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 REPLY 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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ARGUMENT

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

Iowa Code § 537B.3 requires motor vehicle repair companies—such as OCC—to notify consumers—such as the Pollers—that they have a right to an estimate "if the expected cost of repairs or service will be more than fifty dollars." OCC's arguments that they complied with the statute and/or are absolved from these requirements are simply wrong.

First, OCC attempts to argue that Iowa Code § 537B.3 is inapplicable because the Pollers did not authorize in writing to repair the '31 Chevy but instead just simply shipped the car to OCC following the November 6, 2013 email. Appellee Brief P. 27-28. This is not the case. If the Poller's did not authorize the repairs to the '31 Chevy in writing, then OCC is required to provide the same notifications to the Pollers pursuant to Iowa Code § 537B.3(3). Iowa Code § 537B.3(3) specifically states that if the authorization is oral "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." It is absolutely undisputed that this did not happen. OCC's

shop manager admitted that OCC does not have the form, did not inform the Pollers of their rights and in fact, testified that he was not even aware of Iowa Chapter 537B until these proceedings began. (Vol. I. Tr. P. 184 – 188). OCC does not dispute any of these facts. It is without question that OCC violated Iowa Code § 537B.3 by not informing the Pollers of their rights to obtain an estimate, their right to request a call if the price exceeded a certain amount and their right to a reasonably anticipated completion date.

In addition to violating Iowa Code § 537B.3, OCC also violated Iowa Code § 537B.6(5),(6) and (12). The Pollers stand by their original contention that OCC violated each of these provisions as outlined in their opening brief. Due to OCC's undisputed violations of Iowa Chapter 537B, the district court erred and must be reversed.

Recognizing that OCC likely violated Iowa Chapter 537B, OCC attempts to argue that Iowa Chapter 537B is not applicable to OCC due to the type of work it performs on motor vehicles. First, error has not been preserved on this issue. It is admitted that OCC raised this issue in their motion for summary judgment, however, OCC did not raise this issue before the district court during the trial or in its posttrial filings.

Thus, error was not preserved. *See generally 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."). Because these issues were not raised during the trial and OCC has not filed any cross appeal, OCC has not preserved error on this issue.

Even if error was preserved, this argument is without merit. As admitted by OCC, the majority of jurisdictions have found that statutes like Iowa Chapter 537B apply equally to restoration shops like OCC as they do to general automotive mechanics. For example, in 1981 the New Jersey[1] Superior Court was tasked addressing a nearly identical argument proposed by OCC. *Levin v. Lewis*, 431 A.2d 157 (N.J. Super. Ct. App. Div. 1981) (per curiam). In the *Levin* case, the Court stated as follows:

> We disagree with Lewis' contention that he is not an automobile repair dealer but rather a person engaged in "the restoration and remanufacture of antique automobiles and engines, a highly unique and specialized service, the nature of which makes it impossible for him to comply with the regulations"

[1] It should be noted that the Pollers are also New Jersey residents.

> requiring written estimations or waivers before commencing work and forbidding misleading promises.

Id. at 198. The *Levin*'s Court also specifically addressed whether "restoration" to classic or antique cars constitutes repair under a consumer protection statute and held as follows:

> "To restore," as used in this context is defined "as to bring back from a state of injury or decay or from a changed condition (as by repairing or retouching)." Webster's Third New International Dictionary (1971), at 1936).

Id. at 161. This Court should follow the same analysis and rule that the work performed on the Pollers' '31 Chevy is "repair" work as recognized in Iowa Chapter 537B.

OCC also contends that based upon the nature of the work, it is impossible to comply with Iowa Chapter 537B. This argument was also thoroughly addressed by the Court in *Levins*, by stating as follows: "The fact that his work is distinguished in that the cause of repair or replacement is neither collision, use or routine maintenance, and that the purpose of the repairs is preservation or show rather than keeping the car in ordinary running condition, does not warrant exclusion from the regulation. If it is as impossible as appellant contends to give a written estimate, he should seek a written waiver." *Id.* The New Jersey Superior

Court more recently affirmed these principles in *Sprenger v. Trout*, 866 A.2d 1035, 1043-1044 (N.J. Super. Ct. App. Div. 2005).

Additionally, the applicability of consumer protection statutes to antique/classic car restores has been upheld by several other jurisdictions. For example, the Wisconsin Court of Appeals stated as follows:

> We conclude that the restoration work falls within the definition of repairs under the code…Second, there is nothing within the code to suggest that the repairs were meant to be excluded simply because they amounted to a "restoration." While one may sense that a distinction exists between the restoration of an antique automobile and the repair of an automobile used on an everyday basis, the code does not reflect that the Department of Agriculture, Trade & Consumer Protection intended to distinguish between these two procedures.

Jagodzinski v. Jessup, 572 N.W.2d 515, 247 (Wis. Ct. App. 1997). The Wisconsin Court of Appeals went on to further state that "we see nothing in the public policy behind the code to support Jagodzinski's claim that its sole purpose was to protect those seeking to repair a vehicle for everyday use." *Id.*

Maryland's highest court reached a similar conclusion in *Morris v. Gregory,* 661 A.2d 712 (Md. 1995). In *Morris*, the Maryland Court of Appeals stated as follows:

> Alternatively, Gregory asserts that the work done to Morris's car was restoration, not repair, and that restoration work is not covered by the estimate requirements of §§ 14-1002 and 14-1008 even if general body work is. Assuming, *arguendo*, that the work done to the petitioner's car *was* restoration, we see no reason to draw a distinction, in this context, between repair and restoration. The Legislature did not expressly provide for such an exception in the ARFA, and we find no evidence of any intent to do so. We have said that "a court may not as a general rule surmise a legislative intention contrary to the plain language of a statute or insert exceptions not made by the legislature." *Coleman v. State*, 281 Md. 538, 546, 380 A.2d 49, 54 (1977). We will not transgress that rule in this case."

Id. at 716. Similar rulings have been made in both California and Washington. *See Schreiber v. Kelsey*, 62 Cal.App. 3d Supp. 45, 133 Cal.Rptr. 508 (1976) and *Webb v. Ray*, 688 P. 2d 534 (Wash. Ct. App. 1984); *see also 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 § 8 (originally published 2012); *but see Devito Auto Restoration v. Card*, 2000 WL 1426124 (Mass. App. Div. 2000) (unpublished). This Court should follow the clear interpretations and logic of New Jersey, Wisconsin, Maryland, Washington, New York (applying Connecticut law) and California and hold that OCC must abide by Iowa Chapter 537B.

Further, it is worth noting that in an attempt to evade their obligations under Iowa Chapter 537B, OCC attempts to provide some "legislative history." These arguments fail for multiple reasons. First, in looking at statutory construction, the Iowa Supreme Court has said as follows:

> When a statute is plain and its meaning is clear, we need not search for its meaning beyond its expressed language. *American Asbestos Training Ctr., Ltd. V. Eastern Iowa Community College*, 463 N.W.2d 56, 58 (Iowa 1990) (citation omitted). We resort to rules of statutory construction only when the terms of the statute are ambiguous. *Le Mars Mut. Ins. Co. of Iowa v. Bonnecroy*, 304 N.W.2d 422, 424 (Iowa 1981) (citation omitted), *superseded by statute on other grounds*, *Steinkuehler v. Brotherson*, 443 N.W.2d 698 (Iowa 1989); Iowa Code § 4.6.
>
> We give precise and unambiguous language its plain and rational meaning as used in conjunction with the subject considered, absent legislative definition or particular and appropriate meaning in law. *American Asbestos*, 463 N.W.2d at 58 (citation omitted); Iowa Code 4.1(38). Thus, it is not for us to speculate as to the probable legislative intent apart from the wording used in the statute or to use legislative history to defeat the plain words of the statute. *Le Mars*, 304 N.W.2d 2d at 424 (citation omitted). We must look to what the legislature said rather than what it should or might have said. Iowa R. App. P. 14(f)(13).

Stroup v. Reno, 530 N.W.2d 441, 443-444 (Iowa 1995). In this case, the language of Iowa Chapter 537B is clear and unambiguous and therefore,

there is no need to review any legislative history to defeat the plain language of the statute.

Additionally, OCC does not provide any credible legislative history to overcome the clear and unambiguous language of the statute. The only "legislative history" provided by OCC is an affidavit by a former legislator. Not surprisingly, the Iowa Supreme Court has recognized that testimony from members of the legislature is not credible legislative history. In *Iowa State Ed. Association-Iowa Higher Ed. Ass'n v. Public Employment Relations Bd.*, the Iowa Supreme Court was provided with similar evidence and stated as follows:

> On a number of occasions, we have seen records where legislators gave similar testimony. At first blush it might seem reasonable to rely upon an individual legislator's opinion of legislative intent. But we believe such testimony is generally unpersuasive.
>
> The legislative process is a complex one. A statute is often, perhaps generally, a consensus expression of conflicting private views. Those views are often subjective. A legislator can testify with authority only as to his own understanding of the words in question. What impelled another legislator to vote for the wording is apt to be unfathomable.
>
> Accordingly, we are usually unwilling to rely upon the interpretations of individual legislators for statutory meaning. This unwillingness exists even where, as here, the legislators who testify are knowledgeable and

> entitled to our respect. See generally 2A Sutherland Statutory Construction

269 N.W.2d 446, 448 (Iowa 1978). In other words, the subjective opinion of one legislature has no applicability in determining the legislative intent of a statute. Accordingly, OCC's affidavit from former legislator Iverson must be disregarded.

Further, an interpretation that restoration and/or antique automobile repair shops are excluded would lead to a completely unworkable statute. It would be difficult, if not impossible, to provide a meaningful application of Iowa Chapter 537B if OCC's request is adopted. For example, what would be considered an antique motor vehicle versus a motor vehicle? What is considered restoration versus standard repair? Would an elder person who only owned a drove an old motor vehicle not be afforded the protections of Iowa Chapter 537B if the person needed repair work done? OCC's request would likely lead to an absurd result under the statute.

Similarly, OCC attempts to argue that due to the condition of the '31 Chevy at the time of delivery, it was not a motor vehicle within the meaning of Iowa Chapter 537B. This argument is equally absurd. First, despite OCC's arguments to the contrary, OCC has always recognized the

'31 Chevy is a car. On each and every invoice, OCC stated that the '31 Chevy was a "Vehicle" and outlined the Year, Make, Model and Vehicle Identification Number ("VIN").

To support its position that the '31 Chevy is not a motor vehicle within Iowa Chapter 537B, it relies upon *Nelson v. Merchants Bonding Co.*, 425 N.W.2d 433 (Iowa App. 1988). In *Nelson*, the Iowa Court of Appeals held that a "cab, frame, chassis, front axle, and rear axle housing," were not a motor vehicle that required a certificate of title. *Id.* at 435-436. Ultimately the Court held "Because the parts assembly was not a 'vehicle' or 'motor vehicle' within the statutory definitions, there was no obligation for Habhab to provide a certification of title to Lamb." *Id.* at 436. This case is distinguishable for several reasons.

First, and foremost, *Nelson* is not a consumer fraud case, nor was it a repair case as contemplated within Iowa Chapter 537B. Second, the vehicle delivered by the Pollers was much more than the few parts provided in *Nelson*. The '31 Chevy was certainly in parts, but was delivered with a majority of the parts and importantly, included many of the essential parts such as the engine, radiator, wheels, etc. (Vol. I. Tr. P. 152 – 154; Vol. I. Tr. P. 167). Further, the entire purpose of the Pollers'

delivery of the '31 Chevy to OCC was for OCC to repair and restore the '31 Chevy to an operable motor vehicle with the same Vehicle Identification Number. This is exactly why at least one court has ruled 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." *In re Bailey*, 326 B.R. 750, 758 (Bankr. S.D. Iowa 2004). This argument also makes sense when doing a statutory and a simple common-sense analysis.

If this Court were to determine that if the determination of whether a vehicle is a motor vehicle before repair and restoration were applied, it would not only contradict the express language of the statute, it would also lead to truly absurd results. For example, as previously stated, a motor vehicle is defined as "a vehicle which is self-propelled and not operated upon rails." If the determination is made before repair work is completed, every car, truck, or motorcycle that is inoperable prior to the repair work would be exempt from Iowa Chapter 537B's protections. This simply cannot be the case. Instead, what must be determined is whether the vehicle is a "motor vehicle" at the time of completion of the repair and

service upon the vehicle. Thus, when the statute is properly applied, there is little doubt the Pollers' '31 Chevy is a motor vehicle pursuant to Iowa Chapter 537B.

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

The Pollers maintain that the district court erred in finding that OCC proved its breach of contract claim. As stated in the Pollers' opening brief, this Court should follow the majority of jurisdictions and find that OCC's recovery should be barred due to its undisputed violations of Iowa Chapter 537B. *See 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).

In an attempt to escape this result, OCC asserts that the Pollers have not sustained the ascertainable loss in order to be successful on their claimed violations of Iowa Chapter 537B. (Appellee Brief P. 52). To support this position OCC relies upon *Jiries v. BP Oil*, 682 A.2d 1241 (N.J. Super. 1996). *Jiries* is a New Jersey district court opinion that held that even though the defendant automobile mechanic had technically

violated the New Jersey consumer protection act, the plaintiff had not established an ascertainable loss. *Id.* Importantly, the court in *Jiries*, still allowed for recovery of attorney's fees due to the actions of the defendant and simply did not allow for the plaintiff to recover fees for the repair work in that case. *Id.* at 231-32. However, OCC failed to mention that another case mentioned in *Jiries* is directly on point with this case and held that there was an ascertainable loss under the New Jersey consumer fraud statutes.

The court in *Jiries* specifically cited *Hoffmaster v. Robinson*, 534 A.2d 435 (N.J. Super. 1996). *Hoffmaster*, like *Jiries*, is another New Jersey district court case. *Hoffmaster* is very similar to the Pollers situation. In *Hoffmaster*, the there was a disagreement as to what the agreed upon repair costs. *Id.* at 436. Due to the automobile repair shop charging $4,000 more than what was expected by the automobile owner, the owner refused to pay the repair shop. *Id.* The repair shop held on to the car and eventually began including storage costs. *Id.* The district court, despite finding the repair shop witnesses credible, determined that the repair shop had clearly violated New Jersey's consumer fraud act and awarded treble damages to the plaintiff. *Id.* at 440. Because the repair

shop retained the car, the court found that the plaintiff was entitled to the costs of the repair and the value of the vehicle. *Id.*

In this case, the Pollers have paid $45,000 and refused to pay any amount over that. OCC has retained the '31 Chevy and has begun charging the Pollers storage fees. Moreover, they have been denied the possession of the '31 Chevy for over five (5) years. It is simply without question that the Pollers have suffered an ascertainable loss. Accordingly, this Court should follow the majority of other jurisdictions and determine that due to OCC's violations of Iowa Chapter 537B, it is barred from recovering under its breach of contract claim.

On several occasions, OCC makes passing reference that the Pollers authorized upgrades and certain repairs well after receiving notice of the inflated amount of the repairs. It is important to put this in context with the parties' dealings. First, it is undisputed that no invoices were submitted to the Pollers until the Pollers demanded it on August 5, 2014. (APP-211, Exhibit C-89). Additionally, all the purported upgrades selected by the Pollers were done ***before*** the Pollers ever received an invoice and only amounted to a few thousand dollars extra. (APP-139-40, 156-57, 177-78, 181, 188, 202-3, 208, 211, Exhibit C – 17-18, 34-35,

55-56, 59, 66, 80-81, 86, 89). Shortly after demanding the invoices, OCC submitted all of its current invoices showing a balance of just over $39,000 and a total of $49,000. (APP-411, Exhibit F). Another invoice was submitted approximately three weeks later adding another over $25,000 to the total. (APP-411, Exhibit F). After this invoice, the Pollers demanded documentation to support the totals, but this was never supplied. (APP-289, Exhibit C -167). Another invoice was sent approximately two weeks later, increasing the total by another approximately $10,000. (APP-411, Exhibit F). After the documentation was provided OCC added another approximately $25,000 to the total over the next several months. (APP-411, Exhibit F). Finally, when the Pollers wanted to view the completed project, OCC refused to even allow the Pollers to see the car in person. (Vol. I. Tr. P. 31 – 33; APP-117, Exhibit 8; APP-118, Exhibit 9). Based on these facts, it can hardly be said that the Pollers ever consented to or authorized the overall total to be over $112,000.00.

Finally, OCC makes passing reference to the affirmative defense of good faith noncompliance under the Iowa Consumer Protections Act outlined in Iowa Code § 714H.5(7). It is important to note that this is an

affirmative defense that OCC never pursued at the district court level. Additionally, based upon the undisputed testimony at trial, this defense was unavailable to OCC. Iowa Code § 714H.5(7) states that a "person shall not be held liable in any action brought under this section for a violation of this chapter if the person shows by a preponderance of the evidence that the violation was not intentional and resulted from a bona fide error notwithstanding the maintenance of procedures reasonably adopted to avoid the error." During the trial, OCC readily admitted that it was unaware of Iowa Chapter 573 and continues to not follow the requirements today. (Vol. I. Tr. P. 184-188). This is despite the present lawsuit. Additionally, OCC made it clear that it is the policy of OCC to ***never*** give estimates or quotes to customers. (APP-113, Exhibit 3; Vol. I. Tr. P. 184-186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107-108). Given this undisputed testimony, it is clear that this defense is inapplicable to OCC.

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.

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 Final Reply 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