DECLARATION OF MAILING
The undersigned declares that on the 11th day of June, 2009 she deposited in the mails of the United States of America a properly stamped and addressed envelope directed to attorneys/parties or record; containing a true and correct copy of the document on which this declaration appears.

Lisa Skelley, Legal Assistant

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
09 JUN 15 PM 3:28
BETTY J. GOULD, CLERK
BY _____ DEPUTY

SUPERIOR COURT OF WASHINGTON
IN AND FOR THURSTON COUNTY

CHARLES KELLOGG,
Plaintiff,
vs.
JOEL COMER, ET UX
Defendants.

Case No. 08-2-01716-5

ARBITRATION AWARD
(ARBA)

The issues in arbitration having been heard on May 19, 2009 and June 4, 2009, I make the following award:

The Complaint of the Plaintiff against the Defendants is dismissed. The Defendants are awarded $18,000 against the Plaintiff under their Counterclaim for breach of contract. All other Counterclaims are dismissed.

Twenty days after the award has been filed with the clerk, if no party has sought a trial de novo, the prevailing party, on notice to all parties, may present to the Civil Presiding Judge a judgment on the arbitration award for entry as final judgment in this case.

Was any part of this award based on the failure of a party to participate? ☐ Yes ☒ No

If yes, please identify the party and explain:

Dated: 6-11-09

R. Alan Swanson
Swanson Law Firm, PLLC
908 5th Avenue SE
Olympia, WA 98501
360-236-8755

File the **Original** of this form with the
ARBITRATION COORDINATOR, Thurston County Superior Court
and serve copies on all parties to this action.

WASHINGTON STATE SUPERIOR COURT
THURSTON COUNTY
2000 Lakeridge Drive SW
Olympia, Washington 98502
(360) 786-5560 fax: (360) 754-4060

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FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
2009 JUN 15 PM 4:19
BETTY J. GOULD, CLERK
BY _____ DEPUTY

June 11, 2009

Ben D. Cushman
Cushman Law Firm
924 Capitol Way S
Olympia, WA 98501

Clay Selby
Eisenhower & Carlson PLLC
1201 Third Avenue, Suite 1650
Seattle, WA 98101

Re: Kellogg v. Comer, et ex
Thurston County Superior Court Cause N. 08-2-01716-5

Dear Counsel:

This letter will provide you with a summary of my findings which formed the basis of my enclosed Arbitration Award. As I indicated at the conclusion of the hearing, please do not conclude that because I have not commented upon specific evidence in this letter that such evidence was not considered or otherwise ignored.

COMPLAINT OF PLAINTIFF

I begin with considering Kellogg's Complaint, which is very straightforward, seeking $8,082.17 plus pre-judgment interest, on the basis that the Kellogg and Comer entered into a valid contract, that Kellogg substantially performed his obligations under the contract, that Comer has no defenses to payment, and that therefore this amount is due and owing.

Comer alleges several affirmative defenses including lack of consideration, prior breaches by Kellogg, waiver and estoppel, laches, fraud, and payment and discharge.

The "contract" initially consisted of only the 11/26/07 Letter of Authorization which both parties have affirmed as their understanding at least at that time. There was no initial estimate provided as required under Washington law, and I will comment upon that further herein. This Letter of Authorization was qualified in several respects including statements that the $6,000-$8,000 is a "wild guess" and is a "shooting from the hip" number and is "based upon preliminary findings only," and is "not definitive" and so on.

It is unfortunate that nothing more specific was then provided; nevertheless, both parties were comfortable in proceeding on that basis.

But this Letter of Authorization also contains certain statements which rise to the level of express warranties. These statements were affirmed by Kellogg in his testimony, and Comer testified that he specifically relied upon these representations, as well as oral representations made to him by Kellogg over the telephone. Admittedly, by relying upon the Letter of Authorization, Comer agreed that "...I do not wish to discuss the point by point details of the restorative and repair work contemplated...," but in so releasing his right to be advised of these "point by point details," he is "...relying instead on their expertise and judgment to carry out the work required to bring my Land Rover up to very good operating condition." And furthermore that it be "...reliable and steadfast for several years to come." So it was based upon these specific express representations and warranties that Comer relinquished his right to be otherwise advised of the "point by point details." In other words, he placed all of his trust in Kellogg.

As the work progressed, more and more problems were noted. It appears that these problems were discussed between Kellogg and Comer at least generally. No written estimates were provided, but the totality of the evidence seems to indicate that on most occasions Kellogg obtained Comer's oral or e-mail authorization before proceeding. In other situations, perhaps Kellogg simply proceeded and then referenced the work on the invoices.

Therefore, a course of conduct developed between the parties based loosely on occasional telephone calls, e-mails, and then the invoices which were ratified by payment. Frankly, it was this loose and general course of conduct that caused most of the problems which were the subjects of the hearing.

Kellogg kept the Land Rover longer than originally anticipated, but Comer was aware of that, and again had authorized or ratified the ongoing work. Therefore, there was no breach of contract due merely to any delays.

I found it most curious how the vehicle left Kellogg's facility. Frankly, it makes little sense that a Kiwi driver showed up unannounced, hung around awhile, and then somehow coerced Kellogg into loading up the Land Rover to transport back to Comer. If it did happen that way, then Kellogg certainly owed a duty to Comer to first verify that shipment of the vehicle was authorized. Kellogg seemed to testify at first that he wanted to keep the vehicle a little longer for further tests, etc., which would indicate that it was not yet in "good operating condition," but then when questioned further, he specifically testified that it "performed admirably" when it was released to the Kiwi driver. So if that were the case, then Kellogg was ready to release the vehicle in any event. Since Kellogg did not contact Comer, or advise Comer any differently, I am left to conclude that from Kellogg's perspective, all of the work had been completed pursuant to the contract.

But apparently Kellogg had not yet created or forwarded a final invoice, and both parties essentially acknowledged that it was not received by Comer until sometime later. By then, Comer had already noted problems with the vehicle, and therefore expressed to Kellogg that he had no intention of making any further payment unless and until the problems were rectified. Comer testified that Kellogg generally acceded to Comer's position. Yet more and more problems were noted. Kellogg was advised of the legitimacy of these problems by experts in the Bay area, and he attempted to work with those experts to resolve those problems. Ultimately, Comer had to expend an additional $24,000. I will discuss that further below. But the fact is that sometime thereafter Kellogg then decided that even under these circumstances the remaining amount of $8,082.17 was still due and owing under the original contract.

Regarding the reasonableness and necessity of the work performed, Kellogg testified that Chris Driden did the work himself on the vehicle, and would then provide Kellogg's bookkeeper with his time sheets, etc., and from those time sheets the invoices would be created. Kellogg himself had little firsthand knowledge regarding the actual repair work undertaken. Therefore, the basis of Kellogg's claim for additional moneys due ultimately relies upon Driden's work. I found Driden's testimony to be credible, yet also quite vague and general in nature. I also noted that he had no specific training in repairing Land Rovers, rather, received some on-the-job training from Kellogg himself. And Driden affirmed that he was not involved in the preparation of the estimates, and did not even review them for accuracy before they were sent out.

I also note that in Kellogg's letter to Comer of 6/11/08 he stated, "It is now evident retrospectively that Driden was in severely failing health and that his weakness may have adversely affected the caliber of work done on your engine." This sentence seemingly makes two statements: First, that it was "evident retrospectively" to Kellogg that Driden was in "severely failing health" when he was doing the repair work; and second, that his weakness might possibly have adversely affected the caliber of his work. So Kellogg is stating as a matter of the fact that Driden was ill, and stating his opinion that possibly his illness had an affect on the caliber of the work. Yet Driden himself testified that he was not ill during the time period the vehicle was being repaired. So there is an contradiction in the testimony of Kellogg and Driden on a very essential point. If Driden was ill at the time, then he should not have been doing the work. If he was not ill at the time, then what purpose does the statement serve?

It appears there was a disconnect between Driden and Kellogg throughout the entire repair process. Meanwhile, Comer was sent multiple invoices, each of which he timely paid, to the extent that he had paid approximately $37,000 by the time his vehicle was returned to him when Kellogg thought it "performed admirably." Comer was entitled to believe at that time that this $37,000 had provided him with a vehicle in "very good operating condition" which would be "reliable and steadfast for several years to come."

He should not have had to pay an additional $8,000 to get what he had already overpaid for.

Therefore, I conclude that Kellogg shall not recover damages against Comer under his claim of breach of contract.

COUNTERCLAIMS OF DEFENDANT

Comer alleges Counterclaims for fraud in the inducement, negligence, violation of the Consumer Protection Act, and breach of contract. There was insufficient evidence on the claim of fraud. I did not consider the claim of negligence, since I find that Comer's remedies are based in contract, rather than in tort.

I find that the vehicle was essentially defective and inoperable when it was returned to Comer. Certainly Kiwi had nothing to do with that. I appreciate again that Kellogg stated it "performed admirably" just before transport; nevertheless, I found Comer's testimony regarding the problems he immediately experienced to be highly credible. Therefore, I am left to conclude that the vehicle was not performing admirably before it was shipped back, and that Kellogg's testimony to that effect was based in large part on his lack of firsthand information. I seem to recall an offhand comment by him to the effect that if it had been performing poorly then Driden would have told him.

In corroboration of the fact that there were problems, I note that Comer immediately telephoned Kellogg to advise of the problems, and Kellogg affirmed in his own testimony that he offered suggestions, etc. When Comer became more and more frustrated, he invited Kellogg to fly down to inspect the vehicle before any repair work was undertaken. Kellogg decided not to do so. Instead, Kellogg referred Comer first to a carburetor specialist, and then later to Auto Europa. These were both facilities which were recommended by Kellogg himself, and therefore assumedly were qualified in Kellogg's opinion to inspect and repair as appropriate.

It is argued that Comer had an obligation to return the vehicle (admittedly at Kellogg's expense) and allow Kellogg an opportunity to repair it himself. This was assumedly under Kellogg's oral warranty which I believe is referenced for the first time in Kellogg's letter of 6/11/08. But I note that though Kellogg had agreed to pay for the expense of shipping the vehicle back up to Olympia, Kellogg had not agreed to pay for any repair work; rather, the most he could say was that he would not charge for any additional repair work which would be necessitated to correct earlier work. That is perhaps understandable – after all, Kellogg did not want to sign a "blank check," but nonetheless it left Comer in a difficult position. Essentially, Kellogg was demanding that Comer ship the vehicle back up to the very facility which Comer then understandably believed had not done the repair work correctly the first time. And he would be relinquishing possession of his vehicle perhaps for another considerable amount of time. Under all of the circumstances, I cannot find that Comer had an obligation to do so, or that Comer's

decision to have the vehicle repaired at Auto Europa constituted spoliation or otherwise now provides Kellogg with a defense.

I am not finding that Kellogg had a legal obligation to fly down to San Francisco to inspect the vehicle. But on the other hand, that would have been the simplest and most cost effective thing to do. Had Kellogg chosen to do so, perhaps many of his concerns regarding the nature and extent of the damages could have been addressed. But instead, I am faced with evidence and argument that some of the repair work undertaken by Auto Europa was unnecessary, and much of it pertained to repair work which Kellogg had not been authorized to undertake in any event, or otherwise constituted betterment. I very much appreciate the chargeback spreadsheet which Mr. Cushman prepared at my request, and it does indeed help to understand the issues. Nevertheless, I feel I am still in a very poor position to sort all of that out, and frankly, I am not going to make any attempt to go line by line through the Auto Europa invoices, compare them with the Kellogg invoices, and attempt to compare "apples to apples."

I find that Comer did everything reasonable to address the many problems he noted upon return of the vehicle. He was in regular contact with Kellogg, seeking whatever advice Kellogg could provide. He followed up on all of Kellogg's recommendations. And as I recall it, Kellogg even spoke with Ron Mifsud regarding these problems before the repair work was undertaken.

Under all of these circumstances, I cannot therefore conclude that Comer acted inappropriately somehow or otherwise breached his ongoing duties to Kellogg. Rather again, I believe Comer did everything he could do under those circumstances.

Comer did not receive the benefit of the bargain for which he had already paid in excess of $37,000, and in order to receive that benefit and get the vehicle represented by Kellogg, Comer really had no alternative but to incur additional costs. He proceeded with repair work at the facility recommended by Kellogg.

As stated above, it would be very difficult for me to determine whether or not all of the billings from Auto Europa were reasonable and necessary to address the breaches by Kellogg (i.e. compare "apples to apples"). Nevertheless, I am persuaded that Comer presented substantial evidence that much of the repairs by Auto Europa were necessary to correct the repairs of Kellogg.

Comer claims actual damages of $24,000. Given my above comments, I cannot conclude that all of the work undertaken by Auto Europa was necessitated by the contractual breaches of Kellogg. Admittedly it is somewhat "arbitrary," but I have discounted the Auto Europa total by $6,000, and therefore award Comer $18,000 in actual damages against Kellogg.

I now consider the Counterclaim for violation of the Automotive Repair Act and the Consumer Protection Act. RCW 46.71.025 does indeed require that all estimates for work exceeding $100 shall be in writing. Certainly the 11/26/07 Letter of Authorization does not qualify as a written estimate as defined under Washington law. That would therefore constitute a prima facia violation of the Automotive Repair Act. Nevertheless, I must also look to the course of conduct between the parties. I have not imposed upon Mr. Comer any duty to know his rights under Washington law, and I certainly have not concluded that he somehow waived his rights by failure to make demand for a written estimate. That is not his obligation. It is the affirmative obligation of the repair facility.

As counsel as are aware, a "contract" may be formed by a course of conduct running over the period of time of performance. That course of conduct can be evidenced by correspondence, e-mails, testimony regarding conversations, etc. That is what the parties created here. So therefore I cannot conclude that the mere lack of one or more written estimates proximately caused any actual damages.

It has been argued that had Kellogg provided Comer with an initial estimate of over $40,000, then certainly Comer would not have agreed. But that mischaracterizes the evidence. Neither party understood the nature and extent of the repair work at the beginning.

I understand that violations of the Automotive Repair Act constitute per se violations of the Consumer Protection Act. And evidence has been presented that Kellogg has failed in the past to provide written estimates as required. Nevertheless, I am not awarding damages or attorney's fees for violation of the Consumer Protection Act.

I want to thank the parties and counsel for their thorough presentations.

Very truly yours,

SWANSON LAW FIRM, PLLC

R. ALAN SWANSON
RAS/ls

cc: Thurston County Arbitration Supervisor

3

FILED
SUPERIOR COURT
THURSTON COUNTY, WASH.
09 AUG 28 AM 9:57
BETTY J. GOULD, CLERK
BY _____ DEPUTY

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF THURSTON

CHARLES KELLOGG, dba BRITISH NORTHWEST LAND-ROVER COMPANY, a sole proprietorship,

Plaintiff,

vs.

JOEL COMER and "JANE DOE" COMER, husband and wife,

Defendants.

The Honorable Richard D. Hicks

NO. 08-2-01716-5

JUDGMENT ON ARBITRATION AWARD

JUDGMENT SUMMARY

1.	Judgment Creditors:	Joel Comer and "Jane Doe" Comer
2.	Judgment Debtor:	Charles Kellogg, d/b/a The British Northwest Land-Rover Company
3.	Principal Judgment Amount:	$18,000.00
4.	Principal Judgment Amount Shall Bear Interest at a rate of 12.00% per Annum.	
5.	Attorneys for Judgment Creditor:	Michael S. DeLeo L. Clay Selby EISENHOWER & CARLSON PLLC 1200 Wells Fargo Plaza 1201 Pacific Avenue Tacoma, WA 98402 (253) 572-4500

ORIGINAL

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09-9-01169-1

THIS MATTER having come on for entry of judgment on the Arbitration Award of the arbitrator in the above-referenced matter pursuant to MAR 6.3 and LMAR 6.3, and it appearing to the Court that the arbitrator entered an Award in favor of defendants and counterclaimants Joel Comer and "Jane Doe" Comer and against plaintiff Charles Kellogg, d/b/a The British Northwest Land-Rover Company in the principal amount of $18,000.00, and that the arbitrator mailed a copy of his Award to plaintiff on or about June 11, 2009, and the Court finding that Comer provided plaintiff adequate and proper notice of their intent to seek judgment on said Award, and further finding that plaintiff has not requested a trial de novo within the period allowable under applicable law, now, therefore, it is hereby

ORDERED, ADJUDGED AND DECREED that Joel Comer and "Jane Doe" Comer have and recover judgment against Charles Kellogg, d/b/a The British Northwest Land-Rover Company in the principal amount of $18,000.00. Post-judgment interest shall accrue on the principal judgment balance at a rate of 12.00% per annum. It is further

ORDERED, ADJUDGED AND DECREED that plaintiff's Complaint is dismissed with prejudice in accordance with the arbitrator's June 11, 2009 Arbitration Award.

DATED this 26 day of August, 2009.

JUDGE RICHARD D. HICKS

Presented by:

EISENHOWER & CARLSON, PLLC

By: _____
Mike S. DeLeo, WSBA #22037
L. Clay Selby, WSBA # 26049
Jennifer L. Champagne, WSBA #38798
Attorneys for Defendants Comer

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Approved as to form, notice of presentment waived:

CUSHMAN LAW OFFICES. P.S.

By: _____
Benjamin D. Cushman WSBA # 26358
Attorneys for Plaintiff

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