

IN THE SUPREME COURT OF IOWA

AL POLLER and DEB POLLER
Plaintiffs-Appellants,

v.

OKOBOJI CLASSIC CARS, LLC,
Defendant-Appellee,

SUPREME COURT NO. 19-
0875

DICKINSON County No.
LACV027296

APPEAL FROM THE IOWA DISTRICT COURT FOR
DICKINSON COUNTY
THE HONORABLE DON E. COURTNEY

APPELLANT'S FINAL BRIEF AND ARGUMENT

MATTHEW G. SEASE
SEASE & WADDING
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Phone: (515) 883-2222
Fax: (515) 883-2233
msease@seasewadding.com
ATTORNEYS APPELLANT

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STATEMENT OF THE ISSUES

I. Did the district court err in finding that OCC did not violate Iowa Chapter 573?

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Statutes

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II. Did the district court err in awarding damages on OCC's breach of contract claim?

Cases

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Iowa R. App. P. 6.907

ROUTING STATEMENT

The Supreme Court should retain this case as it presents issues of substantial first impression. Iowa R. App. P. 6.1101(2). Despite being adopted in 1990, Iowa Chapter 537B, the “Motor Vehicle Service Trade Practices Act,” has never been addressed by the Iowa Courts. This is significant because all motor vehicle restoration, repair and service providers are required to comply with the terms of Iowa Chapter 537B, yet no guidance has been provided to what protection is available to consumers who have been wronged by deceptive practices or acts. This case provides an opportunity for the Supreme Court to establish what is required for all motor vehicle restoration, repair and service providers in the State of Iowa.

STATEMENT OF THE CASE

Nature of the Case

This is an appeal following a bench trial involving the restoration of an antique car brought by the owners of the car, Al and Deb Poller (collectively the “Pollers”) against the car restoration company, Okoboji Classic Cars, LLC (hereinafter “OCC”). The Pollers alleged several violations of Iowa’s Consumer Fraud Act regarding the restoration of

their vehicle. OCC counterclaimed against the Pollers for breach of contract based upon unpaid bills. Ultimately, the district court found in favor of OCC on all grounds.

Course of the Proceedings

On April 8, 2016, the Pollers filed an amended petition against OCC asserting several claims against OCC regarding the restoration of their 1931 Chevrolet. (APP-5, Amended Petition). On May 11, 2016, OCC filed a motion to dismiss the petition. (APP-13, Motion to Dismiss). The district court denied OCC's motion to dismiss and allowed all claims to continue. (APP-18, Order re: Motion to dismiss). OCC then filed an answer denying all claims and asserted a breach of contract counterclaim. (APP-27, Answer). At the conclusion of discovery, the Pollers moved for summary judgment on their asserted violations of Iowa Chapter 537B and the Iowa Consumer Protection Act. (APP-36, Plaintiff Motion for Summary Judgment). On December 15, 2017, OCC filed its own motion for summary judgment seeking dismissal of the Pollers' claims and seeking summary judgment on its breach of contract claim. (APP-44, Defendant Motion for Summary Judgment). Both motions for summary judgment were ultimately denied by the district court on

January 25, 2018. (APP-55, Order re: Summary Judgment). The matter proceeded to a bench trial on January 30-31, 2018. (APP-84, Order following Trial). After hearing all testimony, the district court entered an order on July 31, 2018 finding in favor of OCC on all counts. (APP-84, Order following Trial). On August 10, 2018, OCC filed an application to enlarge to seek an award of attorney's fees. (APP-104, Motion to Enlarge). The district court denied this request on May 1, 2019. (APP-106, Order re: Motion to Enlarge). The Pollers filed a timely notice of appeal on May 24, 2019. (APP-108, Notice of Appeal).

Statement of the Facts

Approximately, 20 years ago, the Pollers purchased a 1931 Chevrolet 4 door Sedan ("31 Chevy"). (Vol I. Tr. P. 5). The '31 Chevy was purchased as a restoration project for the Pollers in their home state of New Jersey. (Vol I. Tr. P. 5-6). Beginning in the late 1990s, the Pollers began restoration with a company in New Jersey, but ultimately suspended the process after spending approximately \$10,000.00 and focused on raising their family. (Vol. I. Tr. P. 6-7). At this time, the car had been primarily disassembled and was placed in storage in the Pollers' warehouse. (Vol. I. Tr. P. 6; Vol. I. Tr. P. 168).

In July 2013, Deb Poller (“Deb”), originally from Spencer, Iowa, was visiting her family in Northwest Iowa and visited the OCC’s shop. (Vol. I. Tr. P. 7-8). OCC had recently opened a museum of restored antique cars and was also in the business of repairing and restoring antique cars of all varieties. (Vol. I. Tr. P. 7). During this initial visit, Deb inquired about OCC taking over the restoration of the ’31 Chevy. (Vol. Tr. P. 10). She met with Bob Kirschbaum, one of OCC’s managers, to discuss the restoration of the ’31 Chevy. (Vol. I. Tr. P. 8-10; Vol. II. Tr. P. 95). During this meeting, Deb generally discussed what the Pollers would be looking for in the restoration and also generally inquired as to the potential costs of the work. (Vol. I. Tr. P. 149 – 150). Regarding the costs, Mr. Kirschbaum told Deb that the goal is to not spend more on the car than what it was worth. (Vol. I. Tr. P. 149-150).

After returning to New Jersey, the Pollers discussed having OCC performing the restoration of the ’31 Chevy and ultimately decided to have OCC perform the work. (Vol. I. Tr. P. 10-11). In the fall of 2013, the Pollers decided to that OCC would perform the restoration of the ’31 Chevy. (Vol. I. Tr. P. 10-11). By November of 2013, Deb had arranged the shipment of the ’31 Chevy. (Vol. I. Tr. P. 11; APP-112, Exhibit 2).

However, prior to shipping the '31 Chevy, Deb wanted to obtain an estimate from OCC as to the full expected costs of restoration and sent an email to OCC's office manager April Torrence. (Vol. I. Tr. P. 11-12; APP-112, Exhibit 2). Ms. Torrence forwarded the email to OCC's shop manager Dennis Linn ("Linn"). (APP-113, Exhibit 3; Vol. II. Tr. P. 72). On November 6, 2013, Linn emailed Deb that he could not provide an estimate because OCC had not seen the car in person yet. (APP-113, Exhibit 3). Additionally, he stated that it is OCC's policy to not provide any estimates on repair work, however they charge \$65 per hour plus the costs of materials. (APP-113, Exhibit 3). Several employees confirmed that OCC has a stated policy to never provide estimates to a customer. (Vol. I. Tr. P. 184-186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107-108)

OCC eventually received the car on November 26, 2013. (APP-114, Exhibit 4). By all accounts, the car was in good shape and in good condition. (APP-114, Exhibit 4; Vol. I. Tr. P. 152-154). Mr. Kirschbaum was present when the car arrived and did the unpacking of the vehicle from shipping. (Vol. I. Tr. P. 152). He stated that the car appeared to be in excellent condition and contained all major parts such as the chassis, body, engine, radiator, etc. (Vol. I. Tr. P. 152-154). The sheet metal also

appeared to be in excellent condition except for some minor surface rust from the transport and a dent near the roof. (APP-114, Exhibit 4; Vol. I. Tr. P. 40; Vol. II. Tr. P. 14-15). At this time, OCC notified the Pollers that the vehicle would not be completed for the next 1 ½ to 2 years. (APP-114, Exhibit 4). Upon learning of this, Deb sent an email objecting to this request and stated that it was agreed that the car would be available by the summer of 2014. (APP-114, Exhibit 4; APP-127, Exhibit C P. 5). OCC responded by stating that they would move the car up to accommodate that time frame. (APP-127, Exhibit C P. 5). OCC then began to do some minor work on the car to get it ready to be restored, but at this time, the Pollers had not discussed what was to be fully done to the car. (APP-127, Exhibit C P. 5). However, the Pollers notified OCC that they would be coming to OCC between Christmas and New Years and they could discuss these items at this time. (APP-127, Exhibit C P. 5; Vol. I. Tr. P. 163-164).

The Pollers arrived at OCC on December 27, 2013. (Vol. I. Tr. P. 19). During this December 27, 2013 meeting, Deb discussed placing a deposit down payment for the work performed on the '31 Chevy with Ms. Torrence. (Vol. I. Tr. P. 21). OCC had never taken a down payment

before but allowed the Pollers to provide a down payment of \$10,000. (Vol. II. Tr. P. 73). Additionally, Ms. Torrence indicated to Deb that OCC would be providing monthly invoices to the Pollers so they could track the costs of the project. (Vol. I. Tr. P. 21-22). This was a new policy for OCC and was being implemented at the start of 2014. (Vol. I. Tr. P. 189; Vol II. Tr. P. 98). According to Linn, the reasons for this change in policy was that OCC was wanting to provide more information for the customer as the project was being completed. (Vol. I. Tr. P. 189-190).

During this visit with OCC, the Pollers discussed what they wanted to have done to the '31 Chevy. Pursuant to the notes Linn took during this meeting, OCC was to restore the '31 Chevy to its original condition, with only slight modifications to the paint color and the implementation of a stereo. (APP-410, Exhibit D). Also, in their meetings with OCC, the Pollers (specifically Al Poller) discussed the estimated costs of the project with employees of OCC. (Vol. I. Tr. P. 20; Vol. I. Tr. P. 172). In these discussions, OCC stated that the car would cost between \$40,000 - \$45,000 to complete. (Vol. I. Tr. P. 20; Vol. I. Tr. P. 172). Agreeing with this estimate, the Pollers allowed OCC to complete the restoration of the '31 Chevy. (Vol. I. Tr. P. 20; Vol. I. Tr. P. 172).

Over the next several months, OCC continued to perform work on the '31 Chevy and would occasionally send emails to the Pollers to let them see the progress on the car. (APP-123, Exhibit C). The Pollers were also asked to make several determinations regarding various aspects of the restoration. (APP-123, Exhibit C). In June 2014, OCC notified the Pollers that they were not going to make the mid-August time frame that was originally agreed upon. (APP-186, 202, Exhibit C P. 64 & P. 80). In July 2014, Deb visited OCC to check on the progress of the '31 Chevy. (Vol. I. Tr. P. 27). During this July 2014 visit, Deb spoke with Ms. Torrence about sending monthly invoices. (Vol. I. Tr. P. 27). At the time of this meeting, OCC had not provided any invoices to the Pollers or given any update as to the costs spent up to that date. (Vol. I. Tr. P. 27).

By August 2014, the Pollers had not received any monthly billing invoices from OCC. (APP-115, Exhibit 6). On August 1, 2014, Linn emailed several photos of the '31 Chevy to the Pollers and requested that the Pollers put some more money down for the work completed. (APP-115, Exhibit 6). On August 5, 2014, the Pollers responded that, to date, they had not received any of the monthly invoices that were promised in December 2013 and that they were requesting all of the invoices be sent

to date. (APP-115, Exhibit 6). On August 6, 2014, the Pollers received six (6) invoices from OCC. (APP-412-453, Exhibits F1 – F6). According to these invoices, OCC had used the \$10,000 initial down payment and the Pollers owed an additional \$39,560.27. (APP-412-453, Exhibits F1 – F6). Flabbergasted by the amount of money being requested, the Pollers requested itemization of all the work that had been done and a breakdown of the costs for the work that had been performed. (APP-116, Exhibit 7; Vol. I. Tr. P. 53). Before this request was completed, OCC sent another invoice at the end of August indicating that over \$25,000 worth of work had been completed since the August 6, 2014 invoices were submitted. (APP-117, Exhibit F7).

Pursuant to the Pollers' understanding as to the costs of the project, they continued to make payments on the outstanding balance until they reached the agreed upon amount of \$45,000. (Vol. I. Tr. P. 30 – 31; APP-119, Exhibit 11). This last payment was provided on November 13, 2014. (Vol. I. Tr. P. 30 – 31; APP-119, Exhibit 11). At that time, after given credit for the \$45,000 already paid, OCC was requesting an additional \$50,694.93. (APP-411, Exhibit F). By December 31, 2014, OCC's alleged final outstanding bill was \$66,705.70. (APP-411, Exhibit F).

Deb and her son visited OCC on December 26, 2017 in an attempt to see the completed '31 Chevy. (Vol. I. Tr. P. 31; APP-117, Exhibit 8). However, OCC refused to allow the Pollers to see the car until the bill was paid in full. (Vol. I. Tr. P. 31 – 33; APP-117, Exhibit 8; APP-118, Exhibit 9). At this time, the Pollers had only seen the car through pictures and at the one visit in July 2013. (Vol. I. Tr. P. 32). Based upon the terms of the agreement from December 2013, the Pollers refused to pay any more money on the '31 Chevy. (Vol. I Tr. P. 30 – 31). In January 2013, the Pollers arranged to have an appraiser view the car so that they could seek insurance, but OCC also refused to allow the appraiser view the '31 Chevy. (Vol. I. Tr. P. 34). The '31 Chevy remains in the possession of OCC and OCC continues to send invoices to the Pollers. (Vol Tr. P. 46). In addition to the amount for the services provided, OCC continues to add monthly storage fees to the Pollers invoices. (Vol. I. Tr. P. 46).

Many additional relevant facts are discussed within the Argument section, *infra*.

ARGUMENT

I. OCC VIOLATED THE MOTOR VEHICLE SERVICE TRADE PRACTICES ACT BY COMMITTING DECEPTIVE PRACTICES OR ACTS

Preservation of Error:

Whether OCC violated Iowa Chapter 537B and Iowa's Consumer Protection Act was presented and decided by the district court. (APP , Order following Trial). Accordingly, error was preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.") (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review:

The standard of review in cases tried to the court are reviewed "for correction of errors at law, and findings of fact in jury waived cases shall have the effect of a special verdict." Iowa R. App. P. 6.907. Appellate courts "are bound by the trial court's findings of fact if they are supported by substantial evidence." *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007).

Discussion:

Iowa Code Chapter 537B (known as the “Motor Vehicle Service Trade Practices Act”) protects consumers who hire automotive professionals to perform any services and/or repairs to their motor vehicles that are subject to registration. This statute is designed to protect consumers from deceptive practices and acts by individuals providing services and repairs to a motor vehicle. Iowa Code § 537B.2. Iowa’s Motor Vehicle Service Trade Practices Act is similar to acts adopted throughout the country and serves the similar purpose of protecting consumers. One commentator has stated: “In response to the perceived problems of fraud and deceptive practices in the automobile repair industry, a number of jurisdictions have enacted statutes under which automobile repairers are required to conform with certain requirements, such as giving the customer a written estimate of all charges, returning the replaced parts, and informing the customer of his or her rights.” *Automobile Repair Shop’s Duty to Provide Customer with Information, Estimates, ore Replaced Parts, under Automobile Repair Consumer Protection Act*, 78 A.L.R. 6th 97 (originally published 2012). In this case, the Pollers are entitled to protection under Iowa’s Motor vehicle

Service Trade Practices Act and the district court erred in dismissing their claim.

A. Iowa Chapter 573 applies to the Pollers' and OCC's dealings

Iowa Code § 537B.2(1) states that a consumer is “a person contracting for, or intending to contract for, repairs or service upon a motor vehicle used primarily for farm or personal use.” A motor vehicle is defined as a “motor vehicle as defined in section 321.1, which is subject to registration.” Iowa Code § 537B.2(2). Iowa Code § 321.1(42)(a) defines a “motor vehicle” as “a vehicle which is self-propelled and not operated upon rails.” Iowa Code § 537B.2(3) states that a “supplier” is “a person offering to contract for repairs or service upon a motor vehicle.”

First, the Pollers are “consumers” and OCC is a “supplier” as defined in Iowa Code § 537B.2. The Pollers pled and OCC admitted that an agreement was formed for OCC to restore the Pollers’ ’31 Chevy. (APP-5, Amended Petition; APP-52, Amended Answer). Additionally, the types of restoration, repair and service work performed on the ’31 Chevy have been routinely recognized to fall within similar statutory protections of Iowa § 537B.2. *See Levin v. Lewis*, 431 A.2d 157 (N.J. Super. Ct. App. Div. 1981) (per curiam) (recognizing that “restoration” on

antique cars constitutes a repair or service under New Jersey's Consumer Fraud Act); *see also Morris v. Gregory*, 661 A.2d 712 (Md. 1995) (same under Maryland's Consumer Fraud Act), *Jagodzinski v. Jessup*, 572 N.W.2d 515, 247 (Wis. Ct. App. 1997) (same under Wisconsin's Consumer Fraud Act), *Schreiber v. Kelsey*, 62 Cal.App. 3d Supp. 45, 133 Cal.Rptr. 508 (1976) (same under California's Consumer Fraud Act), and *Webb v. Ray*, 688 P. 2d 534 (Wash. Ct. App. 1984) (same under Washington state's Consumer Fraud Act), *Schuster v. Dragone Classic Motor Cars, Inc.*, 98 F.Supp.2d 441, 448-49 (S.D.N.Y. 2000) (same under Connecticut's Consumer Fraud Act).

Second, the Pollers' '31 Chevy is a motor vehicle. At the time of the delivery, the '31 Chevy was complete with all major and necessary components provided. (Vol. I. Tr. P. 152 – 154; Vol. I Tr. P. 167). While the '31 Chevy may have been inoperable at the time of deliver, it was still a motor vehicle. *See, In re Bailey*, 326 B.R. 750, 758 (Bankr. S.D. Iowa 2004) (interpreting Iowa Code § 321.1(42)(a) and holding that “the ordinary and common meaning of the term ‘motor vehicle’ includes an inoperable vehicle that can be made operable by reassembling one [or] more of its parts or by repairing one or more of its parts.”). Additionally,

Iowa Code § 537B.2(2) defines a “motor vehicle” as “a motor vehicle as defined in section 321.1 which *is* subject to registration.” (emphasis added). As can be seen, this statute is written in the present tense to include vehicles that are currently subject to registration. Iowa Code § 4.1(33) states that in interpreting a statute “words in the present tense *include the future*.” (emphasis added). Based upon this interpretation, at the completion of the work, the Pollers’ 31 Chevy is a motor vehicle. Further, Deb testified that if the ’31 Chevy was in her possession it would be subject to registration under the laws of New Jersey. (Vol. I. Tr. P. 34); *see* N.J. Stat. Ann § 39:3-4. Accordingly, Iowa Chapter 537B applies to OCC’s restoration of the Pollers’ 31 Chevy.

B. OCC was engaged in Deceptive Acts or Practices

“It is an unlawful practice for a supplier to commit a deceptive act or practice under chapter 537B.” Iowa Code § 714.16. A violation of Iowa Code § 714.16 is considered a consumer fraud and private cause of action may be pursued. Iowa Code § 714H.2-3, 5. Iowa Code § 537B.6 provides several definitions of deceptive acts or practices. In this case, OCC has committed several violations of Iowa Code § 537B.6.

According to Iowa Code § 537B.6, it is a deceptive act or practice in failing to comply with Iowa Code § 537B.3's requirements. Iowa Code § 537B.3 requires that a consumer be notified of several rights to an estimate of any requested repair work. Specifically, Iowa Code § 537B.3 states that a supplier, such as OCC, must provide a consumer, such as the Pollers, with notice of their right to a written or oral estimate. Additionally, Iowa Code § 537B.3(1) states that a supplier must maintain authorization forms which contain "a conspicuous disclosure in substantially the following language...provided to the consumer at the time of the authorization." This disclosure must state the following:

ESTIMATE

You have the right to a written or oral estimate if the expected cost of repairs or service will be more than fifty dollars. Your bill will not be higher than the estimate by more than ten percent unless you approve a higher amount before repairs are finished. Initial your choice:

Written estimate.

Oral estimate.

No estimate.

Call me if repairs and service will be more than \$_____.

Iowa Code § 537B.3(1). Additionally, the form "shall at minimum contain the following information: (1) The date; (2) The Supplier's name; (3) The

consumer's name and telephone number; (4) The reasonably anticipated completion date.” Iowa Code § 537B.3(2)(a). Further, “[i]f a written estimate is requested the supplier may write the written estimate on the authorization form or on another form. If the nature of repairs or service is unknown at the time the estimate is given, the supplier may state an hourly labor charge for the work. If the consumer so requests, a copy of the written estimate shall be provided to the consumer prior to the commencement of any repairs or service.” Iowa Code § 537B.3(2)(b). Finally, “[i]f a consumer orally authorizes repairs or service upon a motor vehicle prior to the commencement of the repairs or service, the supplier shall inform the consumer of the right to receive a written or oral estimate. The supplier shall note the consumer's response on the form described in subsections 1 and 2. If the consumer requests an estimate, the supplier shall provide the estimate to the consumer prior to commencing the repairs or service.” Iowa Code § 573B.3(3).

A supplier violates Iowa Code § 537B.3 when it fails to inform a customer of the right to a written or oral estimate, or fails to provide a written or oral estimate, fails to mark the consumer's response on the form; and fails to provide the estimate before any work on a motor

vehicle. In this case, OCC did not comply with any of these provisions and therefore committed a deceptive practice or act.

It is undisputed that OCC did not comply with the requirements of Iowa Code § 537B.3. OCC's shop manager testified that at the time of agreeing to restore the Pollers' '31 Chevy that he was not aware of Iowa Chapter 537B. (Vol. I. Tr. P. 185). Additionally, he admitted that OCC does not have a written form as required under Iowa Code § 537B.3. (Vol. I. Tr. P. 186 – 187). He also admitted that OCC did not notify the Pollers of their right to a written or oral estimate. (Vol. I. Tr. P. 187). OCC also admitted in its answer that it never provided an estimate regarding the work. (APP-52, Amended Answer). Further, because they do not have the form, they could not indicate the Pollers' response regarding an estimate on the form. (Vol. I. Tr. P. 188). According to all of OCC's testifying witnesses and despite the language of Iowa Chapter 537B, OCC has a clear policy to never provide estimates to customers. (Vol. I. Tr. P. 184 – 186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107 – 108).

Prior to shipping the car, Deb wrote to OCC asking to provide a quote to completely restore the '31 Chevy. (APP-112, Exhibit 2). In response, OCC's shop manager stated as follows:

Hi Deb,

Thank you for sending the pictures of the 31 Chevy, I just saw them today for the first time. It looks like a pretty nice car. Is it complete? It is very hard for us to give you a quote or estimate. In fact we don't give estimates. Our experience has been that you can never see what problems may arise as we work on the car. What I can tell you is that we charge \$65.00 an hour for work done in the shop. We do the mechanical work, the body work and the upholstery work for \$65.00 an hour plus materials. We would restore or alter the car, whatever your interests maybe, while keeping you involved in the decision making along the way. Right now we are booked up over a year in advance. IN our shop we have area experts in the mechanics, body, and upholstery fields and with your input into what you want, I am sure that we could build you a very nice car.

Denny
Okoboji Classic Cars

(APP-113, Exhibit 3). The district court found that this email complies with Iowa Code § 537B.3's notice and estimate requirements. This is simply not the case.

First, not only does this email not comply with Iowa Code § 573B.3's requirements, it actually runs completely afoul. Iowa Code § 537B.3 states that consumers are to be notified of their right to seek estimates, yet, OCC states that it is there policy to never give estimates or quotes. (APP-113, Exhibit 3; Vol. I. Tr. P. 184 – 186; Vol. II. Tr. P. 68; Vol. II. Tr.

P. 107 – 108). Further, OCC admitted that it does not even have the form required by Iowa Code § 537B.3. (Vol. I. Tr. P. 184 – 188). OCC also admitted that it could not place the Pollers' response on the form because they do not have the form and did not provide the Pollers with the notice requirements. (Vol. I. Tr. P. 184 – 188). Second, and most importantly, the Pollers were denied two important notices that are required under Iowa Code § 537B.3. The Pollers were denied OCC's requirement to provide a reasonably anticipated completion date as required. Additionally, the Pollers were denied their right to place budgetary cap on the project. *See* Iowa Code § 537B.3(1) (___ Call me if repairs and service will be more than \$_____).

The ultimate budget on the project was clearly important to the Pollers. Prior to the commencement of the work, the Pollers requested a quote. (APP-112, Exhibit 2). At a follow up meeting, the Pollers again requested an estimate and they were informed that the costs would be between \$40,000 and \$45,000. (Vol I. Tr. P. 25; Vol I. Tr. P. 172). Further, they were told by an OCC employee that they should not spend more than the car is worth during the restoration process. (Vol I. Tr. P. 149). Further, the Pollers requested and were told that OCC would

provide monthly billing invoices and that receiving the invoices were important to them. (Vol. I. Tr. P. 22). When it was apparent to the Pollers that significant work was being completed on the '31 Chevy, the Pollers began demanding invoices to know how much the car was going to cost. (APP-115, Exhibit 6). When the Pollers eventually received the invoices, they requested more information to justify the charges and were upset with the charges. (Vol. I. Tr. P. 54; APP-116, Exhibit 7). Yet, they were denied this opportunity to limit the budget of the vehicle by OCC's blatant disregard to Iowa Code § 537B.3.

Indeed, when asked during cross examination if there was a limit to what OCC would put into the car, OCC's shop manager agreed there was no limit. (Vol. II. Tr. P. 48). In fact, he testified it did not matter if the total cost of restoration would be \$200,000, the Pollers would still be responsible for the full amount. (Vol. II. Tr. P. 48). This type of predatory behavior of motor vehicle restoration, repair and service shops is exactly what the Motor Vehicle Service Trade Practices Act was designed to prevent. Following the district court's and OCC's logic, when the Pollers agreed to have OCC repair the vehicle, OCC was given a blank check for the vehicle and if the Pollers refused to pay, they could hold the vehicle

hostage under the guise of an artisan lien. *See* Iowa Code § 577.1. This clearly runs contrary to the consumer protections provided in Iowa Code § 537B.6 and Iowa Code § 714.16.

In addition to violating Iowa Code § 537B.3., OCC also was in violated Iowa Code § 537B.6(3). Iowa Code § 537B.6 provides that it is a deceptive practice for a supplier to:

3. Fail to obtain oral or written authorization from the consumer for the anticipate cost of any additional, unforeseen, but necessary repairs or services when the cost of those repairs or services amount to more than ten percent, excluding tax of the original estimate requested by the consumer.

The Pollers testified that at their December 27, 2013 meeting with OCC, OCC employees stated that the cost to restore the '31 Chevy would be between \$40,000 and \$45,000. (Vol. I. Tr. P. 24-25; Vol I. Tr. P. 172). This was consistent with OCC's former employee, Mr. Kirschbaum's testimony that in July 2013, he discussed the costs of the restoration should not exceed the value of the car. (Vol. I. Tr. P. 149).

It is undisputed that the Pollers have paid OCC \$45,000 for OCC's services consistent with OCC's first figure of \$40,000 to \$45,000. (APP-119, Exhibit 11). It is also undisputed however, that after the Pollers

paid the \$45,000, OCC sent invoices for an additional approximately \$67,396.15, for a total cost of approximately \$112,000 – close to three times the original estimate. (APP-411, Exhibit F). At no time were the Pollers ever informed that the final bill would be approximately \$112,000 or that the anyone from OCC informed her that it could be that amount. (Vol I. Tr. P. 34, Vol. II. Tr. P. 48). Further, at no point did OCC ever seek authorization for payment above that amount or did the Pollers authorize work totaling that amount. (Vol. I. Tr. P. 35, 37). Accordingly, OCC was in violation of Iowa Code § 537B.6(3).

OCC also violated Iowa Code § 537B.6(12) which states that it is a deceptive practice to “[m]aterially and intentionally understate or misstate the estimate cost of the repairs or service.” This is very similar to OCC’s violations of Iowa Code § 537B.6(3). Based upon the testimony of the Pollers and Mr. Kirschbaum, OCC’s representations that the cost of the repair and services would be between \$40,000 and \$45,0000 were intentional and material understatements as to the overall costs of the repair work.

OCC also violated the following provisions of Iowa Code § 537B.6:

5. Fail to disclose prior to the commencement of any repairs or service, that a charge will be made for

disassembly, reassembly partially completed work, or any other work not directly related to the actual performance of the repairs or service. A charge so imposed must be directly related to the actual amount of labor or parts involved in the inspection, repair, or service.

6. Charge for any repair or service which has not been authorized by the consumer.

These violations are intertwined.

First, in reviewing the invoice records provided by OCC, numerous charges were made for disassembly, boxing parts, removing parts from crates, etc. (SUPP APP-3, Exhibit 12). It is undisputed that OCC did not disclose such items to the Pollers prior to commencement of the work and that the Pollers never authorized these items. (Vol. I. Tr. P. 38 – 40; Vol. I. Tr. P. 45 – 46; Vol. I. Tr. P. 51; APP-113, Exhibit 3; Vol. I. Tr. P. 199 - 200). This again is a violation of the Iowa Code § 537B.6. Additionally, upon receiving the invoices, the Pollers found that OCC was charging a 30% mark up on all parts used for the Pollers' '31 Chevy. (Vol. I. Tr. P. 45-46). It is undisputed that OCC did not disclose that a 30% markup would be charged the Pollers prior to commencement of the work and that the Pollers never authorized these charges. (Vol. I. Tr. P. 45 – 46). Additionally, OCC charged for shop supplies and disposal of hazardous

materials. (Vol. I. Tr. P. 38 – 40; Vol. I. Tr. P. 45 – 46; Vol. I. Tr. P. 51; APP-113, Exhibit 3; Vol. I. Tr. P. 199 - 200). These again were not authorized by the Pollers and is in violation of Iowa Code § 537B.6.

Next, OCC performed a “show quality” restoration to the Pollers’ ’31 Chevy. (Vol. II. Tr. P. 43 – 45). OCC provided testimony that there are different levels of restoration and in fact, a consumer could go to a different supplier and receive a lower quality restoration. (Vol. II. Tr. P. 43 – 44). Extra work goes into doing a show quality restoration, including extra body work and extra paint work. (Vol. II Tr. P. 44). Linn testified that this takes somewhere between at least 40-50 extra hours of work on the car. (Vol. II. Tr. P. 44). During cross examination, OCC acknowledged that the Pollers were never informed that OCC was going to perform a “show quality” restoration on the ’31 Chevy. (Vol. II. Tr. P. 47 – 48). In fact, according to Linn’s notes from the December 27, 2013 meeting and at the top of every invoice, the parties agree to simply restore the ’31 Chevy to its “original condition” and not a “show quality condition.” (APP-410, Exhibit D). Yet, OCC performed a “show quality” restoration and are now attempting to charge the Pollers with this extra work. This is also a violation of Iowa Code § 537B.6. Further, after OCC

refused to allow the Pollers' to see the vehicle in December 2013 and the Pollers' subsequent refusal to pay any amount greater than the agreed upon \$45,000, OCC began charging the Pollers storage fees on the '31 Chevy. (Vol. I. Tr. P. 46 – 47; Vol. I. Tr. P. 200-201) This again is a violation of Iowa Code § 537B.6.

C. The Pollers are entitled to damages

Iowa Code § 714H.5 allows a consumer who has suffered an ascertainable loss of money or property to recovery damages as well as injunctive relief. In this case, the Pollers seek both money damages and injunctive relief pursuant to Iowa Code § 714H.5. (APP-5, Amended Petition). In this case, the Pollers are entitled to full reimbursement of the \$45,000 previously paid to OCC.

In *I-5 Truck Sales & Service Co. v. Underwood*, 645 P.2d 716, 720 (Wash. Ct. App. 1982) (superseded by statute as stated in *Clark v. Luepke*, 809 P.2d 752 (Wash. Ct. App. 1991)), interpreting Washington's prior Automotive Repair Act (which is similar to Iowa Chapter 537B), recognized that the "statute [is] clear and specific terms prohibits the automotive repairman from charging for labors and parts without first supplying a written estimate...In such an event the court may not resort

to judicial construction in order to rectify what may appear to be an unfair and injudicious result.” Importantly, the Washington Court of Appeal also recognized that “[n]ot only is a repairman prevented from charging for work done in violation of these statutory duties, RCW 46.71.50 prohibits a repairman from asserting a possessory or chattel lien for any amount not reflected in a written estimate or the amount in excess of a written estimate in cases where the repairman has failed to obtain the customer’s additional consent.” *See also Webb v. Ray*, 688 P.2d 534, 537 (Wash. App. 1984)(“We conclude the Automotive Repair Act precludes Dishman from charging Matthew Webb for work performed on the Corvette”).

Like many other states’ Motor Vehicle Services Trade Acts, Iowa Chapter 537B is a consumer protection statute within the Consumer Fraud Act and is, therefore, remedial in nature. *See generally, State ex rel. Miler v. Cutty’s Des Moines Camping Club, Inc.* 694 N.W.2d 518, 527, 28 (Iowa 2005) (recognizing that remedial statutes should be interpreted liberally). Given the similarities between Washington and Iowa’s statutes, the Pollers request that this Court follow the logic of the *I5* and

hold that the Pollers be reimbursed from all money previously spent on restoring the '31 Chevy.

The Pollers should also receive credit for all unauthorized charges submitted by OCC. First, OCC charged the Pollers for a 30% markup on all parts used for the '31 Chevy. Such a charge was not agreed to by the parties and is also in violation of Iowa Code § 537B.6. This amounts to \$5,062.96 (30% x \$16,876.55). Additionally, the Pollers were improperly charged for shop supplies and hazardous waste charges. This totaled an additional \$474.16 (\$13.59 + \$460.57).

The Pollers were also charged several other items that were not agreed upon by the parties and was in violation of Iowa Code § 537B.6.

This includes the following:

| Date of Work | Work Performed | Hours |
|--------------|--|-------|
| 11/25/13 | Unload and inventory car | 3 |
| 1/6/14 | Dismantle engine | 3 |
| 1/7/14 | Uncrate dismantle engine | 3 |
| 1/8/14 | Dismantle engine | 5 |
| 2/6/14 | Crate up engine block for shipping, box up pistons, crank & cam for shipping | 1 |

| | | |
|-----------|--|------|
| 12/6/13 | Remove interior & top, checked out wood | 7 |
| 12/6/13 | Vacuum/help remove seats & headliner | 1 |
| 12/28/13 | Dismantle front seat parts | 0.5 |
| 1/22/14 | Hung parts to be primed, wiped, sprayed etching primer, sprayed epoxy primer | 2.25 |
| 1/23/14 | Hung parts to be primed, wiped, sprayed etching primer, sprayed epoxy primer | 2.25 |
| 3/20/14 | Uncrate engine, attach engine stand | 1 |
| 5/5/2014 | Ass radiator support, hood, for fit, worked on them | 3 |
| 5/5/2014 | Ass & test fit hood | 1 |
| 5/5/2014 | Start ass engine | 4 |
| 5/6/2014 | Start assembling short block | 4 |
| 5/14/2014 | Getting parts ready to prime, fit fenders, drop downs | 2.5 |
| 5/27/2014 | Remove body & put on cart | 1 |
| 5/27/2014 | Remove body & put on cart | 1 |
| 5/27/2014 | Assemble engine | 4.5 |
| 5/30/2014 | Uncrate boxed parts | 1 |

| | | |
|-----------|--|------|
| 5/30/2014 | Disassemble right front wheel, brake, back plate, etc. | 1.5 |
| 6/2/2014 | Inspect parts for rechroming, check parts for blasting | 1 |
| 6/2/2014 | Sort parts & put them on cart | 1 |
| 5/31/2014 | Moved crates to shop, sorted parts | 1 |
| 5/31/2014 | Moved crates to shop, sorted parts | 1 |
| 6/2/2014 | Remove fuel sending unit from fuel tank, sort parts | 1 |
| 5/30/2014 | Sort engine parts | 1 |
| 6/3/2014 | Worked on getting correct paint color | 0.5 |
| 6/4/2014 | Moved parts from paint booth | 1.25 |
| 6/5/2014 | Clean frame parts, remove brakes | 5 |
| 6/5/2014 | Hung frame to paint | 1 |
| 6/5/2014 | Get frame ready for paint | 1.5 |
| 6/5/2014 | Help Dewey with disassemble | 1.5 |
| 6/5/2014 | Disassemble differential, check bearings | 4 |
| 6/6/2014 | Move chassis from paint booth to saw horses | 0.5 |
| 6/6/2014 | Hang parts for painting | 0.5 |
| 6/12/2014 | Tire hold downs, sort parts | 1.5 |

| | | |
|-----------|---|------------|
| 6/17/2014 | Look at interior parts | 0.25 |
| 6/25/2014 | Find & clean brake parts, speed-ometer bushing | 5.5 |
| 6/27/2014 | Remove painted parts from booth | 0.5 |
| 7/11/2014 | Engine assembly | 2 |
| 7/17/2014 | Prep parts for washer, clean dif parts | 1 |
| 7/18/2014 | Prep for paint | 0.5 |
| 7/21/2014 | Unmask car | 0.5 |
| 7/22/2014 | Picked out material, talked about wood graining, measured | 1.5 |
| 8/18/2014 | Disassemble dash & gauges, cleaned them | 7.5 |
| 8/20/2014 | Lay out wiring, dash wiring research | 5.25 |
| | Total Hours | 100.25 |
| | Total amount improperly billed: | \$6,516.25 |

Further, Mr. Linn testified that OCC performed a “show quality” restoration on the ’31 Chevy. He estimated that the amount of additional time spent on the ’31 Chevy to make it show quality was between 40-50 hours on the paint job alone. (Vol. II. Tr. P. 43 – 45). In reviewing the invoices, it appears that a significant amount of time was spent on the

body work and painting, to establish that this estimate may be quite low. (SUPP APP-3, Exhibit 12). This includes several hours spent on the '31 Chevy's running boards, fenders and sanding. (SUPP APP-3, Exhibit 12). This includes an apparent "redo" on August 11, 2014 of the paint on the fenders. Thus, at least 50 hours of work should be credited to the Pollers or \$3,250.

In addition to the damages asserted above, the Pollers should be entitled to exemplary damages. Iowa Code § 714H.5(4). "If the finder of fact finds by a preponderance of clear, convincing, satisfactory evidence that a prohibited practice or act in violation of this chapter constitutes willful and wanton disregard for the rights or safety of another, in addition to an award of actual damages, statutory damages up to three times the amount of actual damages may be awarded to a prevailing consumer." OCC has been in operation for several years and has performed work on several hundred cars. Yet, they have a policy to not provide any estimates to any consumers seeking work from OCC. (Vol. I. Tr. P. 184-186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107-108; APP-113, Exhibit 3). These actions are in complete disregard to Iowa Chapter 537B

and the rights of all consumers. Accordingly, this Court should remand to the district court for an award of exemplary damages.

D. The Pollers are entitled to Trial and Appellate Attorneys' fees

Iowa Code § 714H.5(2) states that if it is established that an individual or corporation has violated Iowa's Consumer Fraud Act, "the court shall award to the consumer the costs of the action and to the consumer's attorney reasonable fees." Because the Pollers should have been successful at the district court and should be successful on this appeal, this Court should remand to the district court for determination of an award of attorneys' fees for both the underlying trial and this appeal.

II. THE DISTRICT COURT ERRED IN FINDING THAT OCC PROVED ITS BREACH OF CONTRACT CLAIM

Preservation of Error:

OCC's breach of contract claim was presented and decided by the district court. (APP-84, Order following Trial). Accordingly, error was preserved. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them

on appeal.”) (citing *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998)).

Standard of Review:

The standard of review in cases tried to the court are reviewed “for correction of errors at law, and findings of fact in jury waived cases shall have the effect of a special verdict.” Iowa R. App. P. 6.907. Appellate courts “are bound by the trial court’s findings of fact if they are supported by substantial evidence.” *Harrington v. Univ. of N. Iowa*, 726 N.W.2d 363, 365 (Iowa 2007).

Discussion:

As a counterclaim to the Pollers’ claims, OCC has brought a breach of contract claim against the Pollers for the unpaid balance of OCC’s invoices. The district court held that OCC established a contract existed between the Pollers and OCC as a result of OCC’s November 6, 2013 email indicating that the work would be completed on a time and material basis at \$65 per hour. This finding was in error and should be reversed by this Court.

First, the Supreme Court has recognized that it is “well-established Iowa law that contracts made in contravention of a statute are void and

Iowa Courts will not enforce such contracts.” *Bank of the West v. Kline*, 782 N.W.2d 453, 462-63 (Iowa 2010) (citing *Pike v. King*, 16 Iowa 49, 52 (1864)) (holding that violations of the Equal Credit Opportunity Act (“ECOA”) void any “obligations made in contravention of the ECOA.”); *see also, Milholin v. Vorhies*, 320 N.W.2d 552 (Iowa 1982) (holding that violations of Iowa Real Estate Commission rules invalidated an oral listing agreement). As mentioned in section I *supra*, OCC violated several provisions of Iowa Chapter 537B. It is illogical and against clear public policy to allow OCC to collect for monies it attempted to earn in violation of a consumer protection statute. Indeed, courts throughout the country have recognized that any violations of the Motor Vehicle Service Trade Practices Act serves as a bar of recovery by the garage owner. *See generally Automobile Repair Shop’s Duty to Provide Customer with Information, Estimates, or Replaced Parts, Under Automobile Repair Consumer Protection Act*, 78 A.L.R. 6th 97 § 33 (Garage’s claim for recovery for work performed—Barred because of violation) (Originally published 2012) (collecting cases). This result must occur, even if the Pollers were unable to establish any monetary damages.

While the result may seem harsh, courts have recognized that it is a necessary result to protect the greater public interest in consumer protections. One Florida court interpreting Florida's similar version of the Motor Vehicle Service Trade Practices Act stated the purpose of the act as follows:

A statute is construed so as to effectuate the intent of the legislature. It was apparently the intent of the legislature to protect consumers against misunderstandings arising from oral estimates of motor vehicle repairs and the legal disputes and litigation that result from the "fait accompli" nature of claims for repair work already done. We do not suggest that the result in this case is fair to the shop. We only agree that with the trial court that this result appears to be mandated in this case by the statute. In the situation addressed by the legislature—the elimination of the legal problem caused to both the customer and the repair shop when repairs are made without a clear written estimate given before the repairs are undertaken—the legislature cannot help the consumer without endangering justice to the repairman in a given case. In such instances the court must carry out the intent of the legislature and cannot do what the court may feel is justice in the case. The "justice" argument in this situation should be presented by motor vehicle repair shops to the legislature.

Osteen v. Morris, 481 So.2d, 1287, 1290 (Fla. Dist. Ct. App. 1987). See also, *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 767 N.W.2d 394, 403 (Wis. App. 2009) ("We hold that a repair shop, which finds itself

outside the law and which has taken money from a consumer after violating the law, causes pecuniary loss to the consumer because of the violation. This is so because the consumer has been prevented from exercising a statutory right—the right of informed consent.”).

Even if OCC had not violated Iowa Chapter 537B, OCC breached the parties’ contract before any breach by the Pollers. In order to succeed on its breach of contract claim, OCC would have to establish that it has satisfied all of its terms of the contract. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa 1998). It cannot satisfy this initial burden. As stated in the, OCC failed to provide monthly invoices as agreed to between the parties. This breach preceded any breach by the Pollers and excused any future performance by the Pollers. *See generally, Niederhasuer v. Jackson Dairy Co.*, 237 N.W. 222, 224 (Iowa 1931) (“It is elemental that the effect of a breach of contract by one party is to excuse performance by the other.”). Indeed, OCC’s own employees acknowledged that it was OCC’s newly formed policy to provide all customers with monthly invoices. (Vol. I. Tr. P. 190 – 191; Vol. II. Tr. P. 77 – 78; Vol. II. Tr. P. 97-98). Deb specifically stated that this was an important aspect of the agreement with OCC. (Vol. I. Tr. P. 22).

“To be bound, the contracting parties must manifest a mutual assent to the terms of the contract.” *Rick v. Sprague*, 706 N.W.2d 717, 724 (Iowa 2005). The Pollers never assented to the terms OCC has now imposed. *See*, First, OCC performed a “show quality” restoration on the ’31 Chevy. Yet, OCC acknowledged that it never conveyed to the Pollers that a show quality restoration would be performed. (Vol. II. Tr. P. 44 – 47). According to OCC, this resulted in a much higher billing and a significant more amount of work performed. (Vol. II. Tr. P. 47). OCC failed to establish that the Pollers assented to a “show quality” restoration. This is also evidenced by the fact that on two separate and distinct occasions OCC represented that the cost of the completion should be no more than \$45,000. This further shows a lack of assent between the Pollers and OCC.

The Pollers testified that they were never told that they would have a bill in excess of \$45,000. (Vol. I. Tr. P. 25; Vol. I. Tr. P. 172). Additionally, OCC’s representatives testified that they never notified the Pollers that their bill would be in excess of \$100,000. (Vol. II. Tr. P. 48). Based upon this undisputed testimony, the Pollers and OCC lacked

mutual assent for anything over the previously discussed \$45,000. Accordingly, OCC's claim for breach of contract must fail.

OCC's claim must also fail, as it has attempted to claim several items that were never agreed to with the Pollers. These include the previously discussed items of improper mark ups, improper charges for assembly, disassembly, improper charges for shop materials and improper charges for hazardous material disposal. These would also include the additional costs associated with performing a "show quality" restoration. For all of these reasons, OCC's claim for breach of contract must fail.

CONCLUSION

The Pollers respectfully request this Court reverse the district court. Specifically, this Court should hold that OCC has violated Iowa Chapter 537B, the Motor Vehicle Service Trade Practices Act, by committing deceptive practices and acts in violation of Iowa Code § 537B.6. Accordingly, this Court should remand to the district court for the purposes of entering an award of damages, exemplary damages, and trial and appellate attorneys' fees. Additionally, this Court should

reverse the district court's finding in favor of OCC's breach of contract counterclaim.

REQUEST FOR ORAL ARGUMENT

The Pollers respectfully requests oral argument in this matter.

Respectfully Submitted,

SEASE & WADDING
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@seasewadding.com

By: 

MATTHEW G. SEASE
Attorney for Appellant

ATTORNEY'S COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Proof Brief and Argument was \$0.00, as it was electronically filed.

SEASE & WADDING
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@seasewadding.com

By: 

MATTHEW G. SEASE
Attorney for Appellant

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Dated: December 17, 2019

SEASE & WADDING
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@seasewadding.com

By:



MATTHEW G. SEASE
Attorney for Appellant

CERTIFICATE OF SERVICE AND CERTIFICATE OF FILING

I certify on December 17, 2019, I will serve this brief on the Appellee's Attorney, John Walker and Jordan Talsma, by electronically filing it.

I further certify that on December 17, 2019, I will electronically file this document with the Clerk of the Iowa Supreme Court.

SEASE & WADDING
The Rumely Building
104 SW 4th Street, Suite A
Des Moines, Iowa 50309
Ph: (515) 883-2222
Fx: (515) 883-2233
msease@seasewadding.com

By:



MATTHEW G. SEASE
Attorney for Appellant