No. 46442-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES SWAIN, individually

Appellant

v.

SUREWAY, INC., a Washington Corporation,

Appellees

Appeal from Superior Court of Pierce County
The Honorable Jerry Costello
No. 10-2-06011-7

BRIEF OF RESPONDENT/CROSS-APPELLANT

HELSELL FETTERMAN LLP

Pauline V. Smetka, WSBA #11183
Lauren Parris Watts, WSBA #44064
1001 Fourth Ave., Ste. 4200
Seattle, Washington 98154
(206) 292-1144
Attorneys for Respondent

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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 assigns error to two decisions by the trial court: (1) dismissal of Swain's ARA and CPA claims at the close of his case-in-chief; and (2) denial of Swain's motion for a mistrial under MAR 7.2. The trial court properly found in favor of Sureway, and the Court should affirm the decisions of the trial court dismissing the ARA and CPA claims and the motion for a mistrial.

The trial court did, however, err in allowing Swain's expert witness to testify about statutory requirements under the ARA, as well as to make legal conclusions on whether Sureway violated the Statute. Accordingly, Sureway filed a notice of appeal seeking cross review on this

sole issue. In the event this Court reverses the trial court's rulings, then Sureway asks the Court to reverse the trial court's ruling allowing such testimony.

II. RESPONSE TO SWAIN'S ASSIGNMENT OF ERRORS

Sureway responds to the assignment of error claimed by Swain as follows:

2.1. The trial court did not abuse its discretion in denying Swain's motion for a mistrial because Robert Merritt's inadvertent reference to arbitration did not unduly prejudice Swain's right to a fair trial.

2.2. The trial court did not err in granting Sureway's motion to dismiss Swain's claims under the ARA and the CPA because there is no legally sufficient evidentiary basis for a reasonable jury to have found for Swain at the close of his case-in-chief.

III. SUREWAY'S ASSIGNMENT OF ERRORS

The trial court erred when it admitted evidence regarding the testimony of Darrell (aka "Mike") Harber concerning the ARA and its requirements of the ARA, and whether the ARA had been violated.

IV. ISSUES PERTAINING TO SUREWAY'S ASSIGNMENT OF ERRORS

4.1 Whether a witness is qualified to testify as an expert on the

ARA when he has no special training or education of the ARA, and when he does not have any accreditation certifying his knowledge of the ARA?

4.2 Whether a trial court abuses its discretion when it allows an expert witness on collision repair to testify about the ARA statutory requirements when the witness lacked the qualifications necessary to testify as an expert concerning the ARA?

4.3 Whether a trial court abuses its discretion when it allows an expert witness on collision repair to make legal conclusions on whether a party violated the ARA when the witness lacked the qualifications necessary to testify as an expert concerning the ARA?

V. 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 first called Sureway's owner, Robert Merritt, to the

stand, VRP (Vol. 1) at p. 3, and then called his expert witness Darrell "Mike" Harber. VRP (Vol. 2) at p. 3.

Over Sureway's objection, the trial judge permitted Mr. Harber to testify about the statutory requirements under the ARA and to make legal conclusions on whether Sureway violated the ARA. VRP (Vol. 2) at p. 27 and 69. After Mr. Harber testified, Swain took the stand as the final witness in his case-in-chief. 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 isues 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. However, 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.

VI. ARGUMENT

6.1 The Trial Court Did Not Abuse Its Discretion When It Denied Swain's Motion for a Mistrial.

A. Standard on Review.

A trial court's denial of a motion for mistrial is reviewed under the abuse of discretion standard. *Anderson v. Dobro*, 63 Wn.2d 923, 928, 389 P.2d 885 (1964).

> Trial 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. 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 v. Otis Elevator Co., 89 Wn. App. 169, 947 P.2d 1275 (1997) (internal citation omitted). *See also Aluminum Co. of America v. Aetna Cas. & Sur. Co.*, 140 Wn.2d 517, 539, 998 P.2d 856 (2000) ("A mistrial should be granted only when nothing the trial could have said or done would have remedied the harm done to the [moving party]") (internal quotes and citation omitted).

B. Swain's Motion for Mistrial Was Properly Denied.

Swain asserts that the trial court abused its discretion when it denied Swain's motion for a mistrial after Mr. Merritt referenced arbitration. While it is true that MAR 7.2(b)(1) provides that no reference shall be made to an arbitration proceeding in a jury trial, it is not true that

the mere reference of arbitration by itself, without consideration of whether the reference had any effect on the trial or whether there was prejudice to one of the parties, is grounds for a mistrial. Without citation to authority, Swain asks this Court to make new law 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 of is *per se* grounds for mistrial. *See* Appellant's Brief at 16 ("the trial court did not have discretion under the mandatory arbitration rules to deny Swain's motion for a mistrial"). This simply cannot be the law.

Trial courts have discretion in determining whether an inadvertent reference had a 'devastating' effect on the jury and unduly prejudiced the moving party's rights to a fair trial. *See Rich v. Starczewski*, 29 Wn. App 244, 247, 628 P.2d 831 (1931). A trial court's discretion is appropriate in these circumstances because 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 statement were sufficient to deny the appellant a fair trial." *Id.* at 247; *see also Tincani v. Inland Empire Zoological Soc.*, 66 Wn. App. 852, 837 P.2d 640 (1992).

Here, the trial court determined that Mr. Merritt's inadvertent reference to arbitration did not have any effect on the proceeding. 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 witness's two references to arbitration were isolated and the trial judge determined that it did not prejudice Swain's case. 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.

6.2 The Record Supports the Trial Court's Dismissal of Swain's Claims under the ARA and the CPA.

A. Standard on Review

The trial court granted Sureway's motion to dismiss as a matter of law pursuant to CR 50(a)(1), which provides in relevant part:

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

An appellate court reviews *de novo* the trial court's decision granting a motion for judgment and applies the same standard as the trial court.

Guijosa v. Wal–Mart Stores, Inc., 144 Wn.2d 907, 915, 32 P.3d 250 (2001); *Estate of Borden v. State Dep't of Corrections,* Wn. App., 95 P.3d 764, 768 (2004).

B. Swain Did Not Introduce Substantial Evidence To Sustain A Verdict Under The ARA.

A motion to dismiss as a matter of law should be granted "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,* 144 Wn.2d 2d at 915. Substantial evidence is said to exist if it is sufficient to persuade a fair-minded, rational person of the truth of the declared premise." *Id.* (quoting *Brown v. Superior Underwriters,* 30 Wn. App. 303, 306, 632 P.2d 887 (1980)). Judgment as a matter of law may be granted at the close of the plaintiff's case if the plaintiff has been "fully heard" and "there is no legally sufficient evidentiary basis for a reasonable jury to find or have found for that party [.]" CR 50(a)(1). The reviewing court must "view [ ] conflicting evidence in the light most favorable to the nonmovant party and determine[ ] whether the proffered result is the only reasonable conclusion." *Hollmann v. Corcoran*, 89 Wn. App. 323, 331, 949 P.2d 386 (1997) (citing *Forro Precision, Inc. v. Int'l Bus. Machs. Corp.*, 673 F.2d 1045, 1058 (9th Cir. 1982)).

Here, Swain argues that there was substantial evidence to show a violation of RCW 46.71.025(1), RCW 46.71.025(3), and RCW 46.71.045(7). He is incorrect.

i. Sureway complied with RCW 46.71.025(1).

Swain contends that Sureway failed to comply with the provisions of RCW 46.71.025(1) which require a written estimate of the repair costs to be given to the customer prior to commencing the work. RCW 46.71.025(1) provides:

> Except as provided in subsections (3) and (4) of this section, 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.

Id.

It is undisputed that Sureway did not provide a written price estimate directly to Swain. However, Sureway did send a written estimate to USAA, Swain's agent. Swain does not deny that USAA received a written estimate but denies that USAA was acting as his agent.

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 *McCurley* court based its finding of apparent authority on the undisputed facts that the car owner permitted the work to be undertaken without objection, regularly visited the repair facility to check on the progress of the repairs, and accepted the insurance check without objection to the written estimate. *Id.* The court reasoned that the repair

facility had no reason to believe that the car owner had any objection to the estimate. *Id.*

In the present case, as in *McCurley*, there was substantial evidence to support a finding that the automobile insurer (USAA) had apparent authority to act as the car owner's (Swain) agent. Swain accepted the check from USAA and signed it over to Sureway, signed a written authorization for $9,914.84 of work on the car when he dropped off the check at Sureway, and then permitted the work to be undertaken on his car without objection to Sureway. The trial court below applied the same analysis:

> 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.

ii. Sureway complied with RCW 46.71.025(3)

Even if this Court were to accept as true Swain's argument that USAA was not its agent, there is still no violation of the ARA. Pursuant to RCW 46.71.025(3), no written estimate is required when the customer's motor vehicle is brought to the repair facility's place of business without face-to-face contact between the customer, including his designees, and the repair facility.

> A written estimate shall not be required when the customer's motor vehicle... 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.... 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). Therefore, if the Court rejects the argument (and the trial court's finding) that USAA was Swain's agent or designee then, under the ARA, Sureway was not required to provide Swain with a written estimate because there was no face-to-face contact between Sureway and Swain when the vehicle was first taken to Sureway. If USAA was not Swain's agent, then to comply with the ARA, Sureway was only required to obtain either an oral or written authorization of Swain before undertaking repairs. Sureway received written authorization from Swain for approximately $10,000 of work in January 2007. Exhibit 1 ("I HEREBY AUTHORIZE THE ABOVE REPAIR WORK TO BE DONE ALONG WITH NECESSARY MATERIALS."). Moreover, Swain understood exactly what he was signing:

Q Do you recall if that was the day that you signed an authorization for repair?
A That's what I remember, yes.
Q When it came to that document that Sureway had you sign [exhibit 1], did you understand what you were signing?
A Yes. I believe so....

VRP (Vol. 3) at p. 39, lines 5-10.

Swain also takes issue with the fact that Sureway did not produce evidence of a written estimate or on a repair order noting the total amount authorized, the name or identification number of the employee who obtained the authorization, and the name of the person authorizing the repairs. Appellant's Brief at 31. However, the written authorization that Swain signed included the total amount authorized ($9,919.84), the signature of the Sureway employee who obtained the authorization, and the signature of the person authorizing the repairs (Swain). Because the authorization was written, and not oral, a date and time of authorization was not required.

iii. Sureway complied with RCW 46.71.045(7)

It is unlawful under the ARA to charge a customer for unnecessary repairs. RCW 46.71.045(7). "Unnecessary repairs" means those for which there is no reasonable basis for performing the service. *Id.*

> 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. (emphasis added). Swain produced no evidence during his case in chief that Sureway provided any service or repair for which there was no reasonable basis. On appeal, Swain argues that his expert, Mike Harber, testified that, on a more probable than not basis, Sureway failed to comply with manufacturer specifications with respect to installing the caliper, and that the caliper fell off of the wheel because it was not torqued to 85 foot pounds. Even if this Court were to accept Swain's contention as true for purposes of reviewing the trial court's dismissal of Swain's ARA claim, Sureway's alleged failure to properly install and torque the caliper does not amount to an "unnecessary repair." It would amount to negligence (the claim that did go to the jury). Mr. Harber did not testify that there was no reasonable basis for Sureway's installation of, and torque of, the caliper. He 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. Mr. Harber never disputed the necessity of the repairs, but instead the quality of workmanship of the repairs. The trial court was also convinced that Mr. Harber's testimony did not support a claim for violation of RCW 46.71.045(7):

> 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. This is not a case where Sureway – it seems to the Court is not a case where Sureway has made misrepresentation that would fall under an actionable set of facts here under this statute, under .045, Subsection 7. I don't see sufficient evidence to go to the jury on the Automotive Repair Act claim, and I am going to dismiss that claim. And I have looked at the evidence in a light most favorable to Mr. Swain.

VRP (Vol. 4) at p. 7-8.

C. Swain Did Not Introduce Substantial Evidence To Sustain A Verdict Under the CPA.

In *Hangman Ridge Training Stables, Inc. v. Safeco Title Ins. Co.*,

105 Wn.2d 778, 719 P.2d 531 (1986), the Supreme Court set forth five essential elements that a plaintiff must prove for a Consumer Protection Act (CPA) claim: (1) an unfair or deceptive act or practice (2) occurring in the conduct of trade or commerce, (3) affecting the public interest, (4) injuring the plaintiff's business or property, and (5) causation between the act and the injury. *Campbell v. Seattle Rebuilders & Remanufacturing, Inc.*, 75 Wn. App. 89, 95, 876 P.2d 948 (1994).

"A per se unfair trade practice exists when a statute which has been declared by the Legislature to constitute an unfair or deceptive act in trade or commerce has been violated." *Id.* RCW 46.70.005 provides:

> 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, 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.

Id.

The public interest element may be met in one of two ways: (1) public interest impact may be factually established, or (2) the violation may satisfy the public element *per se* if there is a showing that a statute has been violated when contains a specific legislative declaration of public interest impact. *Campbell*, 75 Wn. App. at 95.

At trial, Swain argued that, because Sureway violated the ARA, the unfair trade practice and public interest elements are satisfied *per se*. However, for the reasons discussed above, Swain failed to provide substantial evidence of any ARA violations during his case-in-chief. Therefore, the unfair trade practice element was not satisfied *per se*.

Moreover, there is no legislatie declaration of public interest impact in the ARA. In his appellate brief, Swain argues that there is a legislative declaration of public interest impact in RCW 46.70.005, Appellant's Brief at p. 35; however, RCW 46.70 deals with dealers and manufacturers. "The legislature finds and declares that **the distribution, sale, and lease of vehicles** in the state of Washington vitally affects the general economy of the state and the public interest and the public welfare...." RCW 46.70.005 (emphasis added). It does not deal with automotive repair. The relevant statute here is RCW 46.71 (the ARA) and it does not contain a legislative declaration of public interest impact. Moreover, even if it did contain such a statement, Swain failed to provide substantial evidence to support his ARA claim so the public interest element is not satisfied *per se*. Again, the court's analysis is instructive:

> The third element, that it affects the public interest, the Court does not see evidence establishing this element. The contention from the Plaintiff is that there is a per se violation of this element of the Consumer Protection Act because there's an Automotive Repair Act violation. As

> described, the Court cannot see sufficient evidence of an Automotive Repair Act violation. But even if there were, [Swain's] theory that the ARA violation establishes this element of the Consumer Protection act per se is not borne out of the cases.
>
> The Campbell v. Seattle Engine Rebuilders, 75 Wn. App. Page 89, a 1994 decision, indicates that there is no per se public interest impact because the legislature has not made such a declaration. Rather, the legislature declared only that the Automotive Repair Act violation is a per se unfair and deceptive act. So the Campbell court was analyzing the rules announced in the Hangman Ridge case, Hangman Ridge Training Stables v. Safeco Title at 150 Wn.2d 778, a 1996 decision in Supreme Court. Campbell was analyzing what the Supreme Court said in Hangman and concluded that the Automotive Repair Act has not been declared by the legislature – there was not a declaration in that act to indicate that this third prong of the Consumer Protection Act is per se violated.

VRP (Vol. 4) at p. 10.

This Court must look to the five elements of the CPA and determine whether Swain provided substantial evidence at trial to satisfy each. If a plaintiff fails to satisfy even one element of the CPA, his claim fails as a matter of law. *Campbell*, 75 Wn. App. at 95. Here, Swain failed to satisfy two elements—(1) unfair or deceptive practice and (2) in the public interest. His CPA claims fails for those reasons alone.

i. Unfair or Deceptive Practice

An unfair or deceptive act or practice need not be *intended* to deceive—it need only have "the *capacity* to deceive a substantial portion

of the public." *Hangman Ridge,* 105 Wash.2d at 785, 719 P.2d 531. "The purpose of the capacity-to-deceive test is to deter deceptive conduct *before* injury occurs." *Id.* When the issue on appeal is whether a party committed a particular act, the court reviews any contested facts under the substantial evidence test. *Leingang v. Pierce County Med. Bureau, Inc.,* 131 Wash.2d 133, 150, 930 P.2d 288 (1997).

Swain did not admit substantial, credible evidence of an unfair or deceptive act during his case-in-chief. In fact, in his appellate brief, Swain does not argue that he satisfied this element through admission of substantial evidence, but instead relies on this Court to find a per se violation. At trial Swain suggested that Sureway misstated mileage for his car to get the work from USAA, VRP (Vol. 3) a p. 41, line 20 – p. 42, line 12; however, such a suggestion is supported by nothing more than Swain's speculation. The trial court agreed:

> There being no violation of the Automotive Repair Act as a matter of law, there is no per se violation of the Consumer Protection Act. So the Court then searches for sufficient evidence on each of the five elements under the Consumer Protection Act to support that claim going to the jury. The first element is whether there's an unfair or deceptive act or practice on part of the – Sureway. I fail to see what the deceptive act or practice was in this case. Misstating the mileage is an allegation that Mr. Swain has made here, quite forcefully, that a representative of Sureway, perhaps Mr. Merritt or another representation, flat out lied, in his view, in order to get business, so the car wouldn't be declared a total loss.

> **But the Court sees that evidence as very speculative as to why the odometer figure was placed there. Mr. Merritt's testimony was that it may well have been simply a copying over from what the insurance adjuster had found in terms of mileage. I do not see any substantial evidence of an unfair deceptive act or practice with respect to that mileage requirement.** And, again, Mr. Swain was not even aware of it until much later.

VRP (Vol. 4) at p. 8 (emphasis added). Moreover, the trial court considered other evidence offered by Sureway as alleged deceptive practices:

> A failure to say to Mr. Swain that a brake repair job, discovered late in the process, that was done at Sureway, and not sent out to another company, the Court does not see that as substantial evidence of a deceptive act or practice. It's simply a notation that Sureway did certain work and didn't send it out. It kind of begs the question of: How is that a deceptive act or practice? There's no evidence on record showing that Sureway was incapable of doing whatever work occurred on the brake lines or to the braking system of the automobile.
>
> The statement by Sureway that the car would be repaired to as good as condition as before the accident, like new, the Court views that as a statement of – a general statement of Sureway's obligation, of its duty, as a repair shop, and not as a specific representation that was false or misleading. And again, a statement that merely describes its duty, which may have been proven to have been breached by negligent repairs. I cannot see that as an unfair or deceptive act or practice to tell the customer the intention is to repair their car to as good as new condition. So this element is not satisfied by the Consumer Protection Act.

VRP (Vol. 4) at p. 8-9. Swain failed to satisfy the unfair trade practice

element. Therefore, his CPA claim fails.

ii. In the Public Interest

Because there is no legislative declaration of public interest impact, Swain was required to factually establish that the issue affected the public interest. He failed to do so.[1]

> Rather, there must be a factual presentation during trial of a public impact by the alleged deceptive act or practice. In this case, there's been no independent evidence of public impact. So the third element is not satisfied with sufficient evidence to go to the jury.

VRP (Vol. 4) at pp. 10-11. Swain's CPA claim fails as a matter of law.

6.3 The Trial Court Erred When It Admitted Evidence Regarding the Testimony of Darrell (aka "Mike") Harber about the ARA, the Statute's Requirements, and Whether the Statute Had Been Violated.

A. Standard of Review.

The trial courts are afforded broad discretion in deciding whether to admit evidence, including testimony. *State v. Demery*, 144 Wn.2d 753, 758, 30 P.3d 1278 (2001); *City of Seattle v. Heatley*, 70 Wn. App. 573, 577, 854 P.2d 658 (1993). A trial court's decision to admit or deny evidence will be upheld unless the appellant can show abuse of discretion. *Demery*, 144 Wn.2d at 758. In this context, a trial court abuses its

[1] In his brief, Swain does not assert that he factually established the public interest element. Instead, he contends that he satisfied the *per se* element because of the ARA. Appellant's Brief at 36.

discretion only if no reasonable person would adopt the view espoused by the trial court. *Id.* If reasonable people could disagree about the propriety of the trial court's decision, no abuse of discretion will exist. *Id.*

B. Mr. Harber Cannot Testify To Legal Conclusions.

An expert witness may not make a conclusion of law. *Everett v. Diamon*, 30 Wn. App. 787, 638 P.2d 605 (1981) (citing Comment, ER 704, 91 Wn.2d 1159 (1979).

> It is the established and unquestioned rule that it is in the province of the court, and not the jury, to interpret a statute or ordinance and to determine whether it applies to the conduct of a party.... It is accordingly the general rule that a witness is not permitted to give his opinion on a question of domestic law or upon matters which involve questions of law... As was said in *State v. Ballard*, 394 S.W.2d 336 (Mo. 1965), one of the cornerstones of our system of jurisprudence is that questions of fact are to be determined by a jury, and that all matters of law are to be determined and declared by the court.

Ball v. Smith, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976).

Here, the court allowed Mr. Harber to testify not only about ARA's statutory requirements, but also about to make legal conclusions and opine whether Sureway violated any of those requirements:

> Q Earlier you mentioned "R&I." What is that?
>
> A It means remove and install. So you just take apart like a battery, and you put it back in, R&I. R&R means to remove and replace. So if you R&R a part, you would remove it and replace it with a new part. And there would be a – on a final invoice, it would

say "R&R left front lower side member." And then it would have a part price which would then be the indication that there was a new part that was put on. They are supposed to also, according to the Automotive Repair Act –

MS. SMETKA: Objection, Your honor, to this witness testifying to the requirements of the Automotive Repair Act. It's a conclusion of law, and he is going beyond the question asked.

THE COURT: I am going to overrule the objection. I think this is proper testimony from this witness. You may finish your answer.

THE WITNESS: It's just that according to the statute, the Automotive Repair Act, part of that invoice, you would say what the operation was, R&R, R&I. And then it would say what side number. And then it would have the part – it's supposed to have the part number indicating what type of part, whether it was a salvaged part out of the wrecking year, whether it was a new original part, or whether it was what's called aftermarket, parts made in Taiwan, made by somebody other than the manufacturer. Those are all requirements to be on the final invoice so that the consumer knows what was done on their vehicle and what types of parts were put on it.

VRP (Vol. 2) at p. 27, line 2 – p. 27, line 5.

Q All right. I want to start at the mileage. Is there a requirement that a repair facility, I guess, post the mileage on any of their forms?

MS. SMETKA: Objection. Legal conclusion.

THE COURT: Overruled. You may answer.

THE WITNESS: I think I mentioned earlier, one of

the things I have done is I have actually provided classes for shops to comply with the Automotive Repair Act, And there is a whole series of requirements that's law, by the state, that a repair facility, not just collision repairs but tires, any place you have your vehicle repairs, are supposed to comply with. And names, VIN numbers, addresses, mileage, there's a whole series of things that are required.

Q So with respect to those items you just mentioned, Sureway isn't in compliance with the Automotive Repair Act, correct?

MS. SMETKA: Same objection, Your Honor.

THE COURT: Overruled.

THE WITNESS: With that portion of it, yes.

VRP (Vol. 2) at p. 69, line 21 – p. 70, line 17.

The interpretation and application of the ARA was in the province of the trial court. The trial court should not have allowed Mr. Harber to testify to legal conclusions to the jury. The court abused its discretion and its ruling should be reversed on appeal.

VI. CONCLUSION

The trial court properly denied Swain's motion for mistrial. 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 referenes did not unduly prejudice Swain's right to a fair trial and were elicited by Swain's counsel's questioning.

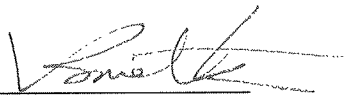
The trial court also properly granted Sureway's motion to dismiss Swain's ARA and CPA violation claims. Swain did not provide substantial evidence for a reasonable jury to have found in his favor for RCW 46.71.025(1),(3). USAA, Swain's agent, received a copy of the written estimate, and Swain signed a written authorization for Sureway to perform the work. Also, Swain did not provide substantial evidence for his RCW 46.71.045(7) claim; Sureway's repair work was arguably negligent, but there was no evidence that it was "unnecessary." Lastly, Swain failed to satisfy the trade practice and public interest elements to establish his CPA claim, and, therefore, the trial court did not err in dismissing that claim.

However, the trial court erred when it permitted Mr. Harber to invade the province of the court and testify about the ARA and make legal conclusions

The Court should affirm the trial court's ruling on Sureway's Motion to Dismiss and on Swain's Motion for Mistrial, and it should reverse the trial court's ruling to allow Mr. Harber's testimony on the ARA. Additionally, the Court should award Sureway, as the prevailing party, its fees abd costs on appeal.

Respectfully submitted this 9th day of January, 2015.

HELSELL FETTERMAN LLP

By 

Pauline V. Smetka, WSBA #11183
Lauren Parris Watts, WSBA #44064
Attorneys for Respondent

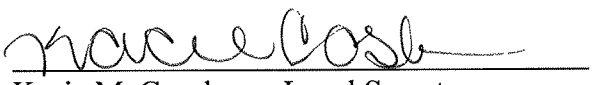
DECLARATION OF SERVICE

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 Brief of Respondent/Cross-Appellant.

Counsel for Plaintiff via Email Followed by First Class Mail	**Court of Appeals via EFiling**
Alana K. Bullis 1911 Nelson Street Dupont, WA 98327 Alana-akblaw@live.com	Court of Appeals, Division II Clerk of the Court

I declare that the foregoing is true and correct.

Dated this 9th day of January, at Seattle, Washington.



Kacie M. Coselman, Legal Secretary
Helsell Fetterman LLP
1001 Fourth Avenue, Suite 4200
Seattle, WA 98154
(206) 689-2165
Email: hsims@helsell.com

HELSELL FETTERMAN LLP

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