No. 46442-0-II

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

JAMES SWAIN, Individually

Appellant,

v.

SUREWAY, INC., a Washington Corporation

Respondent.

AMENDED REPLY BRIEF OF APPELLANT

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P.M. 2-9-15

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES **PAGE**

STATE STATUTES **PAGE**

COURT RULES **PAGE**

MANDATORY ARBITRATION RULES **PAGE**

HOUSE BILL **PAGE**

I. SWAIN'S REPLY TO RESPONSE BRIEF OF SUREWAY, INC. ("SUREWAY")

1. The Standard of Review on Swain's Motion for a Mistrial is De Novo and not Abuse of Discretion.

Sureway argues in its brief that the standard of review on Swain's motion for a mistrial is abuse of discretion. Br. of Respondent at 8-9. The issue with respect to the trial court's denial of Swain's motion for a mistrial is whether the trial court, in its interpretation of MAR 7.2(b)(1) and 7.2(b)(2), failed to give effect to the plain language of the rules when it decided to deny Swain's motion for a mistrial after Sureway repeatedly referenced an arbitration proceeding during testimony before a jury on a trial de novo. Br. of Appellant at 9-10.

Review of the application of a court rule or statute to the facts is de novo. *Twitchell v. Kerrigan,* 175 Wn. App. 454, 461, 306 P.3d 1025 (2013). "[D]e novo review applies to a trial court's application of the mandatory arbitration rules." *Id.* Interpreting the MARs is a matter of law that is reviewed de novo. *Manius v. Boyd,* 111 Wn. App. 764, 766-67, 47 P.3d 145 (2002).

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

2. The Trial Court Erred as a Matter of Law When it Denied Swain's Motion for a Mistrial.

In its brief, Sureway argues that "Swain asserts that the trial court ***abused its discretion*** when it denied Swain's motion for a mistrial after Mr. Merritt referenced arbitration (emphasis added)." Br. of Respondent at 9. Sureway is being generous with the facts. Swain did not assert that the trial court abused its discretion when it denied Swain's motion for a mistrial. Swain clearly stated that the trial court **erred as a matter of law** when it denied Swain's motion for a mistrial. Br. of Appellant at 10-16.

Thereafter, in its brief, Sureway argues that without citation, Swain invites this court to make new law when it comes to review of the trial court's denial of his motion for a mistrial. Br. of Respondent at 10. Swain makes no such invitation to this court. He merely cited numerous authorities as to why the appropriate standard of review for this issue is de novo and not abuse of discretion. Br. of Appellant at 10-16. This issue on review does not involve the creation of new law; it simply applies *existing* law to the facts in this case.

Sureway then goes on to argue that the trial court did not abuse its discretion when it denied Swain's motion for a mistrial due to "Mr. Merritt's inadvertent reference to arbitration;" that such a reference "did not have any effect on the proceeding;"[1] that Merritt's statement was not

[1] There is no support in the record for this argument. It is raised for the first time on appeal.

sufficient to deny Swain a fair trial;[2] that Merritt's two references to arbitration were isolated[3] and not prejudicial to Swain's case; and that Swain's counsel "opened the door" to testimony regarding Merritt's references to arbitration. Br. of Respondent at 10-11.

What Sureway overlooks, however, is that it is now raising these objections and arguments ***for the first time on review***. In fact, Sureway's counsel failed to object at trial to Swain's motion for a mistrial, nor did Sureway's counsel join in on any arguments the trial court advanced on its behalf with respect to the motion for a mistrial. In fact, Sureway's counsel failed to utter ***one word*** in defense of or in opposition to Swain's motion for a mistrial...not. one. single. word. RP (VI) 4-6.

ER 103 requires all objections be timely and specific. Failure to raise an objection precludes a party from raising it on appeal. *DeHaven v. Gant,* 42 Wn. App. 666, 669, 713 P.2d 149 (1986); *Symes v. Teagle,* 67 Wn.2d 867, 873, 410 P.2d 594 (1966). On review, "we will not consider objections to the evidence unless they have been brought to the attention of the trial court...; *nor will we consider grounds not presented to the trial court* (emphasis added)." *Id.* In this court, case law is clear: "[f]ailure to object at trial precludes a party from raising the objection on review." *Bercier v. Kiga,* 127 Wn. App. 809, 825, 103 P.3d 234 (2004). Arguments and defenses raised for the first time on review and that were not raised

[2] There is no support in the record for this argument. It is raised for the first time on appeal.

[3] There is no support in the record for this argument. It is raised for the first time on appeal.

before the trial court is considered waived on review. *Rapid Settlements, Ltd. v. Symetra Life Ins. Co.*, 166 Wn. App. 683, 691, 695, 271 P.3d 925 (2012); *Ford Motor Co., v. Barrett,* 115 Wn.2d 556, 563, 800 P.2d 367 (1990); *City of Seattle v. Lewis,* 70 Wn. App. 715, 718-19, 855 P.2d 327 (1993).

Sureway failed to object at trial to Swain's motion for a mistrial. On review, it has waived any objections, arguments, or defenses it now asserts in support of the trial court's denial of Swain's motion for a mistrial.

3. Swain Presented Substantial Evidence at Trial to Preclude a Dismissal of his claims under the Automotive Repair Act ("ARA) and the Consumer Protection Act ("CPA").

In its brief, Sureway argues that Swain did not present substantial evidence to sustain a verdict for the moving party. Br. of Respondent at 12-26. Swain will rely on his opening brief to support his position that in a light most favorable to him, he presented substantial evidence for a reasonable jury to find or have found for him, specifically when:

a. Sureway argues that it complied with the written estimate requirements under the ARA when the form it relies upon in support of its position is by its own definition a warehouse receipt and it sets forth little, if any, of the requirements under the ARA for such a document;[4] and

b. Sureway argues that it did not engage in an unlawful act or practice under the ARA and the CPA when it charged Swain for a brake repair that did not comply with manufacturer standards or with industry

[4] See CP Exhibit 1.

standards because it is undisputed that the BRAKE FELL OFF shortly after Swain picked up his vehicle from Sureway's repair facility.[5] Logic dictates that if the brake repair complied with manufacturer standards or with industry standards, it would not FALL OFF when it is being used for the purpose for which it was repaired – to stop the vehicle when the brake is engaged; not to FALL OFF and LOCK UP the wheel, thereby endangering Swain's person and the safety of other drivers around him.

Sureway argues that the fact that the brake fell off may amount to negligence, but not an "unnecessary repair" under the ARA.[6] What makes a repair "unnecessary" under the ARA is if a repair facility charges for the service; the service was not performed consistent with manufacturer specifications; the service was not in accordance with industry standards; or that the repair was not performed at the specific request of the customer. Here, it is undisputed that Sureway CHARGED for the service; the service was NOT performed consistent with manufacturer specifications; the service was NOT in accordance with industry standards; AND that Swain DID NOT specifically request the service.[7]

The ARA is strictly construed. *Garth Parberry Equip. Repairs, Inc. v. James,* 101 Wn.2d 220, 224-25, 676 P.2d 470 (1984); *Webb v. Ray,* 38 Wn. App. 675, 678, 688 P.2d 534 (1984). In particular, full effect must be given to the plain language of the ARA "even where the results

[5] Br. of Appellant at 32-37.
[6] Br. of Respondent at 19.
[7] At trial, Sureway did not present any witnesses to dispute the opinions rendered by Harber with respect to the brake repairs.

sometimes seem harsh to the mechanic's interests." *Kyle v. Williams,* 139 Wn. App. 348, 357, 161 P.3d 1036 (2007). *See also Campbell v. Seattle Engine Rebuilders & Remanufacturing, Inc.,* 75 Wn. App. 89, 93, 876 P.2d 948 (1994) *(citing State v. Pike,* 118 Wn.2d 585 at 591 and *I-5 Truck Sales & Serv. Co. v. Underwood,* 32 Wn. App. 4 at 11).

When the ARA is strictly construed and applied to the facts in this case, Swain presented substantial evidence that Sureway performed an unnecessary repair to his vehicle as expressed under the ARA, RCW 46.71.045(7).

4. The ARA Includes a Public Impact Declaration by the Legislature for Purposes of Applying the CPA.

It is bewildering that Sureway argues that the ARA does not include a public impact declaration by the legislature and that Swain referenced the public impact interest under a different statute than the ARA. Br. of Respondent at 22, 26. Sureway states that Swain referenced the public impact statement under RCW 46.**70**.005 that applies to dealers and manufacturers. Br. of Respondent at 22. In the Br. of Appellant at 34, Swain clearly articulates the public impact declaration by the legislature under RCW 46.**71**.070 and not RCW 46.**70**.005. Swain did, however, reference RCW 47.70.005 as an *example* of a statute that includes a public interest declaration, but did not cite it as authority. Br. of Appellant at 35.

Not only did Swain provide citation to the statute and to case law related to the public impact declaration by the legislature in the ARA, he

even provided citation to the legislative intent in enacting the Automotive Repair Act. HB 550 (1977). Br. of Appellant at 30.

Sureway further argues that Swain did "not assert that he factually established the public interest element. Instead, he contends that he satisfied the *per se* element..." of the CPA. Br. of Respondent at 26 FN1. This argument is somewhat correct. Swain argued that the public interest element under the CPA is satisfied when a statute includes a public interest declaration. The ARA contains such a declaration and the public interest element is satisfied *per se* when the statute is shown to have been violated. RCW 46.71.070 provides in relevant part:

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

When it comes to applying the law to the facts in the case with regard to Swain's CPA claim, he will rely on his opening brief. Br. of Appellant at 34-37.

5. The Trial Court did not Err when it Admitted Evidence Regarding the Testimony of Darrell Harber ("Harber") about the ARA.[8]

The trial court did not abuse its discretion when it permitted testimony from Harber relative to the ARA. *State v. Demery,* 144 Wn.2d 753, 758, 30 P.3d 1278 (2001). Harber testified that he had previously

[8] Br. of Respondent at 26-29.

been called as an expert witness on the ARA in other court proceedings. RP (II) 17. Therefore, it was not an abuse of discretion for this trial court to find him qualified to render opinions with respect to the ARA. *Everett v. Diamon,* 30 Wn. App. 787, 638 P.2d 605 (1981).

Furthermore, Sureway does not dispute that Harber was qualified to testify as an expert witness with respect to collision repairs. When it came to collision repairs to Swain's vehicle, Harber testified on a more probable than not basis that Sureway failed to comply with the manufacturer specifications with respect to installing the caliper. CP 23; RP (III) 6-9. Harber opined on a more probable than not basis that the caliper fell off of the wheel because it was not torqued to 85 foot pounds.[9] CP 23; RP (III) 6-9. Had the caliper bolts been torqued to the manufacturer specifications of 85 foot pounds, a bolt would not have fallen off, causing the front driver's wheel of Swain's vehicle to lock up, thereby endangering his person. CP 23; RP (III) 6-9.

All of the foregoing, and undisputed, testimony rendered by Harber on Swain's behalf was substantial evidence to preclude dismissal of Swain's claims under the ARA and CPA.

II. CONCLUSION

For the reasons set forth herein and in Appellant's Opening Brief, the trial court should be reversed with respect to Swain's motion for a mistrial. Further, Swain's claims under the ARA and the CPA against Sureway should be reinstated. The trial court should be affirmed with

[9] The manufacturer's specifications for Swain's vehicle.

respect to Mr. Harber's testimony regarding the ARA. Lastly, this matter should be remanded to the trial court with instructions for a hearing to determine Swain's costs and fees associated with a mistrial and with instructions for a trial on the merits of Swain's claims for negligence, violations of the ARA, and violation of the CPA against Sureway.

RESPECTFULLY submitted this 9th day of January, 2015.

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CERTIFICATE OF SERVICE

I certify that on January 9, 2015, I caused a true and correct copy of this Amended Reply Brief of Appellant to be served on the following by U.S. First Class Mail, postage prepaid.

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

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