IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

No. 92691-3

(Court of Appeals No. 73636-1-I)

JAMES SWAIN, Individually

Petitioner,

v.

SUREWAY, INC., a Washington Corporation

Respondent.

PETITION FOR REVIEW

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATE STATUTES

COURT RULES

COURT RULES **PAGE**

MANDATORY ARBITRATION RULES

I. INTRODUCTION

In a case that involves an issue of substantial public interest where automotive repair facilities have a responsibility to properly, completely, and safely repair a vehicle before releasing the vehicle to an owner, the Court of Appeals, in its opinion, essentially abrogated entire provisions of the Automotive Repair Act (ARA), RCW 46.71.

After a severe collision that was caused by another driver, whereby Appellant James Swain's (Swain) fairly new Saturn vehicle was impacted on the driver side at the front left wheel, the Respondent, Sureway, Inc. (Sureway), performed substantial repairs to the vehicle. According to Swain's collision repair expert witness, the vehicle should not have been repaired; instead, it should have been deemed a total loss because the cost to properly, completely, and safely repair the vehicle would have exceeded its fair market value. Documents produced by Sureway show that after it obtained a fair market valuation report for the replacement cost of the vehicle, Sureway's initial repair estimate for the vehicle was appreciably under the replacement cost of the vehicle, however, that amount significantly increased as repairs commenced.

After the collision, a determination was to be made between Swain's insurance company and the adverse driver's insurance company as to which company would handle the property damage claim and whether Swain's vehicle was to be totaled or if it was to be repaired. Until

a decision was made as to which insurance company would handle Swain's property damage claim and whether the vehicle would be repaired or replaced, the vehicle was towed to a salvage yard. Swain intentionally retained the keys to his vehicle so that he could be involved in the repair decision-making process because he believed that a repair facility would need the keys to gain access to the inside of the vehicle, to the trunk, and to the engine compartment.

Thereafter, Swain contacted the Saturn dealership from where he purchased the vehicle to inquire about the property damage repair process because he lacks knowledge when it comes to vehicle repairs. During the foregoing discussion at the Saturn dealership, Swain decided that if his vehicle was to be repaired, he would elect to use the collision repair facility that the dealership uses for its vehicles because whatever was good for the dealership was good for him.

A period of time afterward, Swain learned that his vehicle had been towed from the salvage yard to the Saturn dealership where he purchased it, but that the vehicle was subsequently moved to Sureway; that Sureway had begun to order parts for it; and that apparently, the decision had been made by USAA, the liability insurer, to proceed with repairs to his vehicle based upon an estimate for repair prepared by Sureway and forwarded to USAA by Sureway.

Swain later discovered that Sureway took possession of his vehicle for the purpose of repairs by having the dealership "cut" a key for it without his knowledge or his consent so that the vehicle could be moved from the Saturn dealership to Sureway's place of business, which also allowed it to gain access to the inside of the vehicle, to the trunk, and to the engine compartment for purposes of ordering parts and for assessing damage. During trial, the owner of Sureway testified that his company has engaged in this practice on a number of occasions.

Although Swain did not agree with the liability insurance company's decision to repair his vehicle because he believed that the damages to it were too extensive to be safely repaired for the transportation of him, his wife, and his two grandchildren, he was informed by the liability insurance company that he did not have a say in the decision. However, throughout the repair process, Swain continually expressed his concerns to Sureway about safety issues related to the repairs it was performing to his vehicle. Swain decided that in the interest of safety for his family, after the repairs were completed by Sureway, he would have a post-repair inspection performed on his vehicle by another collision repair facility.

Two days after picking up his repaired vehicle from Sureway, Swain was traveling on the highway at highway speed during morning traffic on his way to the post-repair inspection when the driver side of the

vehicle at the front left wheel (the exact location that took the bulk of the impact from the initial collision) suddenly locked up and the vehicle violently bounced four to five times before coming to a stop near a cement wall. Swain managed to avoid hitting nearby vehicles, as well as the concrete wall. The vehicle had to be towed to the post-repair inspection.

Subsequently, Swain's collision repair expert determined that Sureway had not completely, properly, and safely repaired Swain's vehicle in numerous aspects. With respect to the brakes, Swain's expert testified at trial on a more probable than not basis that Sureway failed to comply with the manufacturer specifications in regards to installing the left front brake caliper; the expert opined on a more probable than not basis that the left front brake caliper fell off the wheel because it was not torqued to 85 foot pounds, as required by the manufacturer specifications; the expert opined on a more probable than not basis that had the left front brake caliper bolts been torqued to the manufacturer specifications of 85 foot pounds, a bolt would not have fallen off, causing the left front wheel of Swain's vehicle to lock up, thereby endangering his person.

Sureway presented no expert testimony at trial to refute Swain's expert testimony regarding improper left front brake installation. Instead, Sureway argued on cross-examination via its defense counsel that Swain could have mitigated his damages regarding the left front brake issue because he should have "heard" the bolt fall off and that traveling over

"bumpy" roads loosens bolts.

In affirming the trial court's dismissal of Swain's claims of violations of the Automotive Repair Act and the Consumer Protection Act (CPA) against Sureway, as well as Swain's motion for a mistrial after a defense witness repeatedly referenced an arbitration proceeding before a jury during a trial de novo, the Court of Appeals' opinion conflicts with many of this Court's decisions, as discussed below.

II. IDENTITY OF PETITIONER

The Petitioner is James Swain (Swain), the Appellant in the Court of Appeals and the Plaintiff in the Pierce County Superior Court proceeding.[1]

III. CITATION TO COURT OF APPEALS DECISION

Swain seeks review of the unpublished opinion filed by Division I of the Court of Appeals on November 2, 2015, and its denial of his motion for reconsideration filed on December 1, 2015, affirming the trial court's denial of Swain's motion for a mistrial after a defense witness repeatedly referenced an arbitration proceeding before the jury on a trial de novo and the granting of Respondent Sureway Inc.'s (Sureway) motion for dismissal of Swain's claims against it for violations of the Automotive Repair Act and the Consumer Protection Act. Swain seeks review of all portions of Division I's opinion.

[1] On July 9, 2015, this case was transferred from the Court of Appeals, Division II, to the Court of Appeals, Division I.

A copy of the opinion is included in the Appendix. App. A. A copy of the order denying Swain's motion for reconsideration is also included in the Appendix. App. B.

IV. ISSUES PRESENTED FOR REVIEW

a. Whether an automotive repair facility's failure to repair the brakes to a customer's vehicle is an "unnecessary repair" under the ARA when the repairs were not performed consistent with manufacturer specifications.

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

c. Whether a customer who has no knowledge of vehicle repairs is required to conduct a full inspection of his or her repaired vehicle prior to leaving the repair facility in order to later assert a claim under the ARA against the automotive repair facility.

d. Whether an automotive repair facility's form that purports to be a written estimate and authorization for repair complies with the ARA when the form does not include a description of the specific repairs requested by the customer; the form does not include a choice of alternatives specified in the ARA; the form does not clearly and accurately record the parts and labor provided by the automotive repair facility; and the form expressly states that it is a warehouse receipt.

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

f. Whether a trial court errs as a matter of law when it fails to give effect to the plain language of Mandatory Arbitration Rules ("MAR") MAR 7.2(b)(1) and MAR 7.2(b)(2) when it denies a motion for a mistrial after a witness repeatedly references an arbitration proceeding before a jury during a trial de novo.

g. Whether on review, an appellate court reviews only those issues raised by the parties and considered by the trial court. Alternatively, if the appellate court decides to raise a new issue on review, should the appellate court request additional briefing from the parties.

V. STATEMENT OF THE CASE

Swain's vehicle was damaged in a collision caused by another driver on December 13, 2006. CP 2-4. Based upon a recommendation by the Saturn dealership where Swain purchased the vehicle, he elected to have it repaired by Sureway. CP 2; RP (III) 37. Swain's vehicle was subsequently towed to the Saturn 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.

Swain was informed by a representative from USAA that a check was in the mail for the cost of repairs. App. A. The USAA representative instructed Swain that he needed to take the check to Sureway *and* sign it over to Sureway to pay for the repairs. App. A. While at the repair shop, Swain expressed concern over the cost of repairs. App. A.

Two days after Swain picked up his repaired vehicle from Sureway, the wheel to the driver's side of the vehicle suddenly locked up while he was traveling on Interstate 5 at highway speed. CP 3; RP (III) 46-48. The vehicle bounced four to five times. App. A. Swain's vehicle ran off the roadway onto the median and came to a stop near a cement wall. CP 3; RP (III) 46-48; App. A.

The vehicle was towed to Stroud's Auto Rebuild, where Swain's collision repair expert, Darrell Harber (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 his

insurance company, Grange, for refusing to process his property damage claim and compelling him to submit the claim to the liability insurer.[2] 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 Robert Merritt[3] (Merritt) in the initial action, Swain discovered that Sureway did not comply with the written estimate and authorization for repairs requirement under the ARA. CP 14. Specifically, Sureway did not provide to its customers a written price estimate that complied with the ARA prior to providing parts and labor and it did not obtain the proper authorization from its customers prior to providing parts and labor, also required by the ARA. CP 14.

Additionally, Sureway was and 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 did not accurately record labor hours on its repair invoices and it did not advise its customers of this fact. CP 14. Based upon the admissions against interest by Sureway during the

[2] Pierce County Superior Court Cause No. 07-2-11494-2. CP 14.
[3] An owner of Sureway.

deposition, Swain moved for and was granted a voluntary dismissal in his first action against Sureway. 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. During the trial, Harber 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 (III) 6-9. Harber opined on a more probable than not basis that the brake caliper fell off 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 during 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.[4]

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.

Sureway timely filed a notice of appeal seeking cross review of the trial court's ruling on and admission of evidence regarding the testimony of Harber about the Automotive Repair Act, about that Statute's requirements, and about whether the Statute had been violated.

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

On July 9, 2015, the Court of Appeals, Division II, transferred this case to the Court of Appeals, Division I. On November 2, 2015, Division I affirmed the trial court and on December 1, 2015, Division I denied Swain's motion for reconsideration.

Swain timely files this Petition for Review on December 31, 2015, under RAP 18.6 and RAP 13.4.

VI. ARGUMENT

A. Division I's opinion essentially abrogates entire provisions of the Automotive Repair Act, RCW 46.71, which involves an issue of substantial public interest in that it permits vehicles that have been improperly, incompletely, and unsafely repaired by automotive repair facilities to be released to public roadways without a vehicle owner's knowledge of the nature and the extent of the repairs performed to his or her vehicle, thereby endangering the safety of passengers in the improperly, incompletely, and unsafely repaired vehicle and the safety of passengers in vehicles near and around the improperly, incompletely, and unsafely repaired vehicle when it travels on public roadways; and its opinion in this matter conflicts with the Supreme Court's decision in *Garth Parberry Equip. Repairs, Inc. v. James,* 101 Wn.2d 220, 676 P.2d 470 (1984).

The ARA is strictly construed. *Garth Parberry Equip. Repairs, Inc. v. James,* 101 Wn.2d 220 at 224-25; *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).

1. UNNECESSARY REPAIRS
Unlawful Acts or Practices under RCW 46.71.045(7)

An "unnecessary repair" under this provision of the ARA is charging a customer for a service for which there is no reasonable basis, which includes, but is not limited to that the repair is not consistent with manufacturer specifications.

Despite Swain's expert witness's undisputed opinion on a more probable than not basis during his trial testimony that Sureway failed to comply with the manufacturer specifications in regards to the repair of the brake caliper to Swain's vehicle, the trial court and the Court of Appeals totally disregarded this issue when it came to dismissing Swain's claim under this provision of the ARA against Sureway *even* when Swain pointed this fact out to the Court of Appeals in his motion for reconsideration.

The trial court and the Court of Appeals failed to strictly construe the ARA and they 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.

2. UNNECESSARY REPAIRS AND CPA
Matters Vitally Affecting the Public Interest, RCW 46.71.070

The ARA has a strong consumer protection component. *Kyle v. Williams,* 139 Wn. App. at 357. 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).

The Court of Appeals affirmed the trial court's dismissal of Swain's CPA claim against Sureway because it found that the trial court did not err in dismissing Swain's ARA claims against Sureway. However, the Court of Appeals' reasoning is flawed in that it failed to address a fundamental issue Swain raised on review that the trial court failed to address: Swain presented the undisputed opinion of his expert witness that Sureway failed to comply with the manufacturer specifications in the repair of the brake caliper of his vehicle.

3. CUSTOMER INSPECTION OF REPAIRED VEHICLE

In its opinion, the Court of Appeals seems to suggest that Swain had a duty to conduct a "full inspection of the vehicle prior to leaving the shop with the repaired vehicle." App. A at 3. The Court of Appeals also notes that Swain accepted "the benefit of the repaired vehicle without objection." App. A at 17.

The Court of Appeals apparently faults Swain for not objecting to the repaired vehicle at pick up instead of faulting Sureway for not properly and safely repairing the vehicle, which put Swain in danger of serious

injury when, as the Court of Appeals recognized in its own opinion, "the front end of the vehicle 'locked up.' The car bounced 'four to five times' before coming to a stop near a cement wall." App. A at 3.

As Swain testified at trial, he is not a vehicle mechanic and would not know what to look for when picking up his vehicle in terms of repair, especially when the repairs were performed to the frame and other parts that are concealed by body panels, which is why he scheduled a post-repair inspection for the vehicle in the first place. He certainly objected to the benefit of the repaired vehicle two days later when the left front brake caliper locked up while he was traveling at highway speed, thereby endangering his life. CP 3; RP (III) 46-48.

4. WRITTEN ESTIMATE AND AUTHORIZATION FOR REPAIR

Again, the Court of Appeals fails to strictly construe the ARA and to give full effect to its plain language. In the court's opinion, it repeatedly references a "customer concerns" area on the "repair order" form, which lists two towing bills. This section was filled out by Sureway and the "customer concerns" are not "customer concerns" at all, but additional tow charges Sureway fills out to ensure it was paid for non-repair related services in the event USAA totaled Swain's vehicle.

Additionally, Sureway expressly states that the form is a "Warehouse Receipt." Strictly construed against Sureway, a warehouse receipt does not comply with the ARA.

5. CUSTOMER DESIGNEE AND INSURANCE COMPANY REPRESENTATIVE

In the facts outlined at page 3 of the Court of Appeal's opinion, the court states that "[a] representative of USAA notified Swain that a check was in the mail for the cost of repairs. The representative also instructed Swain that he needed to take the check to Sureway and sign it over to Sureway to pay for the repairs." App. A at 3. When an insurance representative tells a vehicle owner what he or she needs to do in terms of having his or her vehicle repaired does not create an agency relationship, particularly in light of the fact that Swain intentionally retained his vehicle keys because he did not want any repairs done to his vehicle without his knowledge. RP (III) 38. Swain testified that he wanted a second opinion with respect to the repairs to his vehicle. RP (III) 38. 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. The foregoing facts do not demonstrate a voluntary agency relationship on Swain's behalf, particularly when he no longer had dominion and control over his vehicle.

B. Division I's opinion in this matter conflicts with the Supreme Court's decision in *Malted Mousse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003); its opinion conflicts with the decision of Division III in *In re Smith-Bartlett,* 95 Wn. App. 633, 976 P.2d 173 (1999); and its opinion manifests an intentional disregard of the legislative intent with respect to MAR 7.2(b)(1) and MAR 7.2(b)(2).

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). Washington courts strictly interpret the mandatory arbitration rules. *Malted Mousse, Inc. v. Steinmetz,* 150 Wn.2d 518 at 529.

"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 at 641.

The trial court erred 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.

In affirming the trial court, the Court of Appeals raised an issue *sua sponte*, which is addressed at ¶ D below, suggesting that instead of moving for a mistrial, the proper remedy available to Swain was to request

a curative instruction.

In its opinion, the court seems to agree that the plain language of MAR 7.2(b)(1) and MAR 7.2(b)(2) state that references to a prior arbitration proceeding shall not be made. App. A. at 9. The court, however, does not go on to address this Court's decision in *Malted Mousse, Inc. v. Steinmetz* which formed the basis of Swain's decision that the prejudice created by the two references to arbitration would not be obviated by a curative instruction.

C. Division I's opinion in this matter conflicts with the Supreme Court's decision in *Worthington v. Caldwell,* 65 Wn.2d 269, 396 P.2d 797 (1964).

An appellate court will not reverse an order granting or denying a new trial motion, except when the trial court has abused its discretion. *Detrick v. Garretson Packing Co.,* 73 Wn.2d 804, 812, 440 P.2d 834 (1968). However, this principle is subject to the limitation that, when such an order 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). A much stronger showing of an abuse of discretion ordinarily will be required to set aside an order granting or denying a new trial. *Id.*

Swain argued that the trial court's ruling was predicated as to the law, specifically MAR 7.2, therefore, no element of discretion was involved and a de novo standard of review was appropriate. The Court of Appeals instructed Swain that the appropriate standard of review is abuse

of discretion. It appears that the appropriate standard of review is stronger than abuse of discretion, but less than de novo.

D. Division I's opinion in this matter conflicts with the Supreme Court's decisions in *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 222 P.3d 785 (2009), and *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013); and RAP 12.1(a).

On review in this matter, the Court of Appeals should have decided this case on the basis of the issues the parties set forth in their briefs and not raised *sua sponte* the issue of a curative instruction when Sureway waived that argument by failing to object to Swain's motion for a mistrial before the trial court. *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 701-02, 222 P.3d 785 (2009); RAP 12.1(a). The courts "are not in the business of inventing unbriefed arguments for the parties sua sponte." *State v. Saintcalle,* 178 Wn.2d 34, 52, 309 P.3d 326 (2013)."

VII. CONCLUSION

Sadly, this case is the poster child of why there has been only one case that has reached this Court with respect to issues related to the Automotive Repair Act because by this time, consumers are fed up with a legal system that does not assign much value to a property damage claim and they just walk away in disgust from the entire process because while there is a law on the books for their protection, it is covered with 30 years of dust.

Here, we have a vehicle owner with a fairly new vehicle who is involved in a collision; he retains his vehicle keys so he can have a say in

the repair process; yet, a collision repair facility (that only gets paid if it repairs a vehicle and NOT if a vehicle is totaled by the insurance company) takes possession of the owner's vehicle without his knowledge or his consent; it works out repair costs and details with the insurance company representative who does not have to transport his family in the vehicle after it is repaired; the vehicle owner is then instructed by the insurance company representative that he has to sign a check over to the repair facility; the vehicle owner expresses concerns about the nature and the extent of the damages to his vehicle, but he does not have a say in the process because he just owns the vehicle, and he just has to drive the vehicle, and he just has to transport his family in the vehicle, but when it comes to repairs, the decisions are made by the insurance companies and the repair facilities, not the consumers who were the intended beneficiaries under the ARA by the legislature.

THEN, two days after the owner picks up his vehicle, a brake caliper falls off and locks up the wheel when he is traveling at highway speed in morning traffic and he is very lucky he does not wipe out other commuters or smash into a concrete wall.

Despite the foregoing facts, when he institutes legal action, he loses at arbitration; all but one of his claims gets dismissed at trial; and the Court of Appeals faults him for not conducting a "full inspection of the vehicle prior to leaving the shop with the repaired vehicle." App. A at 3.

In fairness, Swain does accept fault in that respect. He faults himself for expecting that an automotive repair facility would properly, completely, and safely repair his vehicle. The "repaired" vehicle has not been in a drivable condition since the day Swain nearly hit that concrete wall, despite the Court of Appeals remark that Swain accepted "the benefit of the repaired vehicle without objection (App. A at 17)" even though he did object – two days later when a bolt fell off the brake caliper.

As discussed herein, this Court should accept review because this case presents an issue of substantial public interest...the Court just does not know about it because many consumers have given up long before cases reach this point.

RESPECTFULLY SUBMITTED this 31st day of December, 2015.

ALANA BULLIS, PS

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CERTIFICATE OF SERVICE

Pursuant to RAP 13.4(a), the undersigned certifies that an original of this Petition for Review was filed, and the statutory filing fee paid, this date with the Court of Appeals of the State of Washington, Division I. Further, the undersigned certifies that a copy of this Petition for Review was mailed via U.S. mail, postage pre-paid, and emailed, this date to:

Pauline Smetka
Helsell Fetterman LLP
1001 4th Ave Ste 4200
Seattle, WA 98154
Email: psmetka@helsell.com

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

DATED this 31st day of December, 2015.

Alana K. Bullis

Alana Bullis

APPENDIX A

APPENDIX B

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES SWAIN, individually, Appellant, v. SUREWAY, INC., a Washington corporation, Respondent.	)	DIVISION ONE No. 73636-1-I UNPUBLISHED OPINION FILED: November 2, 2015

DWYER, J. — Following a de novo jury trial after a mandatory arbitration proceeding, a judgment was entered on James Swain's claim of negligent auto repair against Sureway, Inc., arising out of repairs performed by Sureway on Swain's vehicle. Swain appeals, contending that the trial court erred in denying his motion for a mistrial after a witness for Sureway twice referenced the previous arbitration proceeding in violation of Mandatory Arbitration Rule (MAR) 7.2. He also contends that the trial court erred in granting Sureway's motion to dismiss his claims relating to the Automotive Repair Act (ARA), ch. 46.71 RCW, and the Consumer Protection Act (CPA), ch. 19.86 RCW, brought at the conclusion of the plaintiff's case-in-chief.[1] Because Swain does not establish an entitlement to relief on any of his claims, we affirm.

[1] The trial court also dismissed Swain's fraud and intentional misrepresentation causes of action. No error is assigned to those rulings.

I

The contact between Swain and Sureway, Inc. arose after Swain's vehicle was damaged in a collision caused by a third party on December 13, 2006.[2] The third party was at fault for the collision. The third party's insurer, United Services Automobile Association (USAA), agreed to pay for the cost of repairs.

Because Swain was unable to drive his car away from the scene of the collision, he had the vehicle towed to an impound lot, then to the dealership where he purchased the car. The dealership sent vehicles to Sureway for collision repair.

On December 16, 2006, Sureway prepared a preliminary estimate for the cost of repairs that totaled $12,636.09.[3] A USAA adjuster then performed an evaluation of the damage to Swain's vehicle. Based on this evaluation, the adjuster prepared, on behalf of USAA, an estimate for the cost of repairs in the amount of $9,919.84. On December 26, 2006, the insurance adjuster brought USAA's estimate to Sureway and left his business card with the repair shop. That same day, USAA issued a "two-party check" made payable to both Swain and Sureway, in the amount of USAA's estimate. Sureway then prepared a

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[2] The third party who caused the initial collision is not a party to this appeal.

[3] On appeal, we can ascertain the timeline of events as to the estimates exchanged between Sureway and USAA from Swain's opening statement to the jury and from Sureway's trial brief. Robert Merritt, the owner of Sureway, testified at trial that the estimates were prepared a "long time ago."

Further, Merritt testified that the dates on the documents detailing the estimates for repair are the dates when the documents were printed, which was not necessarily the same date that the document was prepared.

Although an attorney's statement in opening statement or in a trial brief does not constitute evidence, neither party appears to dispute the order of events (although the parties do disagree as to the legal significance of events).

"repair order" that included a section at the bottom of the form for customers to provide signature authorization to complete repairs.

A representative of USAA notified Swain that a check was in the mail for the cost of the repairs. The representative also instructed Swain that he needed to take the check to Sureway and sign it over to Sureway to pay for the repairs.

On January 4, 2007, Swain took the check to Sureway. Swain testified that, while at the repair shop, he expressed concern regarding the cost of the repairs.[4] Despite any concern, Swain signed a written authorization for Sureway to proceed with the repairs and signed over the USAA check to Sureway to pay for the repairs.

Sureway repaired the vehicle. The repairs performed by Sureway consisted of replacing the "steering knuckle." The caliper is attached to the steering knuckle, so this repair also required Sureway to remove and replace the caliper. Because Sureway performed "mostly suspension" work, it outsourced other repairs of the vehicle.

On February 14, 2007, Swain picked up the repaired vehicle from Sureway. Swain did not conduct a full inspection prior to leaving the shop with the repaired vehicle.

Two days later, Swain was driving his car when the front end of the vehicle "locked up." The car bounced "four to five times" before coming to a stop near a cement wall.

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[4] A review of Sureway's repair order indicates that when Swain was given an opportunity to express his concern in writing in an area labeled "customer concern" on the form, his concern was limited to "Engels tow bills--$262.72, Herbs tow bill--$45.00."

Swain had the vehicle towed to Stroud's Auto Rebuild where Darrell "Mike" Harber inspected it. After Harber walked around the vehicle, he recommended to Swain that the vehicle be "disassemble[d]." On March 30, 2007, Harber received an authorization from Swain to proceed with disassembling his vehicle.

In examining the vehicle, Harber discovered that a "bolt [had] come loose from the caliper," and "the caliper moved in location and jammed up in the wheel."[5]

In 2007, Swain filed a lawsuit against Sureway alleging negligent auto repair. He later dismissed the suit. In 2010, Swain filed a second lawsuit against Sureway alleging negligent auto repair, violations of the ARA and CPA, fraud, intentional misrepresentation, and fraudulent omissions. The case was transferred to mandatory arbitration. The arbitrator ruled in favor of Sureway. Swain requested a trial de novo before a jury. The trial de novo was held from May 28, 2014 through June 5, 2014. At trial, the jury heard testimony from Sureway owner Robert Merritt, Harber, and Swain.

On June 2, at the close of Swain's case-in-chief, Sureway moved for judgment as a matter of law as to all of Swain's claims. The trial court heard arguments from both sides before granting Sureway's motion to dismiss the claims based on violation of the ARA, CPA, fraud, and intentional misrepresentation. The trial court denied Sureway's motion to dismiss Swain's claim for negligent auto repair.

[5] The testimony does not indicate which front wheel locked up.

The trial continued. During cross-examination, Merritt twice referenced the prior arbitration proceeding. Merritt's references to the prior arbitration proceeding were as follows.

> QUESTION [Plaintiff's counsel, Ms. Bullis]: Now, your attorney asked you if you were notified of any repair issues to Mr. Swain's vehicle before suit was filed. Do you recall that?
>
> ANSWER: If I was notified?
>
> QUESTION: Yeah. If you were informed that there were any problems with Mr. Swain's car?
>
> ANSWER: I'm not remembering, no. It's been awhile.
>
> QUESTION: If I give you a document to refresh your memory, would that be helpful?
>
> ANSWER: Yes.
>
> MS. BULLIS: I am going to hand Mr. Merritt his deposition testimony.
>
> MS. BULLIS: I am going to Page 53 and 54. I am going to Line Item No. 15. On that beginning -- do you see where I ask you –
>
> MS. SMETKA [Defense counsel]: Your Honor, I would object – she has not properly published the deposition. She is not using the proper means of inquiring or using it to refresh his recollection. I'm not sure what she is doing.
>
> THE COURT: Why don't you inquire whether his memory is refreshed on this issue having read this document.
>
> MS. BULLIS: Did you read it?
>
> ANSWER: Just so I understand it, this is a deposition? So this would have been the first time that I was called in to give testimony? Is this an -- was this our arbitration? Was -- is this something different?

Later, the following exchange took place.

MS. BULLIS: Do you recall a time when the first lawsuit was dismissed against Sureway?

ANSWER: It's always been a little confusing for me. All right.

MS. BULLIS: Me too.

ANSWER: It's taken quite a few years to quite get a grasp or get my head around the whole thing. But – I'm not that good with the legal process, so I am going to have to say I am not qualified to answer that.

QUESTION: If I said the lawsuit was dismissed -- the first lawsuit was dismissed in December 2009, would you disagree with that?

MS. SMETKA: Objection. Speculation.

THE COURT: Overruled. You may answer if you are able.

THE WITNESS: Well, my mind's wanting to know what was dismissed. What was on the table? I do remember that there was a lawsuit dismissed. When, where, the terms, I don't know that.

MS. BULLIS: And you do recall that there was a second lawsuit filed against Sureway two months later; is that right?

ANSWER: Yeah. Yeah.

QUESTION: And that lawsuit, without going into the claims, contained additional claims; is that right?

ANSWER: Okay. That's where it gets confusing. And then again, what you are calling a lawsuit, okay, I just remember a deposition and an arbitration.

Swain moved for a mistrial based on a violation of MAR 7.2.[6] The trial court denied Swain's motion. Swain did not seek any other form of relief.

[6] The text of MAR 7.2(b)(1) and MAR 7.2(b)(2) provide:

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

At the conclusion of the evidence, the claim for negligent auto repair was submitted to the jury. The jury returned a verdict in favor of Swain in the amount of $1,080.72. The trial court entered judgment in a lesser amount, reasoning that because Sureway made an offer of judgment in 2010 in the amount of $18,649.98, which was not accepted by Swain, Sureway was the prevailing party for purposes of an award of costs. Thus, the trial court entered judgment in favor of Swain for $880.72, to reflect a $200 offset for Sureway's statutory attorney fee.

Swain appeals.

II

Swain first contends that "the trial court erred as a matter of law on a trial de novo when it denied [his] motion for a mistrial." This is so, he asserts, "because the trial court failed to give effect to the plain language of the mandatory arbitration rules" that "clear[ly] and unambiguous[ly]" state that no reference shall be made during a de novo trial to an earlier arbitration proceeding. While we agree with Swain that no reference is to be made to an earlier arbitration, the texts of MAR 7.2(b)(1) and 7.2(b)(2) do not establish a sole or mandatory remedy in case of violation. Swain's contention to the contrary is

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> during the trial, nor, in a jury trial, shall the jury be informed that there has been an arbitration proceeding.

MAR 7.2(b)(1)

> 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.

MAR 7.2(b)(2)

incorrect.

The law is clear. A trial court's decision to grant or deny a motion for a mistrial is reviewed for abuse of discretion. Adkins v. Aluminum Co. of Am., 110 Wn.2d 128, 137, 750 P.2d 1257, 756 P.2d 142 (1988); accord Rich v. Starczewski, 29 Wn. App. 244, 247, 628 P.2d 831 (1981) (citing Church v. West, 75 Wn.2d 502, 452 P.2d 265 (1969); Todd v. Harr, Inc., 69 Wn.2d 166, 417 P.2d 945 (1966)). Indeed,

> [t]rial courts have broad discretionary powers in conducting a trial and dealing with irregularities that arise. They should grant a mistrial only when nothing the court can say or do would remedy the harm caused by the irregularity or, in other words, when the harmed party has been so prejudiced that only a new trial can remedy the error.

Kimball v. Otis Elevator Co., 89 Wn. App. 169, 178, 947 P.2d 1275 (1997). "In determining the effect of an irregularity, a reviewing court considers whether (1) it was serious, (2) it involved cumulative evidence, and (3) the trial court properly instructed the jury to disregard it." Kimball, 89 Wn. App. at 178.

The relevant court rules provide:

> 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 the trial, nor, in a jury trial, shall the jury be informed that there has been an arbitration proceeding.

MAR 7.2(b)(1).

> 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.

MAR 7.2(b)(2).

The parties agree that a trial irregularity occurred: a witness for Sureway twice mentioned the prior arbitration proceeding. The plain language of the rules state that such references shall not be made. MAR 7.2(b)(1); MAR 7.2(b)(2). However, the text of the rules do not establish any sole, or mandatory, remedy in case of violation.

Indeed, a survey of relevant case law demonstrates that the trial court acted properly in its denial of the mistrial motion. For instance, in Rich v. Starczewski, 29 Wn. App. 244, we addressed a similar issue. Francis Starczewski appealed a judgment entered against him arising from injuries sustained by Lydia Rich when a van driven by Starczewski collided with Rich's bicycle. Starczewski, 29 Wn. App. at 245. We examined whether "the trial judge erred in denying a defense motion for a mistrial after a police officer investigating the accident was asked by Rich's counsel whether he issued a citation at the scene and the officer responded affirmatively." Starczewski, 29 Wn. App. at 246.

In answering this question, we accorded great deference to the trial judge, stating, "[t]he determination of when a mistrial should be ordered because improper evidence is inadvertently mentioned is a matter within the sound discretion of the trial judge." Starczewski, 29 Wn. App at 247 (citing Church, 75 Wn.2d 502; Todd, 69 Wn.2d 166)). Moreover, we observed that, "[t]he trial judge's presence in the courtroom enables him to best determine the effect, if any, of such statements on the jury and if the statements were sufficient to deny the appellant a fair trial." Starczewski, 29 Wn. App. at 247 (citing Church, 75 Wn.

2d 502)). In finding no error, we were persuaded that "[t]he impact of such statements in light of other evidence in the case is a proper consideration in determining whether a fair trial is still possible." Starczewski, 29 Wn. App. at 247.

The record herein indicates that, as in Starczewski, the trial judge carefully considered the severity of the references to arbitration, whether the references involved cumulative evidence, and the potential prejudice, if any, to Swain. In ruling on the motion, the court stated:

> 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 an arbitration, what claims were filed and when, what claim or claims were dismissed and when, whether his deposition pertained to an arbitration proceeding 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 [Swain's] counsel during cross-examination. So in the Court's view, the statement about an arbitration was not intended in any way, shape, or form by [Sureway] to deliberately introduce the subject of an arbitration in front of a jury in an effort to poison this trial in any way. I am confident it was inadvertent. I am confident that there is little, if any, prejudice to [Swain'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 [Swain's] case for the jury to know, as they have been told through counsel -- through [Swain's] counsel's questioning that

> there was a lawsuit once filed and then subsequently dismissed to the extent that there is any prejudice to [Swain'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 [Swain'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.

It is apparent that the trial judge herein was not of the belief that "nothing the court can say or do would remedy the harm caused by the irregularity," or that "the harmed party has been so prejudiced that only a new trial can remedy the error." Kimball, 89 Wn. App. at 178. Thus, the trial court properly exercised its discretion in declining to order a mistrial.

Nevertheless, Swain insisted at trial (and persists in asserting on appeal) that the *sole* and *mandatory* remedy for a violation of MAR 7.2 is a mistrial. Swain is wrong on the law and the trial court recognized this.

> 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.

Neither MAR 7.2(b)(1) nor MAR 7.2(b)(2) require the grant of a mistrial to be the sole and mandatory remedy in case of violation. Swain could not be more wrong when he contends to the contrary. Moreover, the trial judge's ruling on the motion was appropriately based on the law as it actually exists. Because the trial court properly exercised its discretion, there was no error.

III

Swain next contends that the trial court erred in granting Sureway's motion to dismiss his claim pursuant to the ARA. This is so, he asserts, because Sureway did not provide him with a written estimate or obtain his oral authorization before beginning repairs and charged him for unnecessary repairs to his vehicle. We disagree.

"We review a trial court's ruling under CR 50(a)(1) de novo, applying the same standard as that applied by the trial court." Hawkins v. Diel, 166 Wn. App. 1, 13, 269 P.3d 1049 (2011). "'Granting a motion for judgment as a matter of law is appropriate when, viewing the evidence most favorable to the nonmoving party, the court can say, as a matter of law, there is no substantial evidence or reasonable inference to sustain a verdict for the nonmoving party.'" Guijosa v. Wal-Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001) (quoting Sing v. John L. Scott, Inc., 134 Wn.2d 24, 29, 948 P.2d 816 (1997)). "'Substantial evidence' is evidence sufficient to persuade a fair-minded, rational person that the premise is true." Hawkins, 166 Wn. App. at 13 (quoting Wenatchee v. Sportsmen Ass'n v. Chelan County, 141 Wn.2d 169, 176, 4 P.3d 123 (2000)).

The relevant court rule provides that a motion for judgment as a matter of law may be granted:

> 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, counterclaim, cross claim, or third party claim that cannot under the controlling law be maintained without a favorable finding on that issue.

CR 50 (a)(1).

"The Automotive Repair Act is a consumer protection statute designed to foster fair dealing and to eliminate misunderstandings in a trade replete with frequent instances of unscrupulous conduct." Bill McCurley Chevrolet, Inc. v. Rutz, 61 Wn. App. 53, 55, 808 P.2d 1167 (1991). "As a remedial statute, the ARA is to be liberally construed to further this legislative purpose." State v. Pike, 118 Wn.2d 585, 591, 826 P.2d 152 (1992). "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.'" Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc., 75 Wn. App. 89, 93, 876 P.2d 948 (1994) (quoting Pike, 118 Wn.2d at 591)).

The relevant provisions of the ARA that Swain alleged Sureway violated provide, in pertinent part, as follows:

> [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 parts, if applicable.

RCW 46.71.025(1).

> 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.

RCW 46.71.025(3) (emphasis added).

The problem with Swain's contention that Sureway failed to comply with these provisions of the ARA is that Swain does not acknowledge that—through USAA's action of producing an estimate of repairs as a counter-offer to Sureway's estimate and issuing a check in that amount payable to Swain and Sureway, coupled with Swain's actions of accepting the check from USAA, signing it over to Sureway, and signing a repair order that authorized Sureway to proceed with repairs—Sureway was entitled to view USAA and Swain as being in an agency relationship. In this regard, USAA was Swain's designee pursuant to the ARA. Moreover, Swain accepted the benefit of the repaired vehicle without objection. Thus, Swain's actions gave Sureway no reason to believe that Sureway, who provided proper notice to USAA, had, in any way, violated the ARA.

Relevant authority supports this view. In Bill McCurley Chevrolet v. Rutz, 61 Wn. App. 53, Rebecca Rutz was involved in an automobile accident that damaged her car. Rutz and her insurance carrier agreed to have the car towed to McCurley Chevrolet in order to receive an estimate for the cost of repairs. A written estimate was provided to Rutz's insurer who then authorized the repairs. McCurley Chevrolet, 61 Wn. App. at 54. Rutz's father visited the shop weekly while the car was being repaired. McCurley Chevrolet, 61 Wn. App. at 54. After

the car was repaired, Rutz was not satisfied and did not pay. McCurley Chevrolet, 61 Wn. App. at 55. McCurley Chevrolet sued Rutz for the cost of repairs and a jury awarded McCurley Chevrolet $3,657.24. McCurley Chevrolet, 61 Wn. App. at 55. On appeal, the court addressed the question of whether the trial court erred "by denying the Rutzes' motion to set aside the verdict . . . based on violations of the Automotive Repair Act, RCW 46.71, and the Consumer Protection Act, RCW 19.86?" McCurley Chevrolet, 61 Wn. App. at 54.

In answering this question, the McCurley Chevrolet court turned to principles of agency law.

> A principal may be liable because of the apparent or ostensible authority of its agent. . . . Apparent authority exists when, although authority is not actually granted, "the principal knowingly permits the agent to perform certain acts, or where he holds him out as possessing certain authority." Taylor v. Smith, 13 Wn. App. 171, 177, 534 P.2d 39 (1975). . . .
>
> Even if an agent acts without the principal's authority, the principal may nevertheless ratify the agent's act by acting with full knowledge of the act, accepting the benefits of the act or intentionally assuming the obligation imposed without inquiry.

McCurley Chevrolet, 61 Wn. App. at 56-57. In holding that the insurer was the apparent agent of the vehicle owner, the appellate court discussed facts very much like those present herein.

> Here, the undisputed facts reflect Ms. Rutz and her father permitted the work to be undertaken without objection . . . . Additionally, Ms. Rutz accepted the insurance check without objecting to the written estimate. McCurley Chevrolet had no reason to believe Ms. Rutz had any objection to the estimate and, in fact, was told by her that she was going to endorse the check. Thus, we conclude in the context of the facts presented here the insurance carrier was the agent for Ms. Rutz as a matter of law and its acceptance of the written estimate complied with the act.

McCurley Chevrolet, 61 Wn. App. at 57. Thus, the court concluded, "the Automotive Repair Act was not violated by the failure of McCurley Chevrolet to deliver a written estimate to Ms. Rutz." McCurley Chevrolet, 61 Wn. App. at 58.

The same is true herein. Sureway provided USAA the information that was required to be given to the vehicle's owner under the Automotive Repair Act. An exchange of estimates occurred between Sureway and USAA. Sureway sent a preliminary estimate to USAA which was followed by what was essentially a counter-offer from USAA, agreeing to pay for repairs in a lesser amount than that set forth in Sureway's estimate. USAA sent Swain a check, payable to both Swain and Sureway, in the lesser amount, to pay for the repairs. Swain signed the check from USAA over to Sureway. The amount of this check matches the amount written on the repair order that was signed by Swain thereby authorizing Sureway to complete the repairs. These actions constituted compliance with the ARA.

Although Swain testified that he expressed concern to Merritt at Sureway regarding the repairs, such concern did not rise to the level of an objection. Nor did Swain's concern dissuade him from signing the repair order that authorized Sureway to proceed with the repairs. In fact, a review of the repair order that Swain signed indicates that his concern did not reference the repairs at all. Instead, the information written in a "customer concern" area on the repair order listed only two towing bills and the respective amount owed on each one.

Based on Swain's actions, it was reasonable for Sureway to conclude that it had the authority to complete the repairs through USAA's acceptance of the original estimate, production of a counter-offer estimate, and payment of the amount stated therein. Even assuming, *arguendo*, that USAA did not have the authority to act as an agent on Swain's behalf, Swain's actions of signing over the check, signing the repair order authorizing the repairs, and accepting the benefit of the repaired vehicle without objection both established USAA's apparent authority to act on Swain's behalf and constituted a ratification of USAA's and Sureway's performance.

In granting Sureway's motion to dismiss Swain's claims pursuant to the ARA, the trial judge relied on McCurley Chevrolet, stating:

> The Auto Repair Act violation claim, the Court is finding, as a matter of law, that USAA was Mr. Swain's agent for this transaction. Sureway's delivery of an estimate to USAA that -- the evidence shows me, as it has been produced thus far in court, that this estimate delivered to USAA was fully compliant with the ARA, therefore complying with the Automotive Repair Act. The McCurley Chevrolet vs. Rutz case, I think, is significant here. That's at 61 Wn. App. Page 53, a 1991 decision. It's significant to the Court, instructive to the Court because it's very close factually.
>
> In the McCurley case, an insurance company was given an estimate by the repair shop. They were paying for repairs. There was no objection noted by the car owner, the consumer. The car owner accepted a check from the insurance company, again, without objection to the estimate that had been provided. There it was held that in looking at those facts that the insurance company was the car owner's agent. And the company's acceptance of the estimate complied with the Automotive Repair Act.
>
> In the present case, despite Mr. Swain's strong skepticism of whether or not Sureway could repair his automobile to the same condition it was before the accident, despite that skepticism, he signed over the check. And despite the fact he had a conversation

> that was frustrating with a USAA representative feeling like he didn't have a choice in the matter, in terms of his dealings with Sureway, he authorized these repairs. I find, as a matter of law, USAA was acting as Mr. Swain's agent or designee in this particular case. Therefore this transaction is also in compliance with RCW 46.71. 025, Subsection 3.
>
> It seems to me that the legislature wrote this subsection with this sort of a situation in mind: where an automobile is delivered to a repair shop and there's no face-to-face contact between the car owner and the repair person. In that situation, there is no estimate required to be delivered directly to the consumer when there's this lack of face-to-face contact, so long as the work, before it's performed, is only performed after an authorization by the consumer. That is what the Court sees occurring in this particular case. Mr. Swain, in writing, authorized these repairs. And there was no need for an estimate as particularly described in the Automotive Repair Act. It did not have to be delivered directly to Mr. Swain. It was delivered to his agent.[7]

The court also correctly noted that the fact that Swain expressed concern about the repairs or the fact that the vehicle's mileage was incorrectly recorded on the repair order that Swain signed was immaterial to his authorization to complete the repairs.

Based on relevant case law as applied to the evidence herein, the trial court did not err in dismissing Swain's ARA claim.

IV

Finally, Swain contends that the trial court erred in granting Sureway's motion to dismiss his claim pursuant to the CPA. This is so, he asserts, because

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[7] The trial judge opined that Swain's other assertion pursuant to the ARA, that unnecessary repairs were performed (RCW 46.71.045(7)), was "encompassed within and covered by the negligent repair claim in this case," but did not support the ARA claim. The court allowed the negligent repair claim to go to the jury.

The court correctly ruled that proof of a negligent repair does not constitute proof of an unnecessary repair, within the meaning of the ARA.

Sureway's failure to comply with the written estimate and authorization for repair requirements of the ARA constitute a per se violation of the CPA.[8] Because the trial court did not err by dismissing Swain's ARA claim, it follows that it did not err in dismissing Swain's CPA claim.[9]

Affirmed.

We concur:

[8] In a colloquy with the court regarding Sureway's motion to dismiss Swain's claims, counsel for Swain argued:

> With respect to the Consumer Protection Act – when it comes to RCW 46.71, a violation of that section is a per se violation under the Consumer Protection Act. That would be RCW 46.71.070.
>
> . . . .
>
> "[W]hen it comes to the Consumer Protection Act, if the Court wants to throw out the – under RCW 19.86, Plaintiffs don't have a problem with that. But we are alleging a per se violation of the CPA by a violation of the Automotive Repair Act.

[9] Given our disposition of the foregoing issues, we need not address the issue presented in Sureway's cross-appeal.

IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON

JAMES SWAIN, individually, Appellant, v. SUREWAY, INC., a Washington corporation, Respondent.	DIVISION ONE No. 73636-1-I ORDER DENYING MOTION FOR RECONSIDERATION

The appellant, James Swain, having filed a motion for reconsideration herein, and a majority of the panel having determined that the motion should be denied; now, therefore, it is hereby

ORDERED that the motion for reconsideration be, and the same is, hereby denied.

Dated this 1st day of December, 2015.

FOR THE COURT: