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CASE NO. 68833-2-I

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

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KATHRYN MUELLER,

Respondent,

v.

HAURY'S AUTO BODY, INC.,  
a Washington corporation,

Appellant.

2012 OCT 12 11:33:07  
 SUPERIOR COURT  
 STATE OF WASHINGTON  
 DIVISION I  
 SEATTLE




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BRIEF OF APPELLANT

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Michael P. Hooks, WSBA # 24153  
 FORSBERG & UMLAUF, P.S.  
 Attorneys for Appellants  
 Haury's Auto Body, Inc.  
 901 Fifth Avenue, Suite 1400  
 Seattle, Washington 98164  
 Telephone: (206) 689-8500  
 Facsimile: (206) 689-8501

ORIGINAL

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**I.    INTRODUCTION**

Respondent Kathryn Mueller sued Haury's Auto Body, Inc. ("Haury's") seeking damages related to restoration work performed on Ms. Mueller's vehicle. Ms. Mueller owned a 1980 BMW 320i car. She brought her vehicle to Haury's in October 2006 asking Haury's to restore the vehicle after Ms. Mueller had taken her car to another facility and had been displeased with the work performed by that other facility. In November 2006, Haury's presented Ms. Mueller with a detailed estimate for problems with the twenty-six-year-old car. Ms. Mueller approved the estimate and Haury's proceeded with the restoration work.

The trial court, following a non-jury trial, ultimately ruled that Haury's is liable to Ms. Mueller because it (1) breached the parties' contract by failing to restore the vehicle to a rust-free condition, and (2) breached Washington's Automotive Repair Act ("ARA"), RCW 46.71.005, *et seq.*, and Consumer Protection Act ("CPA"), RCW 19.86.010, *et seq.*, by overcharging Ms. Mueller.

Haury's respectfully submits that this Court should rule that Haury's did not breach any contract with plaintiff. Plaintiff and Haury's in fact signed two separate contracts, and neither required Haury's to restore Ms. Mueller's vehicle to a rust-free condition.

Second, Haury's asks this Court to rule that Haury's did not violate the ARA by "overcharging" Ms. Mueller. Ms. Mueller never pled this theory and should therefore be barred from recovering under it. Even if she had pled this theory, she should not have been able to recover under the theory. Ms. Mueller signed a Repair Authorization before any restoration work was begun. On that document, she specifically elected not to request and obtain a written estimate. Haury's nevertheless provided Ms. Mueller with a detailed, five-page estimate, but made clear that additional damage to the car might be discovered as the restoration work ensued. Such was the case, and Haury's charges for the additional work cannot qualify as "overcharging" under the ARA. Ms. Mueller was given the choice to be contacted

"if the price will exceed the estimate by 10%" but elected not to do so.

Alternatively, Haury's asks this Court to remand this case to the trial court to determine which version of the Repair Authorization is the correct contract. Plaintiff presented to the trial court two different versions of the Repair Authorization signed by Ms. Mueller which authorized Haury's to begin the restoration of the car. The two versions vary in one significant and material detail. Before the trial court could rule that Haury's breached a contract or that Haury's violated the ARA by overcharging Ms. Mueller, the trial court first had to determine which version of the Repair Authorization was the correct version of the parties' contract.

## **II. ASSIGNMENTS OF ERROR**

### **A. Assignments of Error**

1. The trial court erred in ruling in Conclusion of Law 2.1 that Haury's breached its contract with Ms. Mueller to restore the vehicle to a rust-free condition. The trial court issued that ruling on March 28, 2012.

2. The trial court erred in ruling in Conclusion of Law 2.3 that Haury's violated the ARA and the CPA by overcharging Ms. Mueller. The trial court issued that ruling on March 28, 2012.

3. The trial court erred in ruling in Conclusion of Law 2.4 that Ms. Mueller is entitled to treble damages under the CPA and erred in its calculation of damages recoverable under the CPA. The trial court issued that ruling on March 28, 2012.

4. The trial court erred in ruling in Conclusion of Law 2.5 that Ms. Mueller is entitled to an award of attorney fees under both the parties' contract and the CPA. The trial court issued that ruling on March 28, 2012.

5. The trial court erred by entering a Judgment against Haury's and in favor of Ms. Mueller. That judgment is dated April 25, 2012.

6. The trial court erred by entering an Order and Judgment on Attorney's Fees filed June 15, 2012.

**B. Issues Pertaining to Assignment of Error**

1. Did the trial court err in concluding that Haury's breached a contract when neither the

Repair Authorization nor the subsequent estimate which defined the scope of work stated that the vehicle would be restored to a rust-free condition? (Assignment of Error No. 1)

2. Did the trial court err in finding that two separate documents signed by Ms. Mueller constituted a single contract when the documents were signed separately and pertained to different matters and contained differing provisions? (Assignment of Error No. 6)

3. Did the trial court err in awarding attorney fees to Ms. Mueller under the contract when only one of the documents signed by Ms. Mueller contained an attorney fee provision? (Assignments of Error Nos. 4 and 6)

4. Did the trial court err in finding that Haury's violated the ARA by "overcharging" when Ms. Mueller signed a Repair Authorization electing not to be contacted about charges if they exceeded the estimate by ten percent? (Assignment of Error No. 2)

5. Did the trial court err in not making a Finding of Fact regarding which of two separate Repair Authorizations offered by Ms. Mueller

constituted the proper and effective contract? The difference in the two versions of the Repair Authorization go to whether Ms. Mueller waived notification protections under the ARA. (Assignment of Error No. 2)

6. Did the trial court err in awarding Ms. Mueller damages for a legal theory Ms. Mueller never pled? (Assignment of Error No. 2)

7. Did the trial court err in calculating the amount of damages recoverable under the CPA? (Assignment of Error No. 3)

### **III. STATEMENT OF THE CASE**

#### **A. Factual Background**

This lawsuit arises out of a dispute between Kathryn Mueller and Haury's Auto Body, Inc. related to restoration work performed on Ms. Mueller's vehicle. Ms. Mueller owned a 1980 BMW 320i car. CP 2 (¶ 2.1). In April 2006, Ms. Mueller had had that vehicle painted at another facility, and she was displeased with the result. CP 2 (¶ 2.1). On October 9, 2006, Ms. Mueller brought her vehicle to Haury's Auto Body, Inc.

CP 3 (§ 2.4).<sup>1</sup> At Haury's suggestion, Ms. Mueller hired a consultant named Mark Olson to assist Ms. Mueller with her complaints with the prior facility and to advise her on the restoration project. [RP, Vol. 1, pp. 95-96].

On that date (October 9, 2006), Ms. Mueller met with Jeff Butler, a principal of Haury's, and they visually inspected the vehicle. At the conclusion of that meeting, Ms. Mueller left her vehicle and signed and dated two documents.

The first document Ms. Mueller signed was a Repair Authorization. Plaintiff presented to the trial court two different versions of the Repair Authorization signed by Ms. Mueller. The first version of the Repair Authorization was appended to plaintiff's Complaint. CP 10. That version states in relevant part:

YOU ARE ENTITLED TO A WRITTEN PRICE ESTIMATE FOR THE REPAIRS YOU HAVE AUTHORIZED. YOU ARE ALSO ENTITLED TO REQUIRE THE REPAIR FACILITY TO OBTAIN YOUR ORAL OR WRITTEN AUTHORIZATION EXCEEDS [sic] THE WRITTEN PRICE ESTIMATE. YOUR SIGNATURE OR INITIALS WILL INDICATE YOUR SELECTION.

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<sup>1</sup> Ms. Mueller had first taken her vehicle to Haury's in June 2006 but she did not leave her car at that time and the parties did not at that time enter into any agreement or sign any contract. CP 2 (§§ 2.1 - 2.4).

CP 10.

Immediately beneath that statement were three choices. A customer could check the box next to any of the three choices to make a selection on how he or she wanted to proceed. The three selections were:

- I request an estimate in writing before you begin repairs. Contact me if the price will exceed this estimate by more than 10%, excluding retail sales tax.
- Proceed with repairs, but contact me if the price will exceed \$\_\_\_\_\_.
- I do not want a written estimate.

CP 10. The ARA requires that a repair facility offer these selections. RCW 46.71.025(1).

On the Repair Authorization appended to plaintiff's Complaint, Ms. Mueller checked the third box indicating that she "did not want a written estimate." CP 10. She did not check either of the top two boxes. *Id.*

At trial, plaintiff presented a different version of the Repair Authorization. Plaintiff's Ex. 3. That alternative version is identical except that the second and third boxes are now checked, and the second selection indicated that

Ms. Mueller wanted to be contacted if the price of the restoration exceeded \$16,000.00. *Id.*

Separately, Ms. Mueller signed and dated an October 9, 2006 Payment for Services Agreement. CP 11. That Agreement essentially set forth the terms of payment. The Agreement stated that the customer is responsible for payment of all invoices for services provided. That Agreement also contained an attorney fee provision which provided, "you [the customer] further agree to pay all necessary collection charges and/or reasonable attorney's fees and court costs in the event legal action is necessary to enforce this contract." *Id.*

After Ms. Mueller left her vehicle, Haury's began work on the car. By November 3, 2006 (approximately three weeks after Ms. Mueller left her car), Haury's had prepared a detailed five-page, 146-item estimate of work to be performed on the vehicle. Plaintiff's Ex. 9. Mr. Butler and Ms. Mueller again inspected the vehicle and Mr. Butler gave Ms. Mueller the detailed estimate prepared by Haury's. Ms. Mueller accepted this estimate by signing and dating it. *Id.*

Ms. Mueller signed the November 3, 2006 estimate immediately below a provision on the estimate which stated:

I understand that this is a preliminary estimate. Once repairs have been started, additional damage or work required to repair the vehicle may be discovered which was not evident on first inspection. This damage report does not cover or include any additional parts or labor which may be required.

The November 3, 2006 estimate was \$21,541.22. *Id.*

Haury's proceeded with the restoration. Certain parts for the restoration had to be ordered from Germany because the vehicle was a BMW 320i. [RP, Vol. 2, p. 174] For approximately six months, Ms. Mueller moved the vehicle from Haury's to another facility so that the interior of the vehicle could be restored. Ms. Mueller contracted to have her car interior restored at another facility, and the vehicle was moved to the other facility between April 2008 to November 2008.<sup>2</sup> (Haury's did not restore interiors.)

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<sup>2</sup> Plaintiff's transfer of the vehicle is reflected on Plaintiff's Ex. 5. Lines 366 and 440 show the car was towed to and from Haury's to the other facility.

It is important to note that much of Haury's file on a particular vehicle - the repair orders, notes from customer meetings, technician notations, etc. - is kept in the vehicle itself while at Haury's. [RP, Vol. 4, p. 4] When Ms. Mueller arranged to have her vehicle towed to another facility to have the interior restored, certain of Haury's file material was transferred with the vehicle. After the car was returned to Haury's, Haury's was unable to locate the entire file for this vehicle. [RP, Vol. 4, p. 4]

Haury's communicated with Ms. Mueller regarding the process of the restoration project. See Defendants' Exs. 204 and 205. Ms. Mueller, however, often did not respond and hired an attorney. CP 3-4 (¶¶ 2.7-2.8). In response, Haury's presented its final invoice of \$29,456.64. CP 13-25. Ms. Mueller paid the remaining balance of that amount and received her vehicle. Before Ms. Mueller picked up her vehicle, she spoke with her consultant, Mark Olson. According to Ms. Mueller, Mr. Olson did not say anything about the car. [RP, Vol. 1, p. 97].

**B. Proceedings Below**

This action was tried, in a non-jury trial, to the Honorable Monica Benton in King County Superior Court. Trial occurred on March 21-23 and March 28, 2012.

At the conclusion of trial, the court issued Findings of Fact and Conclusions of Law. CP 1088-1095. In parts relevant to this appeal, the trial court found and ruled as follows:

- (1) On October 9, 2006, Ms. Mueller signed two documents "which constituted her complete contract with Haury's...." Finding of Fact ¶ 1.6 (CP 1090).
- (2) Haury's breached its contract with Ms. Mueller "to restore the vehicle a rust-free condition." Conclusion of Law ¶ 2.1 (CP 1094).
- (3) Haury's "overcharged" Ms. Mueller in the amount of \$7,915.43 and thereby violated the ARA. Conclusion of Law ¶ 2.3 (CP 1094-1095).
- (4) A violation of the ARA is necessarily a violation of the CPA. The trial court awarded Ms. Mueller actual damages of

\$7,915.43, and pursuant to RCW 19.86.090 of the CPA, trebled those actual damages to \$21,746.29. Conclusion of Law ¶ 2.4 (CP 1095).

(5) Ms. Mueller is entitled to attorney fees and costs under both the parties' contract and the CPA, RCW 19.86.080. Conclusion of Law ¶ 2.5 (CP 1095).

The trial court ruled that Haury's breached the ARA by not returning to Ms. Mueller all parts removed from the vehicle but did not award any damages under that claim. CP 2 (¶ 2.2).

On April 25, 2012, the trial court entered judgment in favor of Ms. Mueller, awarding the following:

\$10,000.00	Breach of contract award
\$23,746.29	Violation of the ARA and CPA
\$596.49	Statutory costs
\$10,394.89	Other litigation expenses
<b>\$44,737.67</b>	<b>TOTAL</b>

(CP 1216-1218.)

Finally, on June 15, 2012, the trial court issued Ms. Mueller an award of attorney fees totaling \$58,430.00 (CP 1246).

#### IV. ARGUMENT

##### A. Standard of Review

When the trial court has weighed the evidence, the appellate court reviews the trial court's factual findings to determine whether there was substantial evidence to support them. *Bingham v. Lechner*, 111 Wn. App. 118, 127, 45 P.3d 562 (2002). "Substantial evidence is evidence in sufficient quantum to persuade a fair-minded person of the truth of the declared premise." *Brin v. Stulzman*, 89 Wn. App. 809, 824, 951 P.2d 291 (1998) (quoting *Cowiche Canyon Conservancy v. Bosley*, 118 Wn.2d 801, 819, 828 P.2d 549 (1992)). After determining whether the factual findings are supported by substantial evidence, the appellate court reviews conclusions of law *de novo* to see if they are supported by the trial court's findings of fact. *Bingham*, 111 Wn. App. at 127.

**B. The Trial Court Erred By Not Finding Which Version of the Repair Authorization Is Applicable**

Ms. Mueller presented the trial court with two different versions of the Repair Authorization which she signed on October 9, 2006. Plaintiff appended one version of the Repair Authorization to her Complaint. (CP 10). Plaintiff later presented a different version. See Plaintiff's Ex. 3.

These two versions vary in one significant manner. In the first version, Ms. Mueller checked the box indicating, "I do not want a written estimate." *Id.* Ms. Mueller did not check the following boxes:

- I request an estimate in writing before you begin repairs. Contact me if the price will exceed this estimate by more than 10%, excluding retail sales tax.
- Proceed with repairs, but contact me if the price will exceed \$\_\_\_\_\_.

(CP 10). This is the version of the Repair Authorization which plaintiff appended to her Complaint. See CP 10. This is the version on which plaintiff based her stated causes of action.

Plaintiff presented to the trial court a different version of the Repair Authorization. (Plaintiff's Ex. 3). On that alternative version, the middle and lower boxes are checked. The middle box indicates:

Proceed with repairs, but contact me if the price will exceed \$16,000.

(Plaintiff's Ex. 3). Plaintiff did not explain to the trial court the discrepancy between her two different Repair Authorizations.

It was essential that the trial court determine, as a threshold matter, which contract was executed by the parties. The court could not rule on whether Haury's breached a contract without first determining the terms of the contract. Further, the trial court had to decide, for purposes of determining whether Haury's violated the ARA by failing to obtain advance authorizations, whether Ms. Mueller had in fact waived any right for an estimate or for subsequent authorizations.

Simply stated, before the trial court could determine whether Haury's breached a contract or violated the ARA or CPA, the trial court had to

first determine the terms of the contract at issue. The trial court erred by failing to do so. That error is reflected in every other ruling by the trial court. Because the trial court did not make a Finding of Fact regarding which version of the Repair Authorization was the proper contract, Haury's submits that this Court cannot determine whether the remainder of the trial court's factual findings are supported by substantial evidence or whether the trial court erred in its legal conclusions.

Haury's submits that the evidence presented at trial does not provide evidence from which this Court can presume a reason the trial court did not make a finding on this issue. It is unclear whether the trial court's failure to include a specific finding on this issue was intentional or inadvertent. See *Douglas Northwest, Inc. v. O'Brien & Sons Constr., Inc.*, 64 Wn. App. 661, 682, 828 P.2d 565 (1992) (court stated it is unrealistic to treat the absence of a finding as the equivalent of a negative finding or an issue unless there is some indication in

the record that the failure to make such a finding was intentional).

Haury's asks that this Court remand this case with instructions to the trial court to determine which version of the Repair Authorization is in effect.

**C. The Trial Court Erred by Ruling that Haury's Breached Its Contract To Restore the Vehicle To "Rust-Free Condition"**

In its first Conclusion of Law, the trial court ruled, "Haury's breached its contract with Ms. Mueller to restore the vehicle a rust-free condition." CP 1094 (§ 2.1). The trial court erred in that conclusion because Haury's never agreed to, and was never contractually obligated to, restore the vehicle a rust-free condition.

The following contracts were presented to the trial court in this case. First, Ms. Mueller signed a Repair Authorization on October 9, 2006. As discussed above, there are two versions of that contract. See CP 10 and Plaintiff's Ex. 3. Neither version contains any obligation that Haury's will restore the vehicle to a rust-free condition.

Ms. Mueller signed that contract after meeting with Jeff Butler, a principal of Haury's, and after they visually inspected the vehicle.

Mr. Butler's handwritten notes from that meeting were admitted as evidence in the trial court. Defendant's Ex. 102. Those handwritten notes, and Mr. Butler's trial testimony regarding those notes, do not contain any reference to restoring the vehicle to a rust-free condition. See Defendant's Ex. 102 and RP, Vol. 2, pp. 160-161.

Ms. Mueller left her car at Haury's on October 9, 2006. By November 3, 2006, Haury's had prepared a detailed evaluation of problems with the vehicle. Ms. Mueller met with Haury's on November 3, 2006. Jeff Butler and Ms. Mueller again inspected the vehicle and Mr. Butler presented Ms. Mueller with a detailed estimate - five pages long with 146 entries reflecting work to be performed on the car. Plaintiff's Ex. 9. Ms. Mueller signed that estimate. *Id.* at p. 5.

That November 3, 2006 estimate is important for two reasons. First, that estimate reflects the parties' agreement about what work Haury's

would perform on the car. That estimate identifies the work that Haury's was to perform pursuant to the Repair Authorization. And nowhere does that five-page estimate state that Haury's would restore the car to a rust-free condition. *Id.*

Ms. Mueller agreed to the estimate by signing it. Plaintiff's Ex. 9 at p. 5. She did not add any obligation to the estimate that the car be restored to a rust-free condition. For good reason. This car was twenty-six years old when Ms. Mueller brought it to Haury's. The trial court heard testimony that restoring this vehicle to a rust-free condition would be a very expensive and very difficult proposition. Haury's principal, Jeff Butler, testified that to obtain a rust-free condition would require a cost of "three or four times" what the parties had agreed for this car. [RP, Vol. 4, pp. 161-162]

The November 3, 2006 estimate is also important because it estimated the costs of repair at \$21,541.22. See Plaintiff's Ex. 9. As noted above, Ms. Mueller signed and dated the

estimate immediately below a provision which reads in part:

I understand that this is a preliminary estimate. Once repairs have been started, additional damage or work required to repair the vehicle may be discovered which was not evident on first inspection. This damage report does not cover or include any additional parts or labor which may be required. All parts prices are subject to invoice....

*Id.*

In short, Ms. Mueller brought her car to Haury's on October 9, 2006 and signed a Repair Authorization. That Repair Authorization authorized Haury's to undertake agreed-upon repairs. Haury's undertook a detailed inspection of the vehicle and on November 3, 2006 presented Ms. Mueller with that inventory. The Repair Authorization (whichever version is the correct version) and the November 3, 2006 estimate represent the parties' contract. That contract does not state that Haury's will restore the car to a rust-free condition, and the trial court erred by ruling that Haury's breached the contract by failing to do so.

D. The Trial Court Erred by Ruling that Ms. Mueller Is Entitled to Attorney Fees and Costs Pursuant to the Parties' Contract

The trial court awarded Ms. Mueller attorney fees and costs pursuant to the parties' contract. CP 1095 (¶ 2.5).<sup>3</sup> The trial court found that Ms. Mueller signed two documents when she brought her car to Haury's on October 9, 2006, and those two documents "constituted her complete contract with Haury's." CP 1090 (¶ 1.6).

The two documents Ms. Mueller signed on October 9, 2006 were a Repair Authorization and a Payment for Services Agreement. CP 10 and CP 11. Only the latter document contained an attorney fee provision: "you [the customer] further agree to pay all necessary collection charges and/or reasonable attorney's fees and court costs in the event legal action is necessary to enforce this contract." CP 11.

By its terms, this contractual attorney fee provision applies only to legal actions brought by Haury's. Under Washington law, however, this attorney fee provision would be read to be

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<sup>3</sup> The trial court also awarded Ms. Mueller her attorney fees and costs pursuant to the CPA. CP 1095 (¶ 2.5). Haury's objects to that ruling as well; that issue is discussed below.

reciprocal. RCW 4.84.340. Nevertheless, Haury's submits that Ms. Mueller is not entitled to recover her attorney fees pursuant to this contract for two reasons. First, as discussed above, Haury's did not breach any contract with Ms. Mueller. Second, if Haury's is held to have breached any contract, it could only have breached the Repair Authorization which does not contain an attorney fee provision. Haury's cannot be held to have breached the Payment for Services Agreement.

The trial court erred by ruling that the two documents signed by Ms. Mueller on October 9, 2006 constituted one contract. The two documents should be considered two separate contracts. They address different issues. One authorized Haury's to undertake repairs; the other set forth payment terms.<sup>4</sup>

Whether separate documents executed by the same parties constitute one contract or multiple contracts is determined by "whether the parties asserted to all the promises as a single whole,

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<sup>4</sup> Ms. Mueller presented the two documents as separate exhibits in her pre-trial submittal to the trial court. See Plaintiff's Exs. 3 and 4.

so that there would have been no bargain whatever, if any premise or set of premises were struck out." *Saletic v. Stammes*, 51 Wn.2d 696, 699, 321 P.2d 547 (1952) (quoting *United States v. Bethlehem Steel Corp.*, 315 U.S. 289, 298, 62 S.Ct. 581, 86 L.Ed. 855 (1942)).

In this instance, the Repair Authorization, supplemented by the November 3, 2006 estimate, contained Ms. Mueller's authorization to Haury's to perform the restoration, identified the agreed work to be performed and provided a price estimate. The second document, the Payment for Services Agreement, separately specified the parties' rights in the event of late payment or nonpayment. These two documents can be, and should have been, read separately and independently. See *State v. Plaggemeier*, 93 Wn. App. 472, 482-83, 969 P.2d 516 (1999) (court held that *one document* which contained separate sections constituted separate independent agreements).

At worst, Haury's could be held to have breached the Repair Authorization; it cannot be held to have breached the Payment for Services

Agreement. Because those must be considered separate contracts and because the Repair Authorization does not contain an attorney fee provision, the trial court erred in awarding Ms. Mueller attorney fees pursuant to contract. Haury's asks this Court to reverse that ruling of the trial court.

**E. The Trial Court Erred in Ruling that Haury's Violated the ARA by Overcharging Ms. Mueller**

The trial court ruled that Haury's violated the ARA by overcharging Ms. Mueller in the amount of \$7,915.34. CP 1094-1095(¶ 2.3). The trial court erred in making this ruling for the following reasons.

1. Ms. Mueller never pled an ARA violation premised on overcharging; therefore, she cannot recover under that theory.

In her Complaint, Ms. Mueller alleged Haury's violated the ARA (1) by failing to return to Ms. Mueller parts removed from the car, and (2) for charging Ms. Mueller for parts which were not added to the car. CP 6. Ms. Mueller never pled that Haury's violated the ARA by allegedly overcharging her. See CP 1-8.

Even under the liberal rules of procedure and notice pleading, a complaint "must apprise the defendant of the nature of the plaintiff's claims and the legal grounds upon which the claims rest." *Molloy v. City of Bellevue*, 71 Wn. App. 382, 385, 859 P.2d 613 (1993), *rev. denied*, 123 Wn.2d 1024 (1994). "A pleading is insufficient when it does not give the opposing party fair notice of what the claim is and the ground upon which it rests." *Dewey v. Tacoma School Dist. No. 10*, 95 Wn. App. 18, 23, 974 P.2d 847 (1999) (citing *Lewis v. Bell*, 45 Wn. App. 192, 197, 724 P.2d 425 (1986)). A party who does not plead a theory of recovery "cannot finesse the issue by later inserting the theory into trial briefs and contending it was in the case all along." *Dewey*, 95 Wn. App. at 26. *Accord*, *Kirby v. City of Tacoma*, 124 Wn. App. 454, 469-71, 98 P.3d 827 (2004) (court affirmed trial court's dismissal of a First Amendment claim which plaintiff had not pled in his complaint but later attempted to assert; the court noted that the defendant "should not be required to guess against which claims they will have to defend.").

In *Evergreen Moneysource Mortgage Co. v. Shannon*, 167 Wn. App. 242, 274 P.3d 375 (2012), plaintiff argued on appeal that one of its claims had wrongfully been dismissed by the trial court because it had not been explicitly pled in the complaint. The Court of Appeals upheld the trial court's dismissal of the unpled claim. *Id.* at 255-57. The court also rejected the argument that any omission in the complaint can be rectified through discovery responses; the court noted that while discovery answers or other subsequent proceedings might "clarify" an ambiguous complaint, they cannot do so to where the complaint is silent as to the claim in issue. *Id.* at 257.

If a party wishes to amend its pleadings to add an additional claim or theory, they must do so under CR 15. Ms. Mueller chose not to pursue that course.

In this case, Ms. Mueller did not plead a theory of recovery based on the argument Haury's violated the ARA by overcharging. Accordingly, Ms. Mueller cannot recover under that theory and the trial court erred in ruling that Haury's

violated the ARA on that basis. Haury's asks that this Court reverse the trial court's ruling that Haury's violated the ARA by overcharging Ms. Mueller and reverse the trial court's award to Ms. Mueller under the CPA for that violation in the amount of \$7,915.43 trebled to \$23,746.29. Haury's also asks that this Court reverse the trial court's award of attorney fees to Ms. Mueller based upon the finding that Haury's violated the CPA.

2. Haury's did not violate the ARA by overcharging; Ms. Mueller waived her right to be contacted about necessary additional work.

The ARA was enacted in Washington to enhance communications between repair facilities and their customers. RCW 46.71.005.<sup>5</sup> In support of that goal, the ARA requires a repair facility either to provide a written price estimate in advance of performing the work **or** offer the customer the following alternatives:

- (1) The customer may waive a written estimate;

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<sup>5</sup> Haury's does not dispute that it falls within the definition of "repair facility" set forth in RCW 46.71.011(3).

- (2) The customer may authorize the repair facility to proceed with repairs but to contact the customer if the price will exceed an agreed upon amount; or
- (3) The customer may request a written estimate before any repairs are undertaken, and the customer may request to be contacted if the price of repairs exceeds the estimate by ten percent.

RCW 46.71.025(1).

Consistent with this requirement of the ARA, Haury's first provided Ms. Mueller when they met on October 9, 2006 with the alternatives set out in RCW 46.71.025(1). These alternatives were contained in the Repair Authorization signed by Ms. Mueller. CP 10. According to her Complaint, Ms. Mueller chose the third alternative. She checked the box next to the alternative, "I do not want a written estimate." CP 10. Ms. Mueller did not check either of the other boxes indicating that she wanted to be contacted if repairs exceeded a certain amount or that she wanted a written estimate.

The ARA makes clear that a customer can waive the requirement of a written estimate. See RCW 46.71.014(4) (recognizing that the right to an estimate may be waived).

Despite the fact that Ms. Mueller elected not to receive a written estimate, Haury's nevertheless prepared a detailed estimate of work necessary for this car. Haury's provided this five-page estimate, containing 146 separate line items, to Ms. Mueller at a meeting on November 3, 2006, approximately three weeks after she left her vehicle. Plaintiff's Ex. 9. The estimated price of the work was \$21,541.22. *Id.*

The Repair Authorization signed by Ms. Mueller on October 9, 2006 and the November 3, 2006 estimate (also signed by Ms. Mueller) represent the contract which defined Haury's agreed scope of work as of November 3, 2006. The Repair Authorization authorized Haury's to work on Ms. Mueller's car, and the November 3, 2006 estimate identified the work to be performed (again, based on the knowledge held by the parties as of November 3, 2006).

It was understood by the parties that additional work might be required. The November 3, 2006 estimate expressly provided:

I [the customer] understand that this is a preliminary estimate. Once repairs have been started, additional damage or

work required to repair the vehicle may be discovered which was not evident on first impression. This damage report does not cover or include any additional parts or labor which may be required. All parts subject to invoice....

Plaintiff's Ex. 9.

In fact, more work was required on the vehicle which Haury's performed. This additional work increased the total cost of the restoration from the estimate of \$21,541.22 to \$29,456.65. The trial court erred in ruling that this increase amounted to "overcharging." Haury's had quite clearly informed Ms. Mueller in the November 3, 2006 estimate that, despite the detail of that estimate, "additional parts or labor . . . may be required." Plaintiff's Ex. 9. And in the Repair Authorization introduced by Ms. Mueller with her Complaint, Ms. Mueller elected not to have Haury's contact her if the price increased. CP 10. She could have chosen to be informed of necessary additional parts or labor but she elected not to. She understood that choice.

It must also be noted that Haury's did not simply take advantage of a situation by

arbitrarily increasing its invoice. Jeff Butler of Haury's testified that he obtained oral authorizations from Ms. Mueller for all additional work performed on the vehicle. [RP, Vol. 3, p. 63] His notes reflecting those authorizations were placed in the file Haury's maintained on this car but that file was lost during or after the period the vehicle was transferred to a separate facility to have the interior restored. [RP, Vol. 4, p. 4]

Accordingly, Haury's did not have at trial the documentation which reflected the oral authorizations given by Ms. Mueller for additional work as required by RCW 46.71.025(2). Nevertheless, as discussed above, Ms. Mueller waived the right to be contacted if additional work was required. The trial court erred in finding that Haury's violated the ARA by overcharging Ms. Mueller, and the trial court erred by awarding damages under the CPA for this violation. The trial court also erred by ruling that Ms. Mueller is entitled to attorney fees under the CPA.

**F. The Trial Court Erred in Calculating CPA Damages**

The trial court erred in calculating that Haury's overcharged Ms. Mueller by \$7,915.43. RCW 46.71.025(2) bars a repair facility from charging more than 110 percent of a written estimate, exclusive of retail sales tax. The trial court should have deducted the sales tax, a total of \$1,190.07. Plaintiff's Ex. 5, p. 13. The trial court also did not account for the permissible 110 percent of the November 3, 2006 estimate, a total of \$1,979.89.<sup>6</sup> That amount, too, must be subtracted from the trial court's damage award.

**V. CONCLUSION**

For the reasons discussed above, Haury's asks this Court (1) to reverse the trial court's ruling that Haury's breached a contract with Ms. Mueller, (2) to reverse the trial court's ruling that Haury's violated the ARA by overcharging Ms. Mueller, and (3) to reverse the trial court's ruling that Ms. Mueller is entitled to an award of attorney fees and costs. Alternatively,

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<sup>6</sup> This total is equivalent to ten percent of the November 3, 2006 invoice prior to addition of applicable taxes. Plaintiff's Ex. 9, p. 5.

Haury's asks this Court to remand this case so that the trial court can make the necessary threshold determination of which Repair Authorization was intended by the parties to control. In the event this Court upholds the trial court's findings and rulings, Haury's asks this Court to find that the trial court erred in calculating damages for the alleged overcharging.

RESPECTFULLY SUBMITTED this 12<sup>th</sup> day of October, 2012.

FORSBERG & UMLAUF, P.S.

  
Michael P. Hooks, WSBA #24153  
Attorneys for Appellants  
Haury's Auto Body, Inc.

**CERTIFICATE OF SERVICE**

The undersigned certifies under the penalty of perjury under the laws of the State of Washington that I am now and at all times herein mentioned, a citizen of the United States, a resident of the State of Washington, over the age of eighteen years, not a party to or interested in the above-entitled action, and competent to be a witness herein.

On the date given below I caused to be served the foregoing APPELLANTS' OPENING BRIEF on the following in the manner indicated:

Clerk of the Court  
Court of Appeals Div. I  
600 University Street  
One Union Square  
Seattle, WA 98101  
 Via Hand Delivery

Kristin G. Olson, Esq.  
O'Shea Barnard Martin  
10900 NE 4th Street  
Suite 1500  
Bellevue, WA 98004-5844  
 Via Hand Delivery

**SIGNED** this 12<sup>th</sup> day of October, 2012, at  
Seattle, Washington.

  
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Jean M. Young

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