IN THE SUPREME COURT OF IOWA

AL POLLER AND DEB POLLER, Plaintiffs-Appellants, vs. OKOBOJI CLASSIC CARS, LLC, Defendant-Appellee.	Supreme Court No. 19-0875 Dickinson County Case No. LACV027926

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

APPELLEE'S FINAL BRIEF AND ARGUMENT

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ROUTING STATEMENT

The Defendant agrees with the Plaintiffs that this case presents a substantial issue of first impression, i.e. the scope of Chapter 537B of the Iowa Code and its applicability to the present case. Accordingly, it should be retained by the Iowa Supreme Court pursuant to I.C.A. Rule 6.1101(2).

STATEMENT OF THE CASE

Nature of the Case: Al and Deb Poller appeal from the Findings of Fact, Conclusions of Law and Verdict entered on July 31, 2018 in the District Court for Dickinson County, the Honorable Don E. Courtney presiding (the "Order"), as amended and enlarged by the Order entered on May 1, 2019 (the "Post-trial Order").

Course of Proceedings: On March 18, 2016, Al and Deb Poller (the "Plaintiffs" or the "Pollers") filed a Petition in which they asserted three causes of action against the Defendant, Okoboji Classic Cars, LLC (the "Defendant" or "OCC"): 1) Count 1- Declaratory Judgment, 2) Count II- Breach of Contract/Breach of Covenant of Good Faith and Fair Dealing, and 3) Count III- Conversion. The Plaintiffs filed an Amended Petition on April 8, 2016 which added a fourth cause of action, i.e. Count IV- Consumer Fraud (the "Amended Petition"). (App. pp. 5-12). On May 11, 2016, the Defendant filed a Motion to Recast Count I and to Dismiss Counts II, III,

and IV of Plaintiffs' Amended Petition (the "Motion to Dismiss"). (App. pp. 13-17). The district court overruled the Motion to Dismiss on October 7, 2016. (App. pp. 18-26). On November 11, 2016, the Defendant filed an Answer, Jury Demand and Counterclaim, in which OCC made a claim against the Pollers for breach of contract. (App. pp. 27-35). The Defendant subsequently filed an un-resisted Motion to Amend Answer on November 22, 2017, which was granted by the district court on January 12, 2018.

The Pollers filed a Motion for Partial Summary Judgment on December 1, 2017, in which they asserted that Defendant was liable, as a matter of law, under Chapter 537B of the Iowa Code, i.e. Motor Vehicle Service Trade Practices Act ("MVSTPA"). On December 14, 2017, the Plaintiffs filed an Answer to Defendant's counterclaim in which they denied any liability for breach of contract. (App. pp. 41-43). The Plaintiffs also dismissed Counts I and III of the Amended Petition. (App. pp. 39-40). On December 15, 2017, OCC filed a Motion for Summary Judgment and a Resistance to Plaintiffs' Motion for Summary Judgment. (App. pp. 44-47). The district court overruled both parties' motions for summary judgment on January 25, 2018. (App. pp. 55-62).

Trial was held in this matter on January 30 and 31, 2018. On July 31, 2018, the district court entered judgment in favor of OCC against Plaintiffs

in the amount of $67,396.15 for breach of contract. (App. pp. 84-102). The district court also determined that the Defendant had satisfied the requirements of Iowa Code Chapter 537B and denied Plaintiffs' claim for consumer fraud. OCC filed a Motion to Amend/Enlarge on August 10, 2018. (App. pp. 104-105). On May 1, 2019, the district court entered the Post-trial Order, which granted the Defendant's request for interest on its judgment at the statutory interest rate pursuant to I.C.A. §535.3 and denied OCC's request for attorney's fees. (App. pp. 106-107). The Plaintiffs filed a Notice of Appeal of the Order and Post-trial Order on May 24, 2019. (App. pp. 108-110).

STATEMENT OF THE FACTS

Al and Deb Poller are residents of New Jersey, and they purchased a 1931 Chevrolet from another resident of New Jersey over twenty years prior to the trial in this case. (Transcript of Day 1 of Trial ("Tr. 1") p. 5, ln. 5-19). The Pollers purchased the 1931 Chevrolet because Al desired to restore it at some future time. (Tr. 1 p. 6, ln. 3-4). A couple of years later in their home state, they began the restoration process, which required the 1931 Chevrolet to be completely disassembled. (Tr. 1 p. 6, ln. 14-25). However, the Pollers later determined to stop the restoration. The Pollers' children were still in grade school and they believed that raising them took precedence over the

restoration of the 1931 Chevrolet. By this point, the restoration process had gone on for approximately two years, and the Pollers had spent approximately $10,000. Yet the 1931 Chevrolet remained a collection of disassembled parts some of which were severely damaged. (Tr. 1 p. 6, ln. 25 to p. 7. ln. 7; App. p. 63, 98). This collection of vehicle parts was never titled in the name of Deb or Al Poller, and the Pollers never registered the 1931 Chevrolet. (Transcript of Hearing on January 12, 2018 p. 10, ln. 14 to p. 11, ln. 9; App. p. 111).

The Pollers retained the vehicle parts in a warehouse for many years, and in 2013, made the decision to restart the restoration process. (Tr. 1 p. 63, ln. 14-18; App. p. 63). In July of 2013, Deb made a trip to Northwest Iowa, where she was born and raised, and visited the Okoboji Classic Cars museum, which had just opened. (Tr. 1 p. 7, ln. 8-12; p. 8, ln. 2-14). Toby Shine, the owner of OCC, knew Deb's family and trusted them, particularly Deb's father. (Tr. 1 p. 193, ln. 23-24; p. 194, ln. 6-8, 16-17). While she was at OCC, Deb met with one of its managers, Robert F. Kirschbaum, Jr., with whom she discussed the possibility of restoring the 1931 Chevrolet. Mr. Kirschbaum did not provide an estimate of the total cost of the restoration project, but he informed Deb of OCC's rate of $65.00 per hour for labor, and he expressed the opinion that, as a general rule, one should not spend more

on restoration than the amount that the vehicle will be worth once it is completed. (Tr. 1 p. 149, ln. 14-23). Mr. Kirschbaum also explained to Deb that this general rule of thumb only applied to "bone stock" restorations and that "if you start doing modifications, that's a whole different, other ball game." (Tr. 1 p. 150, ln. 11-15).

Within a month, Deb and Al made the decision to have OCC restore the 1931 Chevrolet. April Torrence, OCC's office manager, initially served as the Pollers' primary contact at OCC, and on November 6, 2013, Deb sent an e-mail to Ms. Torrence, which stated, "[s]till waiting for a quote from you, trucking is waiting to pick up car. Please get to me asap, so we can move forward." (App. p. 112). Ms. Torrence forwarded Deb's e-mail to Denny Linn, OCC's Shop Foreman. Within two hours, Mr. Linn e-mailed Deb the following response:

> 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 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, what-ever your interests maybe [sic?], 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. (App. p. 113).

After receiving this message, the Pollers proceeded to ship the 1931 Chevrolet to OCC. Mr. Linn acknowledged receiving the shipment, which included the body frame of the car and four separate crates, by e-mail on November 26, 2013. He indicated in this e-mail that OCC would "clean the car up and epoxy prime it," but that once these tasks were completed, it would be set aside for the time being because OCC had many cars to work on ahead of it. Mr. Linn also informed the Pollers that it would take approximately 1-1/2 to 2 years to complete the restoration. (App. p. 114). When Deb expressed dissatisfaction with this timeframe by e-mail to Mr. Linn and in a phone conversation with Ms. Torrence, Mr. Linn sent Deb an e-mail on December 7, 2013, which included pictures of the car. (App. p. 123). He explained that OCC had fourteen other cars in the shop and a list of other cars they were committed to restoring ahead of the Pollers' vehicle. Mr. Linn also informed Deb that the Pollers' vehicle could not take priority over any car that was already in the shop, but that OCC's employees would work on the car when they had extra time and that "as we finish some of the extra cars, we will schedule more time to your car." Mr. Linn also described the work that OCC had already performed and went on to state the following:

> Please look at the pictures to see progress. If this is not satisfactory, please let us know, so that we can stop any work on the car. If we proceed we will need to get a game plan together as to what work you want us to do. We will continue to stay in touch by e-mail to send pictures, ask questions and receive your ideas and plans. The information that we will need is very important. We will need to know if you want it completely stock, what color, what interior, what work you want done to the engine, etc. We have noticed that some of the rims will need to be replace [sic?] because of rust." (App. p. 127).

Deb replied to Denny's e-mail, "[w]e will be in Okoboji between Christmas and New Years, will see you in person at that time. Sounds good? Thank you very much for the push. Deb Soule Poller." (App. p. 127).

On December 27, 2013, Al and Deb visited OCC together. Al met with three employees involved in the restoration process, including the technician in charge of bodywork, Ken Potter. (Transcript of Day 2 of Trial ("Tr. 2") p. 104, ln. 12 to p. 105, ln. 19). They discussed the details of the bodywork to be performed on the 1931 Chevrolet, focusing on the paint process and paint colors. The Pollers had the opportunity to view the vehicle at this time, and they observed that it had already been sanded and primed. (Tr. 1 p. 23, ln. 1-21). Al and Deb did not discuss the cost of restoration with Mr. Potter and the other technicians during this meeting. Nor did they make any further request for an estimate of the total cost when they met with Mr. Linn. (Tr. 2 p. 105, ln. 20 to p. 107, ln. 3). Although OCC did not request a deposit, the Pollers gave Ms. Torrence a check for

$10,000. (Tr. 2 p. 72, ln. 22 to p. 73, ln. 23). She informed them that as of the first of the year, OCC was going to begin billing monthly. (Tr. 1 p. 21, ln. 15-22). After accepting their check, Ms. Torrence converted the Pollers' deposit to a credit towards labor hours in OCC's billing system. She then prepared an invoice reflecting credit for 143.79 hours at $65.00 an hour, which she provided to the Pollers that same day. (Tr. 2 p. 74, ln. 1-15; App. p. 411). Al also had a brief conversation with Mr. Kirschbaum at OCC during the December 27, 2013 visit. Following this conversation, Mr. Kirschbaum had no further contact with the Pollers, and, as of July of 2014, he was no longer employed at OCC. (Tr. 1 p. 148, ln. 10 to p. 149, ln. 1; p. 151, ln. 4-15).

One week later, on January 4, 2014, Mr. Linn sent the following message to Deb and Al in which he updated them on the status of the restoration:

> Deb & Allen,
>
> It was nice to meet you last week. Just wanted to send a picture of the Chevrolet. We have located a business to do the babbits near Watertown SD. This next week we will be able to disassemble the engine and get it to a machine shop to boil it out, so that we can get it to South Dakota. They will have it a couple of weeks before we get it back. Then we can get started on the rebuild. I will try and send weekly updates.
>
> Thank you for allowing us to work with you on your car build.
> Denny
> Okoboji Classic Cars

(App. p. 131). On January 14, 2014, Mr. Linn informed the Pollers that one of the combustion chambers in the center of the engine head was cracked, and that the head either needed to be welded or be replaced, but that his preference would be to replace it. Deb responded that they did not have any lead on a good head and that OCC should start looking for one. (App. p. 137). On March 13, 2014, Mr. Linn e-mailed Deb and Al to let them know that they had found a used head for the 1931 Chevrolet, and inquired as to whether or not they wanted to put hardened seats in the valves at an extra cost. Deb responded, "Al says go for it if that is what they recommend." (App. p. 138).

Over the course of the next several months, Mr. Linn communicated with the Pollers on a regular basis, providing detailed updates on the status of the restoration and requesting input from them at each stage. (Tr. 2 p. 10, ln. 24 to p. 13, ln. 15; App. pp. 139-208). Mr. Linn informed Al and Deb of the need for many modifications to the vehicle. In addition to replacing rims and rebuilding the engine, OCC needed to replace the fuel tank on the 1931 Chevrolet due to severe rusting. (App. pp. 157, 177). The car also needed a new trunk and luggage rack, and the radiator needed to be re-cored. (App. pp. 188, 202-203, 208, 211). The Pollers authorized safety upgrades to the car, including the addition of a second taillight, turn signals and four way

flashers. They also authorized an upgrade of the electrical system from 6 volt to 12 volt, and the addition of electric wipers, a stereo, cigarette lighters, and a new wiring harness. (App. p. 156). Because the vehicle was built for a top speed range of 45 miles per hour and Al wished to drive it on the highway, it was necessary to gear the rear end of the car differently, and the Pollers approved this modification as well. (App. pp. 139-140, 181).

After Deb requested an estimated delivery date on May 6, 2014, Mr. Linn informed her that there was "quite a bit of work yet to be done." (App. p. 149). On June 5, 2014, Mr. Linn sent the following e-mail message:

> Alan & Deb,
>
> Just a couple of picture [sic?] of the frame and some of the parts which have been sandblasted, primed and painted semi-gloss black. We did several spray outs of the purple color for your car. They are drying yet, but tomorrow I will put them into the mail for you. We are still trying to match up the numbers you gave us for paint. Our PPG paint is working on these. We will then mail you spray outs of these. We are putting lots of hours into your car and are sending a lot of parts out for rebuild.
>
> Thank you
> Denny
> Okoboji Classic Cars

(App. p. 178). The Pollers' initial $10,000 deposit covered the charges for the labor performed on their car from the time it was delivered to OCC in November of 2013 through the middle of April of 2014. (Tr. 2 p. 87, ln. 19-25; App. p. 411). By August 1, 2014, OCC had incurred significant costs for parts and additional labor hours, and Mr. Linn requested that the Pollers

forward additional payment. (App. p. 208). When Deb responded that she and Al had not received monthly invoices from OCC, Mr. Linn forwarded these invoices to the Pollers the very next day, on August 6, 2014. (App. pp. 412-465). These invoices reflected total costs of $49,560.27 for parts and labor through July 19, 2014, and a balance of $39,560.27 owed to OCC after crediting the Pollers for their initial deposit. (App. p. 411).

On August 28, 2014, OCC sent another invoice to the Pollers, reflecting costs of $25,074.52 for the period from July 20, 2014 through August 19, 2014. (App. p. 466). Despite not receiving any additional payments for over a month, OCC continued performing work on the 1931 Chevrolet and continued providing the Pollers with updates throughout August and early September. (App. p. 212-255). On September 11, 2014, the Pollers sent a check for $15,000, leaving a remaining balance of $49,634.79 owed to OCC. (App. pp. 120, 411). OCC sent an invoice to the Pollers on September 30, 2014, which reflected additional charges of $10,548.95. (App. p. 511). The Pollers made a $10,000 payment to OCC on October 6, 2014. (App. p. 121). When the Pollers requested additional information regarding the tasks and materials for which they had been billed, OCC sent them detailed logs documenting the tasks performed and the time spent on the restoration by each OCC employee and the cost of each specific

part ordered. (Tr. 2 p. 26, ln. 2-12; p. 27, ln. 4 to p. 30, ln. 2; App. pp. 288, 297-308, 412-537). Mr. Linn also gave the Pollers the option to have OCC stop work on their car and set it aside if there was a problem they wanted to address. (Tr. 2 p. 24, ln. 24 to p. 25, ln. 5). His October 7, 2014 e-mail to Deb stated the following:

> Deb,
>
> During our phone conversation today you stated that you gave us two checks for $10,000 and one for $15,000. We have the first deposit 12-27-2019 check #13293 for $10,000. We also have record of a second check # 13530 date 9-17, 2014 for $15,000. If we are missing another check for $10,000 would you please send us a copy of that check? We will need to check into that. We will be sending the information that you demanded tomorrow morning. I wish our phone conversation wouldn't have ended with you hanging up on me. We will not get our problem resolved with hanging up on each other. If you want us to proceed with the car we will need to resolve this problem. If you want us to stop the project we can move the car over to a locked warehouse. I am seeing that you have paid $25,000 to us for your project, I am also seeing that we have $21,219.19 in parts for the car. If you want to proceed with your car we will need some money to try and catch up the bill. Again please send a copy of the second $10,000, which we do not have a record of. Please favor us with a fast response.
>
> Yours truly
> Denny
> Okoboji Classic Cars (App. p. 288).

After receiving another invoice for $10,511.19 on October 23, 2014, the Pollers paid another $10,000 to OCC on November 13, 2014. (App. pp. 122, 538). At no point did Deb or Al object to any aspect of the work performed by OCC, and they never indicated that the $10,000 payment made

on November 13, 2014 would be their last. (Tr. 2 p. 26, ln. 19 to p. 27, ln. 3; p. 33, ln. 13 to p. 34, ln. 6). After receiving the additional billing information they requested in October of 2014, the Pollers made no further inquiries about the costs of restoration. (Tr. 2 p. 89, ln. 1-6). OCC continued to provide the Pollers with regular updates on the status of the 1931 Chevrolet, and the Pollers continued to authorize OCC to perform work until the restoration was completed. (Tr. 2 p. 33, ln. 13 to p. 34, ln. 6; App. pp. 347, 361-371). Despite receiving four additional invoices following their payment on November 13, 2014, this payment was the Pollers' last. In the end, the Pollers paid a total of $45,000 on a $112,396.15 bill, leaving a remaining balance of $67,396.15 owed to OCC. (App. pp. 411, 561-601).

While OCC initially denied the Pollers' request to have an appraiser view the restored 1931 Chevrolet, it ultimately permitted Don Peers, the appraiser retained by Al and Deb, to inspect the vehicle on July 19, 2017. Mr. Peers' report indicates that he looked at pictures of the 1931 Chevrolet before the restoration, as well as pictures taken during the restoration process, and that these pictures revealed that the car needed a "total restoration," i.e. a "frame off full body, drive train, nut and bolt restoration." (App. p. 603). Mr. Peers described the work performed on the main areas of

the car, i.e. body, paint, drive train, interior, and exterior, and he concluded that OCC's restoration of the Pollers' vehicle was excellent in all respects. (App. pp. 604-605). Mr. Peers makes the following statements near the end of his report:

> In my expert opinion the fair market value of the Poller car would be $37,900. After looking at the Poller car at OCC, I'm thinking that it would cost in excess of $100,000 to restore a car to the quality of the Pollers.

(App. p. 605). In a letter to the Pollers' attorney on August 3, 2017, Mr. Peers reiterated the opinion in his report, stating that "the end quality of the car is excellent." (App. p. 602).

ARGUMENT

I. THE COURT IS BOUND BY THE DISTRICT COURT'S CREDIBILITY FINDINGS.

The Plaintiffs, Al and Deb Poller, make a number of arguments in their Proof Brief. While each of these arguments will be addressed in detail, it is necessary for the Defendant to address the issue of credibility at the outset. It is well settled that when a court's review is for correction of errors at law, the appellate court is bound by the district court's credibility findings. See *Etchen v. Holiday Rambler Corporation*, 574 N.W.2d 355 (Iowa 1997) ("The district court has a better opportunity than the appellate court to evaluate the credibility of witnesses. This

court is prohibited from weighing the credibility of witnesses."). Also see, *Grinnell Mutual Reinsurance Co. v. Voeltz*, 431 N.W.2d 783, 785 (Iowa 1988) ("We construe [the district court's] findings of fact broadly and liberally. In case of doubt or ambiguity we construe them to uphold, rather than defeat, the judgment . . . *A corollary rule prohibits us from weighing the evidence or the credibility of witnesses*.") (Emphasis added). The district court described the testimony OCC presented about issues relevant to this case as "consistent and credible." (App. p. 101). On the contrary, the district court did not believe the Pollers' testimony that OCC placed a price ceiling of $45,000 on the restoration of the 1931 Chevrolet. (App. p. 100).

That the district court had the opportunity to observe the witnesses first-hand at trial provides sufficient justification, in and of itself, for affirming its findings of fact based on determinations regarding credibility. However, it bears emphasizing that there are numerous additional reasons for the Court to affirm these findings in the present case. First, there is no mention of the $45,000 figure anywhere in the e-mail communications between the parties over the course of the restoration process. Second, the Pollers' own witness, Mr. Kirschbaum,

testified that he never gave them an estimate of $45,000, and the district court notes this in the Order. (App. p. 100; Tr. 1 p. 160, ln. 22-25).

Third, there is a fundamental disconnect in Plaintiffs' argument that OCC violated Chapter 537B, and by extension, Section 714.6, of the Iowa Code. *I.C. A. §714.6*. For purposes of their argument that OCC failed to comply with the requirements of Section 537B.3, the statutory section regarding estimates, Plaintiffs argue that OCC never provided them with any estimate of the total cost of restoration of the 1931 Chevrolet. On the other hand, the Pollers argued that they were provided with a firm price ceiling of $45,000 in support of their argument that OCC violated I.C.A. §537B.6(3). The district court recognized this inconsistency, and the Order makes it clear that it contributed to the district court's finding that the Pollers' claim that they were given a price ceiling of $45,000 was not credible. (App. p. 100).

Moreover, the Pollers' credibility is further undercut by their conduct during the discovery process and Deb's trial testimony regarding this conduct. The Plaintiffs produced 431 pages of e-mail correspondence between the Pollers and employees of OCC in response to OCC's Request for Production of Documents. (Tr. 1 p. 72, ln. 6-15; App. p. 608). Notably absent from their response was the e-mail in which Mr. Linn explained OCC's policy of not providing estimates as to price, but quoting OCC's

hourly rate of $65.00 for restoration services. This e-mail was discovered through the efforts of the Defendant, and OCC included it in Defendant's Appendix in Support of Motion for Summary Judgment and Resistance to Plaintiffs' Motion for Summary Judgment, filed on December 15, 2017.

When Deb was questioned on cross-examination, she did not deny that the Plaintiffs failed to produce this e-mail, but rather, offered an explanation for the failure, i.e. that her business had been broken into and that all of her computers were stolen around the time of the Defendant's discovery request. (Tr. 1 p. 72, ln. 23 to p. 73, ln. 18). In other words, the Plaintiffs asked the court not only to believe that the physical removal of computers from Deb's office had an effect on the information stored in her web-based/hosted electronic Hotmail account, but that the only information lost in the process was an e-mail demonstrating the falsity of an allegation the Pollers needed to establish to prove their claim for consumer fraud. Paragraph 9 of the Amended Petition states the following: OCC refused to provide *an estimate as to the costs of the services or* an estimate as to the costs of the complete restoration. (App. p. 6)(Emphasis added). To argue that Deb's testimony strains credulity would be a gross understatement.

II. THE DISTRICT COURT CORRECTLY DENIED PLAINTIFFS' CAUSE OF ACTION FOR CONSUMER FRAUD.

Preservation for Appellate Review: The Defendant agrees with the Plaintiffs that this issue was preserved for appellate review.

Scope of Review: The Defendant agrees with Plaintiffs that the standard of review is for correction of errors at law.

A. The district court correctly determined that OCC did not violate any provision of Chapter 537B of the Iowa Code.

The Plaintiffs' claim they are entitled to damages under I.C.A. §714H.5 on the grounds that Defendant violated several different provisions of the MVSTPA, i.e. I.C.A. §537B.3 and subsections 1, 3, 5, 6 and 12 of I.C.A. 537B.6. (Plaintiff's Proof Brief ("Pl. Br.") pp. 18-33). The district court correctly determined that the Pollers were not entitled to damages because OCC did not violate any of these sections. (App. pp. 96-99). The Plaintiffs' argument that OCC failed to comply with Section 537B.3 is based on two faulty premises. First, the Pollers proceed on the assumption that a form containing the language set forth in Section 537B.3(1) is mandated under all circumstances in which a supplier performs repairs or service on a motor vehicle. This is false. Section 537B.3(1) clearly states that this language is required "[i]f a consumer authorizes, in writing, repairs or service upon a motor vehicle prior to the commencement of the repairs or service. . ." *I.C.A. §537B.3(1)*. As the district court points out in the Order, the Pollers did not authorize the restoration of the 1931 Chevrolet in writing,

but rather, by shipping, in a series of separate crates, the disassembled vehicle parts to OCC after receiving Mr. Linn's e-mail regarding OCC's policy on estimates. (App. p. 97). Hence, Section 537B.3(1) is inapplicable.

For purposes of their argument that OCC violated Section 537B.3, the Pollers also assume, incorrectly, that use of the term "estimate" in Section 537B.3 means an estimate as to the total price of the repairs or services. On the contrary, the text of Section 537B indicates that the legislature clearly contemplated that suppliers would not be able to offer total price estimates in some circumstances. Accordingly, Section 537B.3(2) states, "[i]f the nature of repairs or service is unknown at the time that the estimate is given, the supplier may state an hourly charge for the work." *I.C.A. §537B.3(2)*. This is an important point, because the Plaintiffs cite cases from other jurisdictions in which the legislatures have not provided this option explicitly. See *Morris v. Gregory*, 661 A.2d 712, 714-716 (Md. Ct. App. 1995)(citing Maryland Automobile Repair Facility Act §14-1002); *Schreiber v. Kelsey*, 122 62 Cal.App.3d Supp. 45, fn. 1 (Ca. Ct. App. 1976)(citing California Bus. & Prof. Code §9884.9(a)). In another case cited by the Plaintiffs, *Levin v. Lewis*, 431 A.2d 157 (N.J. App. 1981), the Administrative Law Judge who determined that the automotive repair dealer, Earl Lewis, had violated New Jersey's Consumer Fraud Act, noted

specifically that Lewis did not tell the consumer that he worked only on a time/materials basis, the implication being that if he had done so, there would have been no violation. *Levin*, 431 A.2d at 157-158.

OCC did exactly what was required by I.C.A. §537B.3(2) when Deb requested a "quote" for the restoration of the 1931 Chevrolet. Mr. Linn's email of November 6, 2013 complied with Section 537B.3(2), as it was provided to the Pollers prior to the commencement of the restoration, and it indicated that OCC charged $65.00 per hour plus materials for its services. (App. pp. 113, 123). Because OCC complied with Section 537.3, it did not engage in a deceptive act or practice under subsection (1) of I.C.A. §537B.6. *I.C.A. §537B.6(1).*

The Pollers also claim that OCC violated four additional subsections of I.C.A. §537B.6, i.e. subsections 3, 5, 6, and 12. That the district court did not believe the Pollers' claim that OCC employees communicated that the cost of restoration would not exceed $45,000 is fatal to their argument that OCC violated both Section 537B.6(3) and Section 537B.6(12) of the Iowa Code. Subsection 3 provides that it is a deceptive practice to fail to obtain authorization "for the anticipated 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 consumer." *I.C.A. §537B.6(3)*. Subsection 12 provides that it is a deceptive act of practice for a supplier to "[m]aterially and intentionally understate or misstate the estimated cost of the repairs or service." *I.C.A. §537B.6(12)*. Because the district court determined the Pollers' claim that they were provided with a price ceiling of $45,000 was not credible, the only way the Plaintiffs can show that OCC violated either of these subsections is by demonstrating that it did not abide by its quoted rate of $65 an hour. The Pollers do not even attempt to make this argument in their Proof Brief, because it is plain that the argument is baseless. Hence, their claim that OCC violated subsections 3 and 12 of I.C.A. §537B.6 must fail.

Moreover, as the district court emphasized in the order, each and every task performed by OCC, which included "numerous modifications and change orders to the original scope defined in December 27, 2013," was authorized. (App. pp. 98-99). The record contains overwhelming support for the district court's finding. (Tr. 2 p. 10, ln. 24 to p. 13, ln. 15; App. pp. 139-140, 156-157, 177-178, 181, 188, 202-203, 208, 211). For this reason, the Plaintiffs' claim that OCC violated subsection 6 of I.C.A. §537B.6 by charging for repairs or services which were not authorized also fails. *I.C.A. §537B.6(6)*. It bears emphasizing that while the Pollers originally wanted the vehicle "pretty much stock," they always contemplated some

modifications, including a change to the paint color of the vehicle, the addition of a stereo, and a new, custom-made interior. (Tr. 2 p. 18, ln. 5-23; App. pp. 89, 156). As it turns out, the process of preparing the car for painting (i.e. sanding, buffing, priming, etc.) and the painting itself were very detailed and time consuming, as evidenced not only by Mr. Linn's testimony, but by numerous communications between OCC and the Pollers and by the daily logs documenting the time spent on these aspects of the restoration. (Tr. 2 p. 41, ln. 13 to p. 44, ln. 4; App. pp. 140-141, 149-154, 156-161, 169-172, 181-188, 201, 204-205, 413-417, 425, 442, 448, 470, 513, 541, 562, 573). OCC kept the Pollers informed of the progress on the 1931 Chevrolet, and the Pollers approved numerous modifications and upgrades during the restoration process, even after being presented with invoices of well over $45,000. (App. pp. 226-287, 309-353).

The Pollers argument that the Defendant violated I.C.A. §537B.6(6) because they did not authorize OCC to perform a "show quality" restoration is also unavailing. (Pl. Br. p. 32-33). It was well within the district court's discretion to credit Mr. Linn's testimony that OCC performs only "show quality" restorations, notwithstanding the fact that Defendants' Exhibit D does not use this precise term. (Pl. Br. p. 32; Tr. 2 p. 8, ln. 4-8). In fact, on August 1, 2014, Mr. Linn sent an e-mail to the Pollers in which he stated,

"[f]ront fenders have been color sanded and buffed. Again it takes a lot of time, but *show quality* when finished." (App. p. 238)(Emphasis added). Even if this evidence were not in the record, the Pollers could not demonstrate a violation of Chapter 537B simply by demonstrating that they did not want OCC to perform a "show quality" restoration. Throughout the restoration process, when OCC presented the Pollers with a choice between a cheaper more cost effective option and a more costly option that would produce a higher quality vehicle, the Pollers chose the latter. (Tr. 2 p. 8, ln. 4-12). Whether the Pollers believed the original modifications they requested to the paint and the interior of the 1931 Chevrolet, or the later modifications and change orders they authorized were being made for the purpose of producing a "show quality" restoration is not relevant for purposes of Section 537B.6(6). This section requires only that the "repairs or service" be authorized by the consumer, not that they be authorized for a particular purpose or with a particular mindset. *I.C.A. §537B.6(6)*.

The Plaintiffs also claim that they did not authorize any mark-up of the costs of materials that were purchased wholesale by OCC. (Pl. Br. p. 31). Again, the Plaintiffs rely on a faulty premise to support their argument, for they assume that Mr. Linn's quote of "$65.00 an hour plus materials" bound OCC to charge $65.00 an hour plus materials *at wholesale cost*. But

nobody at OCC represented to the Pollers that they would be receiving materials at wholesale cost, and both Mr. Linn and Ms. Torrence testified that it was customary in the automobile industry for sellers who purchase parts at wholesale price to mark-up this price when the parts are sold at retail to consumers, and that their previous employers followed this practice. (Tr. 2 p. 21, ln. 23 to p. 22, ln. 21; p. 69, ln. 17 to p. 70, ln. 13). Ms. Torrence also testified that even with the mark-up, there were instances in which customers still received a discount when the price charged by OCC for a part was compared to the retail price of that part, and the district court found this testimony to be credible. (Tr. 2 p. 70, ln. 14-17; App. p. 101).

Moreover, the record indicates that OCC did not attempt to hide this practice from the Plaintiffs. The Pollers received copies of the invoices itemizing each of OCC's retail charges for parts, as well as copies of the bills OCC received from outside vendors, which reflected the wholesale prices OCC paid to these vendors. On August 1, 2014, Mr. Linn sent an e-mail about the new core and rebuilt radiator for the 1931 Chevrolet to the Pollers. Mr. Linn stated in this e-mail, "[o]ur cost was $2080 and we will not be marking it up for you." (App. p. 208). This e-mail serves as an acknowledgement that OCC's general practice is to mark up the wholesale cost it pays for parts from outside vendors, for if this were not OCC's

general practice, it would have been unnecessary for Mr. Linn to make a contrary assurance in this particular instance. Since the Plaintiffs cannot demonstrate that OCC represented that they would be providing materials to the Pollers at wholesale cost, and because the MVSTPA does not require them to do so, the Plaintiffs' claim that OCC's mark-up of the wholesale costs for parts and materials violates Chapter 537B also fails.

Finally, the Pollers argue that OCC violated subsection 5 of I.C.A. §537B.6, which prohibits suppliers from "failing to disclose prior to the commencement of any repairs or service, that a charge will be made for disassembly, reassembly . . . or any other work not directly related to the actual performance of the repairs or service." *I.C.A. §537B.6(5).* On pages 35 through 38 of their Proof Brief, the Pollers list forty-seven different tasks they do not believe OCC is entitled to be paid for, but they fail to explain why these tasks are not "directly related" to the performance of the "repairs or service" they authorized. (Pl. Br. pp. 35-38). Presumably, many of these tasks were included because the log entries include words such as "disassemble," "assemble," and "dismantle," which are similar to the words used in I.C.A. §537B.6(5). OCC was tasked with performing a total restoration on a completely disassembled vehicle, which arrived at OCC in a series of crates, many parts of which needed to be replaced and rebuilt. For

this reason, it simply cannot be said that these tasks were not "directly related" to the service the Pollers hired OCC to perform. As such, charges for these services do not come within the prohibition in I.C.A. §537B.6(5).

The district court's Order reveals that it engaged in an exceedingly thorough review of the record before determining that "the detailed invoices Plaintiffs requested [show] that every charge OCC imposed was directly related to the restoration of the Plaintiffs '31 Chevy." (App. pp. 98-99). OCC did spend significant time on tasks and incurred expenses which were not "directly related" to the restoration of the 1931 Chevrolet, i.e. time spent looking at and ordering parts, travel time necessary to retrieve parts, mileage costs, etc. However, Mr. Linn testified at trial that the Pollers were not charged for any of these tasks or expenses. (Tr. 2 p. 8, ln. 24 to p. 10, ln. 15). Accordingly, the district court's determination that OCC complied with Section 537B.6(5) of the Iowa Code was completely justified.

B. Alternatively, the Court should affirm the decision of the district court because Chapter 537B of the Iowa Code is not applicable to the present dispute.

The Defendant argued in the district court that Chapter 537B was not applicable to the present dispute. Because it determined that OCC ultimately complied with the requirements of the MVSTPA, it was unnecessary for the district court to address this argument in the Order.

However, the Plaintiffs do address the issues relevant to OCC's argument in their Proof Brief. (Pl. Br. pp. 20-22). The Defendant submits that the district court's finding that OCC complied with all of the requirements of Chapter 537B was well reasoned and should be affirmed. This finding, by itself, provides sufficient basis for denying the Plaintiffs' cause of action for consumer fraud. Therefore, if the Court agrees with the district court's finding, it is not necessary to address the Defendant's alternative argument on appeal.

However, the Court may affirm the district court on any basis argued by the appellee in the district court and urged on appeal, even if the issue was not reached by the district court. See *Northeast Community School District v. Easton Valley Community School District*, 857 N.W.2d 488, 491 (Iowa 2014)(citing *In re Estate of Voss*, 553 N.W.2d 878, 879 n. 1 (Iowa 1996), *Johnson Equip. Corp. v. Indus. Indem.*, 489 N.W.2d 13, 17 (Iowa 1992), and *Chauffeurs, Teamsters & Helpers, Local Union No. 238 v. Iowa Civil Rights Comm'n*, 394 N.W.2d 375, 378 (Iowa 1986)). Hence, if the Court is not convinced that OCC complied with Chapter 537B, it should affirm the district court's decision denying Plaintiff's action for consumer fraud on the alternative ground that the transaction between the Pollers and OCC is not covered by the MVSTPA.

Iowa Code Chapter 537B sets forth requirements applicable to transactions between a "consumer" and a "supplier." The Plaintiffs set forth the correct definitions of these terms, which are set forth in I.C.A. §537B.2(1) and (3), in their Proof Brief. *I.C.A. §537B.2(1), (3)*. (Pl. Br. p. 20). A party can only meet the definition of "consumer" or "supplier" if the transaction at issue involves "repairs or service upon a motor vehicle." *I.C.A. §537B.2(1), (3)*. "Motor vehicle" means as "a motor vehicle as defined in section 321.1 which is subject to registration . . ." *I.C.A. §537B.2(2)*.[1] If the Pollers do not meet the definition of "consumer" and OCC does not meet the definition of "supplier," the restoration of the 1931 Chevrolet is not covered by the MVSTPA, and the Pollers' action for consumer fraud must be denied. The Defendant argued in the district court that the type of service provided by OCC, i.e. the complete and total restoration of classic cars to show quality condition, did not come within Chapter 537B. OCC also argued that the disassembled, inoperable, 1931 Chevrolet, which the Pollers shipped to OCC in a series of crates in November of 2013, did not constitute a "motor vehicle" pursuant to the definition in Chapter 537B. While the Defendant submits the Court should

[1]The term "vehicle" is defined differently, as not every "vehicle" constitutes a "motor vehicle" for purposes of Chapter 321, let alone Chapter 537B. I.C.A. §537B.2 does not include a definition for "repairs" or "service."

accept both of these arguments, it bears emphasizing that it need only accept one of them to conclude that Chapter 537B is inapplicable to the present case.

1. OCC is not subject to the requirements of Chapter 537B of the Iowa Code due to the nature of the work it performs.

That OCC is not a typical garage or automotive "repair shop" is undisputed. Toby Shine, the owner and President of the Defendant and a lifelong collector of show quality automobiles, built OCC, which is a 45,000 square feet custom car showroom. It contains a life-size diorama of 1950s Main Street, Spencer, Iowa. (App. p. 48). OCC builds show quality cars essentially from scratch over extended periods of time. In *Gulbankian v. Harabedian*, 2002 Mass. App. Div. 51, 2002 WL 480952 (Mass. App. Div. 2002), a Massachusetts appellate court determined that a machine shop performing antique automotive engine overhauls was not subject to the regulation concerning unfair or deceptive acts or practices by repair shops. Relying on a previous case, the court in *Gulbankian* stated the following:

> In Devito Auto Restoration v. Card, 2000 Mass. App. Div. 245 [(Mass App. Div. 2000)], the Northern Division of this court held that a business that restores antique cars to their original appearance and condition was not a repair shop because "[i]ts work customarily required several months, if not years to complete . . . and routinely cost twenty to thirty thousand dollars" and that "it did not provide towing or typical engine, transmission, mechanical or maintenance services characteristic of an automobile repair shop or garage." By analogy, J&M did not perform general automotive repairs, nor

> autobody work, nor towing, but specialized in rebuilding antique automobile engines. . .” *Gulbankian*, 2002 WL 490952* at 3

This same logic should apply to exclude the work performed by the Defendant from Chapter 537B, due to similarities in the services provided in *Devito* and *Gulbankian*, and the services provided by OCC.

In their Proof Brief, the Plaintiffs cite cases from other jurisdictions to support their claim that the type of work performed by OCC is covered by Chapter 537B. (Pl. Br. pp. 20-21)(citing *Levin, Morris, Jagodzinski v. Jessup*, 572 N.W.2d 515 (Wis. Ct. App. 1997), *Schreiber, Schuster v. Dragone Classic Motor Cars, Inc.*, 98 F.Suppp.2d 441 (S.D.N.Y. 2000); et al.). These cases are not persuasive, as there are important distinctions between the statutes addressed therein and Chapter 537B of the Iowa Code. For example, the New Jersey, Wisconsin, and Connecticut statutes addressed by the courts in *Levin, Jagodzinski,* and *Schuster*, respectively, all contain expansive, detailed definitions of the services covered by the statutes. *Levin*, 431 A.2d at 159 (citing N.J.A.C. 13:45A-7.1); *Jagodzinski*, 572 N.W.2d at 517 (citing Wis. Adm. Code §132.01(12)); *Schuster*, 98 F.Supp.2d at 448 (citing Conn. Gen. Stat. Ann. §14-65j). The *Schreiber* case is also distinguishable from the present. The court in this case specifically noted that the company’s name included the words “foreign car repair and service.” *Schreiber*, 62 Cal.App.3d Supp. at 45-46.

In contrast to the statutes addressed in *Levin*, *Jagodzinski*, *Schuster* and *Schreiber*, Iowa Code Chapter 537B does not contain a detailed definition of the services covered by the MVSTPA. The only evidence in the record which sheds any light on the scope of the services covered by Chapter 537B indicates that the legislature did not intend for it to cover the type of work performed by OCC, but rather, to provide security and safeguards to consumers who used their vehicles *for daily transportation* and to prevent the exploitation of *these* consumers when they delivered these vehicles to automotive repair shops for service and repair. (App. pp. 50-51)(Emphasis added). Stewart Iverson, who served in the Iowa House of Representatives when the legislature passed the MVSTPA in 1990 and when it amended the statute in 2012, specifically states in his affidavit that Chapter 537B was "not intended to apply to the restoration of dismantled vehicles incapable of operating on the roadway because there are too many unknowns in the car restoration industry and restoring vehicles is not an exact science." (App. pp. 50-51).

Finally, and perhaps most importantly, applying Chapter 537B to OCC would not serve what the Plaintiffs themselves acknowledge to be the purpose of consumer protection statutes like the MVSTPA. In their Proof Brief, the Pollers cite the case of *Osteen v. Morris*, 481 So.2d 1287 (Fla.

Dist. Ct. App. 1987) with approval. In *Osteen*, a Florida appellate court stated, "[i]t 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." *Id* at. 1290. But it is not OCC's practice to perform work and then present the final product to its customers as a done deal, i.e. a "fait accompli." Rather, OCC acts with complete transparency by keeping its customers informed of the progress on their restoration projects through regular updates, and it involves customers in the decision making at each stage. Mr. Linn informed Deb Poller of OCC's policy in his first e-mail on November 6, 2013, and OCC followed the policy in restoring the 1931 Chevrolet. Permitting the Pollers to accept and authorize work at each stage of the restoration process only to turn around and sue OCC for consumer fraud would permit the MVSTPA to be used as a sword rather than a shield.

2. <u>The disassembled 1931 Chevrolet, which was shipped to OCC by the Pollers, was not a "motor vehicle" for purposes of Chapter 537B of the Iowa Code</u>.

Even if the Court determines that the complete restoration/rebuilding, which was performed by OCC in this case, is a service covered by Chapter 537B, OCC can still demonstrate that the transaction in the present case falls

outside the scope of the MVSTPA. This is because the labor it offered to perform for the Pollers in November of 2013 did not constitute repairs or service upon a "motor vehicle." For purposes of the MVSTPA, "motor vehicle" means "a motor vehicle as defined in section 321.1 which is subject to registration," with certain exclusions not applicable to the present case. *I.C.A. §537B.2(2)*. Section 321.1(42) of the Iowa Code defines "motor vehicle" as "a vehicle which is self-propelled and not operated on rails." *I.C.A. §321.1(42)*. This means that in order for the transaction in this case to be governed by Chapter 537B, it must be true that the disassembled 1931 Chevrolet which OCC agreed to restore constituted "a vehicle which is self-propelled and not operated on rails" and that it was "subject to registration." In *Nelson v. Merchants Bonding Company*, 425 N.W.2d 433 (Iowa Ct. App. 1988), the court of appeals held that a collection of automotive parts did not constitute a "motor vehicle" for purposes of I.C.A. §321.1. *Id*. at 436.

The United States Bankruptcy Court for the Southern District of Iowa reached a contrary conclusion in the case of *In re Bailey*, 326 B.R. 750 (Bankr. S.D. Iowa 2004). The issue in *Bailey* was whether each of two disassembled vehicles owned by the debtors constituted a "motor vehicle" for purposes of Iowa's exemption statute, i.e. Iowa Code Chapter 627. The court determined that "the term 'motor vehicle' includes an inoperable

vehicle that can be made operable by reassembling one of more of its parts or by repairing one or more of its parts." *Bailey*, 326 B.R. at 757. What *Bailey* does not hold is that the term "motor vehicle" includes a completely disassembled, inoperable vehicle, which can only be made operable by *replacing* and *rebuilding* numerous essential parts, including the engine, radiator and fuel tank, which was the case for the 1931 Chevrolet shipped to OCC by the Pollers. Because the shipment to OCC did not include a complete set of parts which could be used in the restoration, *Bailey* is not persuasive in the present case.

Be that as it may, even if the court determines that the holding in *Bailey* applies to the present case, the Plaintiffs' argument still fails. This would only mean that the 1931 Chevrolet constituted a "motor vehicle" within the meaning of I.C.A. §321.1(18). *Bailey* does nothing to help the Pollers' argument that their disassembled vehicle was "subject to registration," as the case does not address this issue. The Pollers have never contested the fact that they do not hold a certificate of title to the 1931 Chevrolet or that they never registered the vehicle in the twenty plus years they maintained possession of its disassembled parts. Rather, the Pollers maintain that the vehicle was "subject to registration" at the time they shipped the parts to OCC, because it would have been "subject to

registration" upon completion. In support of their argument, the Pollers rely on Section 4.1(33) of the Iowa Code, which provides that "[w]ords in the present tense include the future." *I.C.A. §4.1(33)*. If the Court reaches this issue, it must provide guidance on the application of this section, and the Defendant submits that it must reject the Plaintiffs' position.

Notably, the introductory paragraph to I.C.A. §4.1 provides that "[i]n the construction of the statutes, the following rules shall be observed, unless such construction would be inconsistent with the manifest intent of the general assembly, or repugnant to the context of the statute." *I.C.A. §4.1*. Iowa case law is also clear that in interpreting a statute, the Court "look[s] for an interpretation that is reasonable and avoids absurd results." *Colwell v. Iowa Department of Human Services*, 923 N.W.2d 225, 233 (Iowa 2019)(citing *State v. Spencer*, 737 N.W.2d 124, 139 (Iowa 2007)). The Plaintiffs' interpretation of Section 4.1(33) violates this principle, for under the Plaintiffs' logic, the 1931 Chevrolet was "subject to registration" for the entire thirteen year period that its disassembled parts were held in storage, on the grounds that it would have been required to be registered in the event that it was ultimately restored and made operable at a future date. By the Plaintiffs' logic, any party who is not presently required to take action pursuant to the plain language of a statute is still be required to do so if the

circumstances could potentially change so as to require them to do so in the future. The legislature could not have intended this absurd result in enacting Section 4.1(33) of the Iowa Code.

Moreover, an examination of Section 321.18 of the Iowa Code, which is titled "Vehicles subject to registration—exception," provides a logical, alternative manner in which to apply the principle set forth in Section 4.1(33) in determining whether a vehicle is "subject to registration." Section 321.18 provides that "[e]very motor vehicle, trailer, and semi trailer when driven or moved upon a highway shall be subject to the registration provisions of this chapter. . ." *I.C.A. §321.18*. Without the aid of Section 4.1(33), an argument could be made that vehicles are only "subject to" the registration provisions of Chapter 321 while they are in the process of being "driven or moved upon a highway." However, pursuant to the rule that "words in the present tense include the future," the vehicles are "subject to registration" when they are capable of being "driven or moved upon a highway" at a future time. In other words, if the Pollers had paid for and taken possession of the restored 1931 Chevrolet, the vehicle would have been "subject to registration" prior to the precise moment it was first "driven or moved upon a highway."

An Illinois appellate court recently interpreted 1 U.S.C.A. §1, the federal statute comparable to I.C.A. §4.1(33), in a similar manner in *City of Chicago Through Department of Finance v. Wendella Sightseeing, Inc*., -- N.E.3d--, 2019 IL App (1st) 18148 (Ill App (1st) 2019). The statutory section at issue in *Wendella* was Section 5(b) of the Maritime Transportation Security Act, which provides that "[n]o taxes, tolls, operating charges, fees, or any other impositions whatever shall be levied upon or collected from any vessel or other water craft. . . if the vessel or watercraft *is operating on any navigable waters* subject to the authority of the United States. . ." *Wendella*, 2019 IL. App (1st) 181429 at *2 (Emphasis added). Applying 1 U.S.C.A. §1, the court held that *Wendella* could not be charged with the tax at issue even assuming that its boats were not "actively operating on the federal waters at the precise moment that the tax was levied. . ." *Id*. at 5.

III. THE DISTRICT COURT CORRECTLY DETERMINED THAT PLAINTIFFS' WERE LIABLE TO DEFENDANT FOR BREACH OF CONTRACT.

The Court has recognized the validity of agreements to perform services at a fixed price and agreements to perform services on a time and materials basis. *Welter v. Heer*, 181 N.W.2d 134, 134 (Iowa 1970). In the present case, the district court correctly determined that the parties entered into a time and materials contract "incorporating a labor charge of $65 per

hour plus materials." (App. p. 97). The Plaintiffs' claim that the Defendant violated Chapter 537B of the Iowa Code and its claim that OCC is not entitled to damages for breach of contract are intertwined, as it is the Pollers' position that because OCC violated Section 537B, the Pollers' performance under the contract is excused. Of course, a finding that the Defendant did not violate Chapter 537B or a finding that the transaction in this case was not governed by the MVSTPA would eliminate the Pollers' primary defense to the Defendant's counterclaim. Both of these findings are warranted for the reasons set forth in Section II of this brief and in the district court's Order. However, even assuming that this case is governed by the MVSTPA and that OCC engaged in a technical violation of this statute, the Pollers would not be excused from paying the $67,396.15 in charges incurred by OCC. Nor, for that matter, would they be entitled to return of the $45,000 they already paid or any additional damages.

The Pollers cite two cases from the state of Washington in support of their claim that they are entitled to damages under Section 714H.5 of the Iowa Code, i.e. *I-5 Truck Sales & Service Co. v. Underwood*, 645 P.2d 716 (Wash Ct. App. 1982) and *Webb v. Ray*, 688 P.2d 534 (Wash App. 1984). (Pl. Br. pp. 33-34). Both of these cases have been superseded by statute. See *Clark v. Luepke*, 809 P.2d 752 (Wash Ct. App. 1991). The Pollers

acknowledge that the *Underwood* case was superseded by statute in their Proof Brief, but claim that the holding should still apply in the present case because the Washington statute which was in effect when *Webb* and *Underwood* were decided is similar to the MVSTPA. (Pl. Br. p. 33). This is false. When the Court of Appeals of Washington decided *Underwood* and *Webb*, the Washington Automotive Repair Act (the "ARA") contained a provision expressly prohibiting a repairman who failed to furnish a written cost estimate from charging for work performed or parts supplied. *Underwood*, 645 P.2d at 719-720 (citing R.C.W. 46.71.040(2)); *Webb*, 688 P.2d at 536-537. As Iowa's MVSTPA contains no such provision, these cases have no persuasive value. The case of *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 767 N.W.2d 394 (Wis. Ct. App. 2009), which Plaintiffs cite in Section II of their Proof Brief to support their claim that the district court erred in awarding OCC damages for breach of contract, is inapposite for the same reason. Unlike the Iowa statute, the Wisconsin statute at issue in *Kaskin* explicitly prohibits repair shops from "demanding or receiving payment for unauthorized repairs." *Kaskin*, 767 N.W.2d at 399 (citing Wis. Adm. Code § ATCP 132.09(3)(a), (4)(e)).

By the time the Court of Appeals of Washington decided *Clark v. Luepke*, 809 P.2d 752 (Wash. Ct. App. 1991), the ARA had been amended to

remove the provision relied upon in *Underwood* and *Webb*. Accordingly, the court in *Clark* permitted the repairman to retain payment for his services, despite violations of the ARA, on the grounds that his work was reasonable, necessary and justified and permitting the repairmen to retain payment would not cause him to be unjustly enriched. *Clark*, 809 P.2d at 754-755. The same logic should apply in the present case. Not only does the logic in *Clark* justify denying the Pollers' claim for return of the $45,000 and the additional damages they claim they are entitled to, it also provides a justification for requiring them to pay the total amount billed by OCC.[2] This is particularly true in light of the report of Mr. Peers. Mr. Peers performed a thorough examination of the 1931 Chevrolet restored by OCC, and he expressed the expert opinion that the restoration performed was excellent and "would cost in excess of $100.000." (App. p. 604). Notably, Mr. Peers was retained by the Pollers, and his opinion was based upon forty-five years of experience in the restoration industry. (App. p. 602). Not even the testimony of the Pollers' witness, Mr. Kirschbaum, supports their claim that the OCC's charges were unreasonable. Mr. Kirschbaum explained that his

[2] Not only do the Pollers claim they are entitled to a return of the entire $45,000 they paid to OCC, they claim they are entitled to additional "credit" for OCC's mark-up of parts from wholesale cost and for charges they claim were unauthorized. Hence, it seems the Plaintiffs are not only asking the Court to award exemplary, treble damages pursuant to I.C.A. §714H.5(4), they are asking that the base amount of the compensatory damages awarded to them be significantly increased over and above the dollar amount of their expenses.

general rule of thumb that one should not spend more to restore a vehicle than the amount the vehicle will be worth upon completion applies only to "bone stock" restoration, and not to restorations including modifications. (Tr. 1 p. 150, ln. 11-15). There is no dispute that the restoration of the 1931 Chevrolet ultimately was not "bone stock" and included significant modifications, Mr. Kirschbaum's ignorance of this fact notwithstanding.

Section 714H.5 of the Iowa Code, the statutory section under which the Pollers are claiming damages, is also instructive. Not only has the Iowa Legislature, in contrast to other state legislatures, declined to prohibit charges for services performed in violation of Chapter 537B, but Section 714H.5 describes the court's power to award equitable relief in permissive terms, i.e. "[t]he court *may* order such equitable relief as it seems necessary to protect the public from further violations . . ." *I.C.A. §714H.5(1)* (Emphasis added). This undercuts the Plaintiffs' argument that the contract between OCC and the Pollers must be declared void for violation of public policy. (Pl. Br. pp. 41-42). Clearly, the intention of the legislature was for Iowa courts to have discretion in deciding private actions for consumer fraud. The Iowa Legislature even prohibited consumers from collecting damages in certain circumstances in which the supplier can demonstrate that a violation was "not intentional and resulted from a bona fide error

notwithstanding the maintenance of procedures reasonably adopted to avoid the error." *I.C.A. §714H.5(7)*.

Even assuming, *arguendo*, that the Defendant engaged in a violation of Chapter 537B and that it cannot take advantage of I.C.A. §714H.5(7), the Plaintiffs would still have to prove by a preponderance of the evidence that they suffered an "ascertainable loss of money or property" as a result of OCC's violation in order to recover damages. *I.C.A. §714H.5(1), (7)*. For example, if the Court were to accept, over the Defendant's objection, Plaintiffs' argument that use of the form described in Section 537B.3(1) was mandatory for the transaction in this case, the Pollers would still have to demonstrate that they suffered an "ascertainable loss" as a result of OCC's failure to provide this form. Because this violation would be inconsequential, they could not do so. See *Rogers Refrigeration Co., Inc. v. Pulliam's Garage, Inc.*, 505 A.2d 878, 883-884 (Md. Ct. App. 1986)(Court held that an inconsequential departure from the consumer protection statute did not excuse customer's obligation to pay for repairs). In *Jiries v. BP Oil*, 682 A.2d 1241 (N.J. Super. 1996), the court held that an automobile repair shop's technical violation of the state's consumer protection statute was not, by itself, sufficient basis for a consumer to recover damages in the absence of an "ascertainable loss." The court also held that the consumer's payment

for the repairs themselves did not qualify as an "ascertainable loss", because the consumer could not demonstrate that the defendant failed to perform the repairs or performed them improperly. *Jiries*, 682 A.2d at 231. The same principle should apply in the present case.

Of course, the Pollers claim that OCC's failure to provide them with the form in Section 537B.3(1) was significant, because it denied the Pollers' their "right to place a budgetary cap on the project." (Pl. Br. p. 27). The evidence in the record does not support this claim. Use of the form would not have required OCC to perform the entire restoration of the 1931 Chevrolet for $45,000, as the Pollers desired. Rather, it would merely have given the Pollers the option to have OCC contact them in the event the cost exceeded a certain amount, at which point the Pollers could have chosen to discontinue the project rather than incur additional costs. The Pollers had this very opportunity after receiving notice that OCC had incurred costs of $49,560.27 for the restoration in August of 2014. Yet they failed to take any further action to nail down a firm price with OCC, let alone stop the restoration from going forward. On the contrary, they induced OCC to continue the project and incur significant additional expenses by failing to object to any of the charges in the invoices, continuing to make partial payments, and authorizing additional changes. Hence, there is no reason to

believe that OCC's failure to use the form in Section 537B.3(1) caused the Pollers any damage.

Lastly, the Plaintiffs argue that even if the Defendant did not violate Chapter 537B, its breach of contract claim must fail because "OCC breached the parties' contract before any breach by the Pollers." (Pl. Br. p. 44). The district court's rejection of the Pollers' testimony that the parties placed a $45,000 cap on the total cost of the project is fatal to the Plaintiffs' claim that the Pollers and OCC "lacked mutual assent for anything over the previously discussed $45,000." (Pl. Br. p. 45). The Pollers' claim that they never assented to a "show quality" restoration contains the same flaw as their argument that OCC violated the MVSTPA by performing a "show quality" restoration. First, the Pollers never intended a "bone stock" restoration. From the beginning, they contemplated modifications to the paint on the 1931 Chevrolet, as well as a custom made interior. Subsequently, the Pollers authorized numerous additional modifications at significant cost. Whether the Pollers' believed these modifications were being made for the purpose of producing a "show quality" vehicle, or simply because it was their personal preference for OCC to make them is irrelevant.

It is true that OCC, initially, failed to send out monthly invoices after the Pollers visited OCC in December of 2013. The fact is that the Pollers

never requested invoices, and the subject only came up because Ms. Torrence informed them of OCC's new policy. The Pollers did not request a monthly invoice until August of 2014 after OCC requested that they make additional payment. This is despite the fact that Mr. Linn informed Deb in an e-mail on May of 2014 that OCC was putting "lots of hours" into the car and "sending a lot of parts out for rebuild." (App. p. 178). The Pollers' seven-month silence on the issue of monthly invoices strongly suggests their current claim that "this was an important aspect of the agreement with OCC," just like their claim that the parties agreed to a $45,000 price ceiling, was concocted after the fact. (Pl. Br. p. 44). There is no reason to believe OCC's newly adopted policy of sending monthly invoices constituted any part of its contract with the Pollers, let alone an "important" part. If, in fact, the receipt of monthly invoices from OCC was a part of the contract between OCC and the Pollers, the Pollers waived this right when they failed to request these invoices for seven months. Waiver is defined as "the voluntary or intentional relinquishment of a known right" and it "can be shown by the affirmative acts of a party, or can be inferred from conduct that supports the conclusion waiver was intended." *Scheetz v. IMT Insurance Company (Mutual)*, 324 N.W.2d 302, 304 (Iowa 1982).

Even if the Court determines that the Defendant's promise to forward monthly invoices was bargained for by the Pollers, and that the Pollers did not waive this right, OCC's failure to fulfill this promise would not excuse the Pollers from their obligation to pay OCC for the restoration. The district court explains the difference between a "material breach," which excuses performance by the other party, and a "partial breach," which merely gives the aggrieved party a right to damages, in the Order. (App. pp. 99-100). In order for a breach to be "material" it has to be "substantial and significant." (App. p. 99; citing Deluxe Black's Law Dictionary 189 (6th ed. 1990)). Also see *Agri Careers, Inc. v. Jepsen*, 463 N.W.2d 93, 96 (Iowa Ct. App. 1990)(Court held that plaintiff was entitled to be paid for its services despite breaches "collateral to the main contract" because it "substantially performed its part of the bargain"). OCC's failure to send monthly invoices between January and August of 2014, was collateral to the main contract. As such it could only be considered a "partial breach."

Moreover, the Pollers cannot demonstrate any damages resulting from OCC's failure to provide them with monthly invoices. At this point, it bears repeating that any argument based on the claim that the parties agreed to a $45,000 price ceiling must fail per the district court's credibility assessment. Mr. Linn's forwarding of the invoices in August of 2014 provided the

perfect opportunity for the Pollers to remind OCC of the agreed upon $45,000 and to question the fact that OCC had already incurred total costs of $49,634.79. Yet the Pollers said nothing about this. Nor did they question any of OCC's charges in October of 2014 after receiving the daily time logs documenting all of the tasks performed on their vehicle by OCC employees. This is despite the fact that the Pollers knew the restoration was not complete and that a significant amount of work remained to be done. This silence is yet another factor undermining the Pollers' credibility. The fact that the Pollers continued to authorize repairs after receiving this information demonstrates that even if the parties had agreed to a $45,000 price ceiling, the Pollers waived this agreement. See *Scheetz*, 324 N.W.2d at 304.

The record in this case leaves no doubt that the Pollers' actions were strategic. They made the calculated decision to pay what they believed to be a reasonable price for the restoration of the 1931 Chevrolet, despite the knowledge that OCC never agreed to this price and would continue performing detailed quality work on the vehicle until the restoration was completed. The district court recognized this ploy for what it was, and it issued a thorough well-reasoned decision denying the Pollers' claims and

granting OCC's counterclaim. This decision should be affirmed by the Court in its entirety.

CONCLUSION

For the reasons stated herein, the Defendant respectfully requests that the Court affirm the decision of the district court in its entirety.

Respectfully submitted,

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REQUEST FOR ORAL ARGUMENT

Counsel for Appellee respectfully requests to be heard in oral argument upon submission of this case.

ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellee's Final Brief was the sum of $15.00.

/s/ Jordan M. Talsma
Jordan M. Talsma

CERTIFICATE OF SERVICE

I certify that on the _____ day of December, 2019, I served the following individuals with the attached document electronically through EDMS:

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/s/ Jordan M. Talsma
Jordan M. Talsma

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I further certify that on the ____ day of December, 2019, I filed this document with the Clerk of Supreme Court by EDMS.

/s/ Jordan M. Talsma
Jordan M. Talsma

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