, of the customer or the customer's designee.

RCW 46.71.015(1).[26] CP 21. On Sureway's "Authorization to Repair" form, Swain did not designate USAA, or any other entity or individual, as his agent with respect to the written estimate and authorization for repair requirement under the ARA. CP 21; Exhibit 1. In fact, just above Swain's signature on the form, there is a statement that "the vehicle will be delivered to the owner or *owner's agent* whose name is set forth (emphasis added)." CP 21; Exhibit 1. The only name set forth on the form is Jim Swain by way of his signature. CP 21; Exhibit 1.

Even if USAA could be considered Swain's agent or designee for purposes of the ARA merely because it tenders payment under a liability insurance policy,[27] Sureway still failed to comply with the written estimate and authorization for repair requirement under the ARA because it produced no evidence that absent face-to-face contact, it noted on a written estimate or on a repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing repair. CP 22.

Based upon the trial court's independent research, it found that under its interpretation of *Bill McCurley Chevrolet, Inc. v. Rutz*,[28] USAA

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[26] RCW 46.71.015(1) provides in relevant part: "[A]ll estimates that exceed one hundred dollars *shall* be in writing and include the following information: The date; the name, address, and telephone number of the repair facility; the name, address, and telephone number, if available, of the customer or the customer's designee...(emphasis added)."

[27] Swain does not concede that USAA was his agent or designee for purposes of the ARA.

[28] Sureway did not cite or argue *Bill McCurley Chevrolet, Inc. v. Rutz* to the trial court.

was Swain's agent for purposes of repair because Sureway delivered to USAA a copy of the repair estimate, which the trial court also found "fully compliant" with the ARA. RP (IV) 4-7.

In *Bill McCurley Chevrolet, Inc. v. Rutz,* 61 Wn. App. 53, 808 P.2d 1167 (1991), the court held that the repair facility did not violate the ARA by failing to provide Rutz with a written repair estimate. *Id.* at 58. The court found that *Rutz's insurer* acted as her agent when it accepted the written estimate from the repair facility; that the repairs were done with Rutz's knowledge; that Rutz accepted the insurance check without objecting to the written estimate; and that the foregoing facts were undisputed. *Id.* at 56-57. However, the court limited its decision to the facts of the case "(we conclude in the context of the facts presented here the insurance carrier was the agent for Ms. Rutz as a matter of law...)" *Id.* at 57.

Swain disputed that as the third-party insurance company, USAA was his agent merely because it tendered payment for repairs to his vehicle under a liability claim. CP 21. If insurance companies may be considered an agent of a vehicle owner under the ARA solely because the insurance companies are obligated to pay for vehicle repairs under an insuring agreement and to tender payment to claimants for those repairs, then such an interpretation would essentially gut the legislative intent of the ARA, which is provided in relevant part:

> The legislature recognizes that improved communications and accurate representations between automotive repair facilities and the customers will: Increase consumer confidence; reduce the likelihood of disputes arising; clarify repair facility lien interests; and promote fair and nondeceptive practices, thereby enhancing the safety and reliability of motor vehicles serviced by auto repair facilities in the state of Washington. RCW 46.71.005.

"The stated intent of the ARA is to promote disclosure of the repair costs to avoid disputes and deceptive practices." *Kyle v. Williams*, 139 Wn. App. 348 at 357. In *Garth Parberry Equip. Repairs, Inc. v. James*, the court discussed the legislative intent of the ARA: "The "trade" whose mischief this statute seeks to control is the business of auto repair, as the title of the act suggests. These are the businesses to which the *ordinary consumer* is directly exposed when he seeks to have *his passenger vehicle* repaired. These were the businesses within the contemplation of the Legislature when it enacted this statute. See Regulating Automotive Repair: Hearings on HB 550 Before the House Commerce Comm., 45th Legislature (1977)." *Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220 at 224-25 (emphasis added). The legislative intent in enacting the ARA was to protect the *ordinary consumer* when he seeks to have *his passenger vehicle* repaired, not to protect insurance companies that tender payment under an insuring agreement to the consumer or to the automotive repair facility for repairs to the consumer's vehicle.

In a light most favorable to Swain and accepting the truth of his evidence, USAA was not Swain's agent or designee under the ARA; however, even if USAA could be considered Swain's agent or designee

under the ARA, Sureway still failed to comply with the written estimate requirement under the ARA because it produced no evidence that absent face-to-face contact with Swain, it noted on an written estimate or on a repair order the date and time of obtaining an oral authorization, the total amount authorized, the name or identification number of the employee who obtains the authorization, and the name of the person authorizing repair. The trial court erred as a matter of law in dismissing Swain's claims against Sureway under the ARA because the trial court failed to give full effect to the plain language of RCW 46.71.025, RCW 46.71.025(1), and RCW 46.71.025(3) "even where the results sometimes seem harsh to the mechanic's interests." *Kyle v. Williams,* 139 Wn. App. 348 at 357.

III. Swain Presented Sufficient Evidence that Sureway Engaged in an Unlawful Act or Practice under the ARA by Charging him for Unnecessary Repairs to his Vehicle and the Trial Court Erred as a Matter of Law When it Dismissed Swain's Claim under the ARA

a. ISSUES PRESENTED

1. Whether a trial court errs in dismissing a claim based upon an unlawful act or practice under the ARA when an automotive repair facility charges a customer for unnecessary repairs to a motor vehicle.

2. Whether an automotive repair facility's failure to properly repair the brakes to a customer's motor vehicle is an "unnecessary repair" under the ARA when the repair service is not

consistent with specifications established by the manufacturer of the motor vehicle.

b. LEGAL AUTHORITIES

Under the ARA, it is an unlawful act or practice to charge a customer for unnecessary repairs. RCW 46.71.045(7) provides in relevant part:

> For purposes of this subsection "unnecessary repairs" means those for which there is no reasonable basis for performing the service. A reasonable basis includes, but is not limited to: (a) That the repair service is consistent with specifications established by law or the manufacturer of the motor vehicle, component, or part; (b) that the repair is in accordance with accepted industry standards; or (c) that the repair was performed at the specific request of the customer. CP 23.

c. ARGUMENT

In his complaint against Sureway, Swain alleged that the driver's side wheel of his vehicle locked up and that Sureway failed to comply with the manufacturer specifications to properly and to completely repair his vehicle, thereby giving rise to a violation of the ARA and the CPA CP 1-7, 23.

Swain's expert, Harber testified on a more probable than not basis that Sureway failed to comply with the manufacturer specifications with respect to installing the caliper. CP 23; RP (III) 6-9. Harber opined on a more probable than not basis that the caliper fell off of the wheel because it was not torqued to 85 foot pounds. CP 23; RP (III) 6-9. Had the caliper bolts been torqued to the manufacturer specifications of 85 foot pounds, a

bolt would not have fallen off, causing the front driver's wheel of Swain's vehicle to lock up, thereby endangering his person. CP 23; RP (III) 6-9.

Sureway moved for judgment as a matter of law after Swain presented his evidence and rested his case-in-chief. At this time, Sureway had not presented any evidence in its defense to Swain's claims against it, particularly with respect to the manufacturer's specifications for the repair of a brake caliper. In a light most favorable to Swain and accepting the truth of his evidence, Sureway performed an unnecessary repair to Swain's vehicle because the repair did not comply with the manufacturer's specifications, which is an unfair and deceptive practice under the ARA. The trial court erred as a matter of law in dismissing Swain's claims against Sureway under the ARA because the trial court failed to give full effect to the plain language of RCW 46.71.045(7) "even where the results sometimes seem harsh to the mechanic's interests." *Kyle v. Williams*, 139 Wn. App. 348 at 357.

b. CONSUMER PROTECTION ACT

Swain Presented Sufficient Evidence that Sureway Violated the ARA for Purposes of Applying the CPA and the Trial Court Erred as a Matter of Law when it Dismissed Swain's Claim under the CPA

a. ISSUE PRESENTED

1. Whether an automotive repair facility that fails to comply with the written estimate and authorization for repair requirement under the ARA is an unfair and deceptive act or practice for the purpose of applying the CPA.

2. Whether an automotive repair facility that performs an "unnecessary repair" to a customer's motor vehicle under the ARA is an unfair and deceptive act or practice for the purpose of applying the CPA.

b. LEGAL AUTHORITIES

The ARA has a strong consumer protection component. *Kyle v. Williams,* 139 Wn. App. at 357. CP 19. RCW 46.71.070 provides in relevant part:

> The legislature finds that the practices covered by this chapter are matters ***vitally affecting the public interest*** for the purpose of applying the Consumer Protection Act ("CPA"), chapter 19.86 RCW. Violations of this chapter are not reasonable in relation to the development and preservation of business. A violation of this chapter is an unfair or deceptive act in trade or commerce and an unfair method of competition for the purpose of applying the Consumer Protection Act, chapter 19.86 RCW (emphasis added). CP 19.

The stated intent of the ARA is to promote disclosure of the repair costs to avoid disputes and deceptive practices. *Kyle v. Williams,* 139 Wn. App. at 357. CP 19. It is important to remember that consumer protection statutes like the ARA have been adopted "to foster fair dealing and to eliminate misunderstandings in a trade which [has] been replete with frequent instances of unscrupulous conduct. *State v. Pike,* 118 Wn.2d 585 at 591 (*citing I-5 Truck Sales & Serv. Co. v. Underwood* at 11). CP 19.

"A per se unfair trade practice exists when a statute has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Campbell v. Seattle Engine Rebuilders &*

Remanufacturing, Inc., 75 Wn. App. 89, 95, 876 P.2d 716 (1994). CP 19. The per se method requires a showing that a statute has been violated which contains a specific legislative declaration of public interest impact. CP 19-20. Examples of statutes which include a specific declaration of public interest include RCW 46.70.005 ("The legislature...declares that the distribution and sale of vehicles...***vitally affects...the public interest***..."). *Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.*, 75 Wn. App. 89 at 95 (emphasis added). CP 20.

It is to be emphasized that when a statute containing a legislative public interest pronouncement can be shown to have been violated, only the public interest requirement is per se. The other four elements of a private CPA action must be separately established. *Id.* at 95. CP 20.

Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co., 105 Wn.2d 778, 719 P.2d 531 (1986), provides the five essential elements a plaintiff must prove in order to succeed on a CPA claim. These elements include: (1) an unfair or deceptive act or practice, (2) occurring in the conduct of trade or commerce, (3) affecting the public interest, (4) injuring the plaintiff's business or property, and (5) causation between the act and the injury. *Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.*, 75 Wn. App. 89 at 95. CP 20.

c. ARGUMENT

Sureway's failure to comply with the written estimate and authorization for repair requirement under the ARA is an unfair and

deceptive act or practice that occurs in the conduct of trade or commerce. CP 22. Without disclosing to its customers an estimate of parts and labor, customers have no knowledge regarding the nature, extent, and cost of repairs to their vehicles when they decide whether to authorize Sureway to proceed with repairs. CP 22.

Furthermore, failure to comply with manufacturer specifications with respect to vehicle repairs is a per se violation of the public interest impact because the legislature has expressly declared this procedure an unlawful act or practice; as a result, Swain's property was injured because the break caliper locked up the wheel and there was causation between the act (in this case omission – Sureway did not torque the caliper bolt) and Swain's injury. CP 23; RP (III) 6-9.

In a light most favorable to Swain and accepting the truth of his evidence, Sureway failed to comply with the written estimate and authorization for repair requirement under the ARA and it performed an unnecessary repair to Swain's vehicle because the repair did not comply with manufacturer's specifications, which are unfair and deceptive acts or practices under the ARA and the CPA. Swain has more than met his burden with respect to the sufficiency of the evidence to preclude dismissal of his claims against Sureway under the ARA and the CPA. CP 23. The trial court erred as a matter of law in dismissing Swain's claims against Sureway under the ARA and CPA because the trial court failed to give full effect to the plain language of RCW 46.71.025, RCW

46.71.025(1), RCW 46.71.025(3) RCW 46.71.045(7), and RCW 46.71.070 "even where the results sometimes seem harsh to the mechanic's interests." *Kyle v. Williams*, 139 Wn. App. 348 at 357.

V. CONCLUSION

For the reasons set forth herein, the trial court should be reversed with respect to Swain's motion for a mistrial. Further, Swain's claims under the ARA and the CPA against Sureway should be reinstated. Lastly, this matter should be remanded to the trial court with instructions for a hearing to determine Swain's costs and fees associated with a mistrial and with instructions for a trial on the merits of Swain's claims for negligence, violations of the ARA, and violation of the CPA against Sureway.

RESPECTFULLY submitted this 11th day of December, 2014.

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CERTIFICATE OF SERVICE

I certify that on December 11, 2014, I caused a true and correct copy of this Opening Brief of Appellant to be served on the following by U.S. First Class Mail, postage prepaid.

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I declare under the penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

/s/ Alana K. Bullis
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