

No. 46442-0-II

COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON

JAMES SWAIN, individually,

Appellant,

v.

SUREWAY, INC., a Washington Corporation,

Appellee.

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

REPLY BRIEF OF CROSS-APPELLANT/RESPONDENT

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

TABLE OF CONTENTS

I. ARGUMENT IN REPLY..... 1

II. CONCLUSION.....2

TABLE OF AUTHORITIES

Cases

Ball v. Smith,

87 Wn.2d 717, 722-23, 556 P.2d 936 (1976)..... 1

Hyatt v. Sellen Constr. Co.,

40 Wn. App. 893, 899, 700 P.2d 1164 (1985) 1

State v. Olmedo,

112 Wn. App. 525, 49 P.3d 960 (2002) 1

Strenger v. State,

104 Wn. App. 393, 407, 16 P.3d 655, *reveiwed denied*, 144 Wn.2d
1006, 29 P.3d 719 (2001)..... 1

I. ARGUMENT IN REPLY

It is for the trial court, not an expert witness, to interpret the relevant statute and instruct the jury as to its requirements. *Ball v. Smith*, 87 Wn.2d 717, 722-23, 556 P.2d 936 (1976). “Improper legal conclusions include testimony that a particular law applies to the case, or testimony that the defendant’s conduct violated a particular law.” *State v. Olmedo*, 112 Wn. App. 525, 49 P.3d 960 (2002), citing *Hyatt v. Sellen Constr. Co., Inc.*, 40 Wn. App. 893, 899, 700 P.2d 1164 (1985). Furthermore, experts may not offer opinions of law in the guise of expert testimony. *Strenger v. State*, 104 Wn. App. 393, 407, 16 P.3d 655, review denied, 144 Wn.2d 1006, 29 P.3d 719 (2001).

Here, the court improperly allowed Mr. Harber to testify about the Automotive Repair Act (“ARA”) and which sections apply to this case, and to testify that Sureway’s conduct violated those particular sections of the ARA. In his response, Swain suggests that Mr. Harber’s testimony was limited to whether Sureway complied with the manufacturer specifications and to why the caliper fell off. Reply Brief of Appellant at pp. 8. However, as discussed in Sureway’s Appellate Brief, Mr. Harber also testified about the ARA’s statutory requirements and opined whether Sureway violated any of those requirements. *See* VRP (Vol. 2) at p. 27, line 2 – p. 27, line 5; VRP (Vol. 2) at p. 69, line 21 – p. 70, line 17.

Swain also argues that the trial court did not err because Mr. Harber “testified that he had previously been called as an expert witness on the ARA in other court proceedings.” Reply Brief of Appellant at pp. 7-8. The sole testimony referenced in support of this argument was the question “Have you ever testified as an expert regarding the Automotive Repair Act?” and his answer “Yes.” VRP (Vol. 2) at p. 17, lines 19-21. That Mr. Harbor may have testified in some other court proceeding “regarding the Automotive Repair Act” does not overcome the clear law prohibiting experts from testifying to what law applies, what that law requires, and whether Sureway complied with the statute’s requirements.

II. CONCLUSION

The trial court erred when it permitted Mr. Harber to testify to the requirements of the Automotive Repair Act and whether Sureway complied with the Act. This court should reverse the trial court’s ruling allowing Mr. Harber’s testimony as to the requirements of the ARA and prohibit such testimony at any trial on remand.

Respectfully submitted this 11th day of March, 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 Reply Brief of Respondent/Cross-Appellant.

| | |
|--|--|
| <u>Counsel for Plaintiff via Email and U.S. Mail</u> Alana K. Bullis 1911 Nelson Street Dupont, WA 98327 Alana-akblaw@live.com | <u>Court of Appeals via E-Filing</u> Court of Appeals, Division II Clerk of the Court |
|--|--|

Dated this 11th day of March, at Seattle, Washington.



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

HELSELL FETTERMAN LLP

March 11, 2015 - 12:10 PM

Transmittal Letter

Document Uploaded: 5-464420-Respondent Cross-Appellant's Reply Brief.pdf

Case Name: James Swain v. Sureway, Inc.

Court of Appeals Case Number: 46442-0

Is this a Personal Restraint Petition? Yes No

The document being Filed is:

Designation of Clerk's Papers Supplemental Designation of Clerk's Papers

Statement of Arrangements

Motion: _____

Answer/Reply to Motion: _____

Brief: Respondent Cross-Appellant's Reply

Statement of Additional Authorities

Cost Bill

Objection to Cost Bill

Affidavit

Letter

Copy of Verbatim Report of Proceedings - No. of Volumes: _____

Hearing Date(s): _____

Personal Restraint Petition (PRP)

Response to Personal Restraint Petition

Reply to Response to Personal Restraint Petition

Petition for Review (PRV)

Other: _____

Comments:

No Comments were entered.

Sender Name: Heather E Sims - Email: hsims@helsell.com

A copy of this document has been emailed to the following addresses:

Alana-akblaw@live.com

psmetka@helsell.com

lwatts@helsell.com

bkindle@helsell.com