No. 92691-3

SUPREME COURT OF THE STATE OF WASHINGTON

File No. 73636-1-I

COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION I

JAMES SWAIN, Individually,

Appellant,

v.

SUREWAY, INC., a Washington Corporation,

Respondent,

RESPONDENT SUREWAY'S ANSWER TO APPELLANT SWAIN'S PETITION FOR REVIEW

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I. INTRODUCTION

This case was a trial de novo from a mandatory arbitration. Appellant James Swain (Swain) filed this lawsuit in February 2010, against Respondent Sureway, Inc. (Sureway) for negligent automotive repairs, violations of the Automotive Repair Act (ARA) and the Consumer Protection Act (CPA), fraud, intentional misrepresentation, and fraudulent omissions. The case was tried before a jury from May 28, 2014, through June 5, 2014. At the close of Swain's case-in-chief, the trial judge dismissed all of Swain's claims with the exception of his claim for negligent automotive repairs. On June 5, 2014, the jury returned a special verdict awarding Swain a total of $1,080.72 in damages.

Swain appealed contending that the trial court erred in dismissing Swain's ARA and CPA claims at the close of his case-in-chief; and in denying Swain's motion for a mistrial under MAR 7.2. The Court of Appeals, Division I held that Swain did not establish an entitlement to relief of those claims, and affirmed the decision of the trial court dismissing the ARA and CPA claims and denying Swain's motion for a mistrial. Swain now petitions this Court for review of the Court of Appeals' decision.

II. RESPONSE TO ISSUES PRESENTED FOR REVIEW

Sureway responds to Swain's issues presented for review as

follows:

2.1. Negligent repair work is not evidence of an "unnecessary repair" under the ARA.

2.2. Negligent repair work is not an unfair and deceptive act or practice for purposes of the CPA.

2.3. A vehicle owner's acceptance of the benefit of his repaired vehicle without objection is relevant to the trial court agency analysis, and is an act that the repair facility can rely on it determining whether an insurer is the owner's "designee" under the ARA.

2.4. An automotive repair facility can provide information required to be given under the ARA to the vehicle owner's "designee" instead of to the owner himself.

2.5. An automotive repair facility is entitled to view an insurer as a vehicle owner's "designee" under the ARA when the insurer produces an estimate of repairs as a counter-offer to the facility's estimate; the vehicle owner accepts a check for the amount of the repairs from the insurer and signs it over to the repair facility; the vehicle owner signs a repair order authorizing the facility to proceed with the repairs; and the vehicle owner accepts the benefit of the repaired vehicle without objection.

2.6. The trial court does not abuse its discretion in denying a

party's motion for a mistrial when a witness' inadvertent reference to arbitration did not unduly prejudice that party's right to a fair trial.

2.7. The appellate court did not raise new issues on review.

III. RESTATEMENT OF THE CASE

Litigation arose between the parties after a December 2006 two-car auto accident involving Swain and a third party. VRP (Vol. 3) at 36, line 3-21. Swain was unable it drive his car, a 2006 Saturn, away from the scene, VRP (Vol. 3) at 34, lines 21-22, so it was towed to an impound lot, and then to defendant Sureway Collision Center. VRP (Vol. 3) at 37, lines 4-8). USAA, the insurer paying for Swain's repairs, prepared an "Estimate of Record" in the amount of $9,919.84 and gave it to Sureway. Exhibit 3. USAA then issued a check to Swain for "approximately $10,000" and informed Swain that he needed to take the check to Sureway and sign it over. VRP (Vol. 3) at 37, lines 20-24. Swain took the check to Sureway on January 4, 2007, and signed a written authorization for Sureway to proceed with repairs totaling $9,919.84. VRP (Vol. 3) at 37-38; Exhibit 1. Swain picked up the car from Sureway on February 14, 2007. VRP (Vol. 3) at p. 43, lines 1-2.

On February 16, 2007, while driving on I-705, Swain claims that his front wheel locked up and that his vehicle then bounced four or five times before coming to a stop. VRP (Vol. 3.) at p. 47, line 11 – p. 49, line

6; VRP (Vol. 3) at p, 49, line 10-11. Swain had the vehicle towed to Stroud's Auto Rebuild to have Darrell "Mike" Harber inspect it. VRP (Vol. 3) at p. 49, lines 1-9.

Swain filed a complaint against Sureway in 2007 for negligent auto repair; however, he later dismissed that lawsuit. VRP (Vol. 3) at p. 52, line 23 – p. 53, line 6. Swain then filed a second lawsuit in 2010 alleging a claim for negligent auto repair in addition to claims for violations of the ARA and the CPA, fraud and intentional misrepresentation, and fraudulent omissions. CP 1-7. The case was transferred to mandatory arbitration, and the arbitrator ruled in favor of Sureway. CP 32-41. Swain requested a trial de novo before a jury. CP 32-41.

The case was tried before a jury on May 28, 2014 through June 5, 2014. CP 27. Swain's case in chief consisted of testimony from Sureway's owner, Robert Merritt, VRP (Vol. 1) at p. 3, expert witness Darrell "Mike" Harber, VRP (Vol. 2) at p. 3, and Swain, VRP (Vol. 3) at p. 3.

On June 2, 2014, at the close of Swain's case-in-chief, Sureway moved to dismiss all of Swain's claims. VRP (Vol. 3) at pp. 97-124. After considering the testimony, the argument of counsel, Swain's written response to the motion, and the relevant statutes and case law, the trial court decided to dismiss all but Swain's claim for negligent auto repair. VRP (Vol. 4) at p. 4-17; CP 17-25. In its oral ruling, the trial court was

very thorough and carefully stated its reasoning in detail. *Id.*

On June 3, 2014, Sureway called Robert Merritt to the stand. VRP (Vol. 5) at p. 4, lines 16-22. During Mr. Merritt's cross-examination by Swain's counsel, and in response to a series of confusing questions, Mr. Merritt inadvertently twice uttered the word "arbitration." RP (Vol. 5) at pp. 15, 18; VRP (Vol. 6) at p. 5, lines 7-23.

> Q 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?
> A I'm not remembering that, no. It's been awhile.
> Q If I give you a document to refresh your memory, would that be helpful?
> A Yes.
>
> MS. BULLIS: I am going to hand Mr. Merritt his deposition testimony.
>
> BY MS. BULLIS:
>
> Q I am going to Page 53 and 54. I am going to Line Item No. 15.
>
> ...
>
> Q Did you read it?
> A 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?

VRP (Vol. 5) at p. 14, line 11 – p. 15, line 13.

> Q Do you recall a time when the first lawsuit was dismissed against Sureway?
> A It's always been a little confusing to me. All right.
> Q Me too.

A 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.

Q If I said the lawsuit was dismissed – the first lawsuit was dismissed in December 2009, would you disagree with that?

...

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

BY MS. BULLIS:

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

A Yeah. Yeah.

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

A 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.

VRP (Vol. 5) a p. 17, line 2 – p. 18, line 3. Swain later moved for a mistrial pursuant to MAR 7.2. After hearing from Swain's counsel, the trial court thoroughly explained the reasoning behind its decision to deny Swain's motion:

> THE COURT: ... 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 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 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. I don't think there would be much prejudice. I think that there 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.

VRP (Vol. 6) at p. 5, line 7 – p. 6, line 14 (emphasis added).

> THE COURT: ... And the Court has considered all 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 mistrial.

VRP (Vol. 6) at p. 7, line 20 – p.8, line 3.

At the end of trial, the jury returned a special verdict in favor of Swain in the amount of $1,080.72. CP 27.[1] Swain timely appealed the trial court's denial of his motion for mistrial and for the trial court's dismissal of his ARA and CPA claims against Sureway.[2] CP 65.

The Court of Appeals, Division II transferred the case to the Court of Appeals, Division I on July 9, 2015. On November 2, 2015, the Court of Appeals affirmed the trial court's decisions, and it denied Swain's Motion for Reconsideration on December 1, 2015. On December 31, 2015, Swain filed a Petition for Review.

IV. ARGUMENT

4.1 The Court of Appeals' Opinion Does Not Abrogate the ARA, Is Not In Conflict with *Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220, 676 P.2d 470 (1984), and Does Not Violate the CPA.

A. Sureway Did Not Perform An "Unnecessary Repair" Under the ARA.

In his Petition for Review, Swain contends that the Court of Appeals erred when affirming the trial court's dismissal of his claims

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[1] Because Sureway made an offer of judgment in December 2010 in the amount of $18,649.98 that was not accepted by Swain, Sureway was deemed the prevailing party for purposes of an award of costs. CP 27. Therefore, the trial court entered a judgment in favor of Swain for $880.72, to reflect a $200 offset for Sureway's statutory attorney fees. CP 27.

[2] Sureway also filed a notice of appeal seeking cross review of the trial court's ruling on and admission of evidence regarding the testimony of expert witness Mike Harber about the Automotive Repair Act, its requirements, and whether it had been violated. However, the admission of Mr. Harber's testimony is no longer an issue on review.

relating to the ARA because Sureway charged him for an "unnecessary repair". There was no evidence of an unnecessary repair in Swain's case-in-chief. "Unnecessary repairs" means those for which there is no reasonable basis for performing the service. RCW 46.71.045(7).

> 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.

Id. Swain did not produce evidence that Sureway repaired the caliper bolt (or any other part) without a reasonable basis.

Instead, Swain asks this Court to create new law by holding that an unnecessary repair also includes a repair for which there is a reasonable basis but was negligently performed. His expert testified that Sureway *negligently* made the repairs:

> Q Do you have an opinion as to why this caliper fell off?
> A Well, this seems obvious to me is [sic] that it was never tightened properly. It was probably—more than likely, it was finger tight. And somebody was in the process of completing their operation, got distracted, and never put the right tool – the torque wrench in what would have needed to be used on this caliper in order to torque it to the specifications by the manufacturer. And if that was done, it would have never loosened up, bumpy road or no bumpy road.

VRP (Vol. 3) at p. 6, lines 16-25. In fact, Mr. Harber never disputed the *necessity* of the repairs, but instead the *quality* of workmanship of the repairs.

Sureway's alleged failure to take the proper care in installing and torqueing the caliper does not amount to an "unnecessary repair." It would amount to negligence (the claim that did go to the jury). The trial court agreed:

> The other assertion under the act made by the Plaintiff is under 46.71.045, Subsection 7 that unnecessary repairs were made. It wasn't a reasonable basis for what occurred here, that it wasn't done in accordance with manufacturer's specifications, and that the representation was that it would be. That, from the Court's view, is encompassed within and covered by the negligent repair claim in this case.
>
> Sureway certainly had a reasonable basis to act as they did in this instance, intending and representing that they would repair it in accordance with specifications and in accordance with industry standards. The fact that it's been alleged, and potentially proven satisfactorily to the jury, we will wait to see on that, that they didn't repair it satisfactorily. Again, that's a question under the negligent repair claim.

VRP (Vol. 4) at p. 7-8. In its affirmation, the Court of Appeals acknowledged that the trial "court correctly ruled that proof of a negligent repair does not constitute proof of an unnecessary repairs, within the meaning of the ARA." App. at 18, n. 7.

B. Sureway's Written Estimate and Authorization for Repair Complied with the ARA; USAA Was Swain's Designee for

Purposes of the ARA.

Swain next contends that Sureway violated ARA when it did not provide him with a written estimate or obtain his oral authorization before beginning repairs. It is undisputed that Sureway did not provide a written price estimate directly to Swain. However, the problem with Swain's contention is that Swain does not acknowledge that Sureway was entitled to view USAA and Swain as being in an agency relationship. Swain does not deny that USAA received a written estimate. He denies that USAA was acting as his agent.

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 of 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....*

RCW 46.71.025(3) (emphasis added).

The court's decision in *Bill McCurley Chevrolet, Inc. v. Rutz*, 61 Wn. App. 53, 808 P.2d 1167 (1991) is instructive. In *McCurley*, the court held that the automobile insurer had apparent authority to act as the agent for the car owner:

> A principal may be liable because of the apparent or ostensible authority of its agent. Apparent authority can only be inferred from the acts of the principal, not from the acts of the agent, and there must be evidence the principal had knowledge of the agent's acts. **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....**
>
> Facts and circumstances are sufficient to establish apparent authority only when a person exercising ordinary prudence, acting in good faith and conversant with business practices and customs, would be misled thereby, and such person has given due regard to such other circumstances as would cause a person of ordinary prudence to make further inquiry.
>
> **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.**
>
> Although the question of an agency relationship is generally one of fact, when the facts are not disputed and susceptible of only one interpretation, the relationship becomes a question of law.

Id. at 56-57 (internal quotations and citations omitted; emphasis added).

The trial court also considered *McCurley* when considering whether USAA was Swain's designee under the ARA:

> The Automotive 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 dealing 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....
>
> 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. 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.... I cannot see sufficient evidence of an Automotive Repair Act claim violation in this case to go to the jury.

VRP (Vol. 4) at pp. 5-6.

Additionally, even assuming USAA did not have the authority to act as Swain's agent, Swain acceptance of the benefit of the repairs to his car without making any objection to the fact that Sureway was performing the repairs was ratification of USAA's and Sureway's performance.[3]

C. The Court of Appeals' Decision Is Not Inconsistent with *Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220, 676 P.2d 470 (1984).

Swain cites *Garth Parberry Equip. Repairs, Inc. v. James*, 101 Wn.2d 220, 676 P.2d 470 (1984) for the black letter law that the ARA must be strictly construed. The lower courts' refusal to create new law by holding that a negligent repair violates the ARA,

[3] Swain takes issue with the fact that the Court of Appeals notes that he picked his car up without objection. Swain argues that the court is faulting him for not completing an inspection of his car at pickup. Swain misreads the opinion. The court did not take issue with the fact that Swain did not complete an inspection and object to the quality of the repairs. Instead, in its discussion on whether there was an agency relationship between Swain and Sureway, the court notes that Swain did not object to the fact that Sureway performed the repair because this act (or failure to act) is something that Sureway could rely on for purposes of agency analysis.

or that a repair facility can give the information required under the ARA to the vehicle owner's designee is not inconsistent with *Garth Parberry.*

D. Proof of a Negligent Repair Does Not Violate the CPA.

In his Petition, Swain argues that the Court of Appeals should not have affirmed the dismissal of his CPA claim because of Mr. Harber's testimony. Petition at 14. Mr. Harber testified that Sureway negligently repaired the car. For the reasons discussed above, any negligence on Sureway's part did not violate the ARA, and it follows that any negligence did not violate the CPA either.

4.2 The Court of Appeals Correctly Applied An Abuse of Discretion Standard When Considering the Trial Court's Decision to Deny Swain's Motion for Mistrial, And Its Decision Does Not Conflict with *Worthington v. Caldwell*, 65 Wn.2d 269, 396 P.2d 797 (1964).

Again, Swain asks this Court to create new law by holding that a trial's denial of a motion for mistrial for violation of MAR 7.2(b)(1) is not reviewed on an abuse of discretion but rather that any such violation is *per se* grounds for mistrial. 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 (1988); *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).

> Trial courts have broad discretionary power 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, 947 P.2d 1275 (1997) (emphasis added).

The exception discussed by the court in *Worthington v. Caldwell*, 65 Wn. 269, 278, 396 P.2d 797 (1964) (holding that an appellate court will not reverse a trial judge's order denying a new trial except when such an order is predicated upon rulings as to the law because no element of discretion is involved) does not apply. Here, the court's decision was based on the language of MAR 7.2 as well as the judge's observations that the references were inadvertent and invited by Swain's counsel, and that there was little to no prejudice to Swain. The decision was not predicated upon rulings as to the law, and the *Worthington* exception does not apply.

4.3 The Mere Reference of Arbitration By Itself Is Not Per Se Grounds For a Mistrial.

There is no dispute that a trial irregularity occurred when Mr. Merritt twice mentioned the prior arbitration proceeding. However, the text of MAR 7.2(b)(1) and (b)(2) does not establish any sole, or mandatory, remedy in case of a violation. In fact, appellate courts accord

great deference to the trial judge. "The 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." *Rich v. Starczewski*, 29 Wn. App. 244. "The 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." *Id.* at 247 (citing *Church*, 75 Wn.2d 502)). In determining whether a fair trial is still possible, "[t]he impact of such statements in light of other evidence in the case is a proper consideration...." *Id.*

Here, the trial court determined that Mr. Merritt's inadvertent reference to arbitration did not have any effect on the proceeding.[4] The trial judge recognized that his presence in the room enabled him to both observe the effect, if any, of Mr. Merritt's statement and to determine if the statement was sufficient to deny Swain a fair trial. The judge found that there was little effect, if any, and certainly not enough to deny Swain a fair trial. The Court of Appeals acknowledged that "the record indicates that the judge carefully considered the severity of the references to the

[4] Moreover, as noted by the trial court, it was Swain's counsel who "opened the door" to the testimony regarding arbitration by asking confusing questions that elicited the complained of testimony.

arbitration, whether the references involved cumulative evidence, and the potential prejudice, if any, to Swain." App. A. at p. 10. Appropriately, the Court of Appeals deferred to the sound discretion of the trial judge.

Swain's misrepresents *Malted Mouse, Inc. v. Steinmetz*, 150 Wn.2d 518, 79 P.3d 1154 (2003) and *In re Smith-Bartlett*, 95 Wn. App. 633, 976 P.2d 173 (1999) by suggesting that the holdings in those cases are inconsistent with the Court of Appeals' opinion in the present case. Petition at 17. *Malted Mouse* requires Washington courts to strictly interpret the mandatory arbitration rules, and *In re Smith-Bartlett* states that no reference of arbitration can be made before, during or after the de novo trial. In its opinion, the Court of Appeals acknowledged that two arbitration references were "trial irregularit[ies]." App. A at 9. Neither *Malted Mouse* nor *In re Smith-Bartlett* require that a trial court remedy the irregularity with a mistrial, as Swain suggests.

4.4 The Court of Appeals Did Not Raise *Sua Sponte* the Issue of a Curative Instruction, and Its Decision Is Not Inconsistent with *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 222 P.3d 785 (2009), *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) and RAP 12.1(a).

Lastly, Swain argues that the Court of Appeals should "not have 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." Petition at 19. Such action, Swain argues, is inconsistent

with *Ducote v. Dep't of Soc. & Health Servs.*, 167 Wn.2d 697, 222 P.3d 785 (2009), *State v. Saintcalle*, 178 Wn.2d 34, 309 P.3d 326 (2013) and RAP 12.1(a), which he cites for the principle that the appellate court confines itself to the issues the parties briefed and the trial court considered.

Swain's argument is confusing for many reasons: First, nowhere in the opinion does the court make reference to a curative instruction.

Second, even assuming the appellate court did make reference to a curative instruction in its opinion, its decision would still be consistent with relevant case law and court rules. On appeal, Swain raised the issue of whether the trial court erred when denying his motion for a mistrial after the two references to arbitration. The trial court's suggestion that Swain could present a curative instruction to remedy the references to arbitration is relevant to the issue of whether the trial court erred by denying the motion for a mistrial. It is not a separate issue by itself.

Finally, Swain's argument that the appellate court is barred from discussing the trial judge's offer of a curative instruction because Sureway did not object to a motion for mistrial is nonsensical. Swain raised the issue of his motion for a mistrial on review. Sureway opposed that issue on appeal. It was proper for the appellate court to review what the court considered when ruling on the motion, including whether there was

anything that the trial court could have said or done that would have remedied the harm done.[5]

V. CONCLUSION

The Court of Appeals properly affirmed the trial court's decision. Swain failed to present any evidence the Sureway performed a repair for which there was no reasonable basis, and he failed to recognize that Sureway gave the information required under the ARA to USAA as his designee.

Additionally, the trial court has discretion when considering whether to declare a mistrial over an inadvertent reference to arbitration in front of the jury. Mr. Merritt's inadvertent references did not unduly prejudice Swain's right to a fair trial and were elicited by Swain's counsel's questioning.

The Court should deny Swain's Petition for Review.

Respectfully submitted this 29th day of January, 2016.

HELSELL FETTERMAN LLP

By _____
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Attorneys for Respondent

[5] In fact, Sureway informed the appellate court that the trial court was right to consider whether it could have said or done anything to remedy the harm done. Brief of Respondent/Cross-Appellant at p. 9.

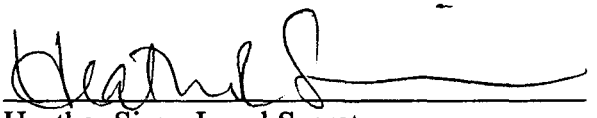
DECLARATION OF SERVICE

The undersigned declares under penalty of perjury under the laws of the State of Washington, that on this day the undersigned caused to be served in the manner indicated below a copy of the foregoing Respondent Sureway's Answer to Appellant Swain's Petition for Review.

Counsel for Plaintiff via Email Followed by First Class Mail	**WA Supreme Court via Email**
Alana K. Bullis 1911 Nelson Street Dupont, WA 98327 Alana-akblaw@live.com	Supreme Court Clerk's Office supreme@courts.wa.gov

I declare that the foregoing is true and correct.

Dated this 29th day of January, 2016, at Seattle, Washington.



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APPENDIX A

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.

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[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.
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> 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.
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> 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.

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Dear Clerk:

Attached for filing, please find Respondent Sureway's Answer to Appellant Swain's Petition for Review. The case information is below:

James Swain v. Sureway, Inc.
Supreme Court No. 92691-3
Court of Appeals No. 73636-1-I

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Opposing counsel has been cc'd on this email as a courtesy with a copy to follow via mail.

Sincerely,

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