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

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

APPELLANTS' APPLICATION FOR FURTHER REVIEW OF THE DECISION OF THE IOWA COURT OF APPEALS FILED AUGUST 19, 2020

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QUESTIONS PRESENTED FOR REVIEW

I. **WHETHER THE DISTRICT COURT ERRED IN FINDING OKOBOJI CLASSIC CARS, LLC DID NOT VIOLATE IOWA'S MOTOR VEHICLE SERVICE TRADE PRACTICES ACT, IOWA CODE CHAPTER 537B, AND THAT THE AUTOMOBILE OWNERS DID NOT SUFFER AN ASCERTAINABLE LOSS.**

II. **WHETHER THE DISTRICT COURT ERRED IN AWARDING OKOBOJI CLASSIC CARS, LLC DAMAGES ON ITS BREACH-OF-CONTRACT COUNTERCLAIM.**

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

Rules

STATEMENT SUPPORTING FURTHER REVIEW

The owners of an antique car, Al and Deb Poller ("Pollers"), brought suit against a car restoration company, Okoboji Classic Cars, LLC ("OCC"), alleging violations of Iowa's consumer fraud statutes. OCC counterclaimed for breach of contract based on unpaid bills. The district court rejected the Pollers' consumer fraud claims while accepting OCC's counterclaim. The court of appeals, in a two-judge per curiam opinion joined by a special concurrence, affirmed, and the Pollers now respectfully seek further review.

Almost thirty years ago, the Iowa legislature enacted the Motor Vehicle Service Trade Practices Act, Iowa Code chapter 537B. 1990 Iowa Acts, ch. 1010. The Act—like its counterparts in other states—provides lay automobile owners with robust protections against deceptive practices in the automobile repair industry. *See* S.F. 81, Explanation, Seventy-Third Gen. Assemb. (Jan. 23, 1989); Jay M. Zitter, *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 (2012), Westlaw. Those protections include giving auto owners the right to a written or oral estimate if the expected cost is more than $50 and the opportunity to put a cap on repair costs. Iowa Code § 537B.3. Thus the Act's protections apply to almost all auto repairs and services in Iowa.

Nevertheless, no Iowa appellate court has previously addressed the Act's provisions and provided auto owners, mechanics, and courts with guidance as to the protections therein. The district court and court of appeals rulings here demonstrate why it is necessary for the supreme court to provide that guidance: those rulings effectively strip the Act of its generous consumer protections by allowing mechanics to recover for breach of contract even when the contractual damages were incurred because the mechanic violated the Act. *See* Iowa R. App. P. 6.1103(1)(*b*)(4). Those holdings are also contrary to the majority of jurisdictions addressing this issue. *See* Zitter, 78 A.L.R.6th 97, §§ 33–36 (collecting cases).

Additionally, this case presents the opportunity to clarify the definitions of "actual damages" and "ascertainable loss" in

Iowa Code chapter 714H—Iowa's general consumer fraud statute. *See* Iowa Code § 714H.2(1) (" 'Actual damages' means all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount. 'Actual damages' does not include damages for bodily injury, pain and suffering, mental distress, or loss of consortium, loss of life, or loss of enjoyment of life."); *id.* § 714H.5(1) (providing that "[a] consumer who suffers an ascertainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages").

The court of appeals and district court determined that because OCC's breach-of-contract counterclaim was meritorious, the Pollers did not incur "actual damages" and thereby suffer an "ascertainable loss." (Court of Appeals Op. at 7–9, 7 n.1; APP-96–99). But they failed to recognize the pertinent question is not whether the auto owner authorized the repairs by entering into a contract with the mechanic. Rather, the pertinent question is whether the mechanic's violation of

chapter 537B proximately caused an ascertainable monetary or property loss—e.g., monetary expense in excess of what the owner would have paid or property loss the owner would not have suffered had the mechanic not violated the statute.

The purpose of chapter 537B is to protect auto owners from becoming liable for repairs that were authorized because the mechanic violated chapter 537B. If an owner's "actual damages" are nullified merely because the owner contracted with the mechanic for the repairs, the robust protections of chapter 537B are likewise nullified. Accordingly, clarification on the definitions of "actual damages" and "ascertainable loss" as applied to chapter 537B claims is needed.

Furthermore, definitional clarification is needed because there is little caselaw providing guidance. No cases address the term "actual damages," and only one precedential Iowa case—*McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532–33 (Iowa 2015)—addresses "ascertainable loss." The court of appeals used *McKee* to conflate resolution of the Pollers' chapter 537B claim with resolution of OCC's breach-of-contract

counterclaim. (Court of Appeals Op. at 7 & n.1.) However, in *McKee*, the consumer had no ascertainable loss because (1) *the consumer's* breach-of-contract claim—not the defendant's breach-of-contract *counterclaim*—failed and (2) the consumer did not have any out-of-pocket expenses—i.e., she did not lose money. 864 N.W.2d at 532–33. Under *McKee*'s reasoning, because the Pollers have had an out-of-pocket expense of $45,000 as well as the loss of the possession of their automobile,[1] they have suffered an ascertainable loss. *See id.* Thus, the court of appeals' reliance on *McKee* is inconsistent with *McKee* itself. Further review is needed to correct the court of appeals interpretation that conflicts with supreme court precedent, especially in light of the dearth of other caselaw on point. *See* Iowa R. App. P. 6.1103(1)(*b*)(1).

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[1] Notably, when analyzing whether the Pollers suffered "an ascertainable loss of money or property as a result of a prohibited practice," neither the court of appeals nor district court considered OCC's refusal to release the car back into the Pollers' possession or even allow them to view the work OCC has done. (Court of Appeals Op. at 7–9; APP-95, 96–99.) *See* Iowa Code § 714H.5(1).

Finally, further review is needed to resolve the apparent conflict caused by the lower courts' rulings and section 714H.5(1)'s allowance of injunctive relief for a chapter 537B violation. Under the rulings here, a chapter 537B claim will fail if there is no ascertainable loss even if chapter 537B was violated and, therefore, the consumer cannot use the chapter 537B violation as a defense to the mechanic's breach-of-contract counterclaim. However, section 714H.5 expressly provides for injunctive relief in addition to actual damages. Even if the consumer does not obtain relief in the form of actual damages, if the consumer obtains injunctive relief, it is unclear whether the consumer has a defense to the mechanic's breach-of-contract counterclaim. Further review is appropriate and necessary to clarify this question as well as fix the court of appeals and district court rulings that are inconsistent with supreme court precedent.

STATEMENT OF THE FACTS

Approximately, 20 years ago, the Pollers purchased a 1931 Chevrolet 4 door Sedan ("'31 Chevy") as a restoration project in their home state of New Jersey. (Vol I. Tr. P. 5-6). In the late 1990s, they paid a New Jersey restoration company approximately $10,000, but ultimately suspended the process to focus on raising their family. (Vol. I. Tr. P. 6-7). The car was disassembled and placed in storage. (Vol. I. Tr. P. 6; Vol. I. Tr. P. 168).

In July 2013, Deb Poller ("Deb"), was visiting family in Iowa and visited OCC's shop. (Vol. I. Tr. P. 7-8). Deb inquired about OCC taking over the restoration and met with Bob Kirschbaum, one of OCC's managers. (Vol. I. Tr. P. 8-10; Vol. II. Tr. P. 95). During this meeting, Deb generally discussed the Pollers' restoration desires and inquired about the potential costs. (Vol. I. Tr. P. 149–150). Importantly, Kirschbaum told Deb that the goal is to not spend more than what the car was worth. (Vol. I. Tr. P. 149-150).

That fall, the Pollers decided to have OCC perform the restoration work, and by November 2013, Deb had arranged shipment of the '31 Chevy. (Vol. I. Tr. P. 10-11; APP-112, Exhibit 2). However, before doing so, Deb wanted an estimate of the full expected costs of restoration and sent an email to OCC's office manager, April Torrence. (Vol. I. Tr. P. 11-12; APP-112, Exhibit 2). On November 6, OCC's shop manager, Dennis Linn, responded that OCC could not provide an estimate because it had not seen the car in person yet and that it is OCC's policy to not provide any estimates on repair work but it charges $65 per hour plus costs of materials. (APP-113, Exhibit 3; Vol. II. Tr. P. 72). Several employees confirmed OCC's policy to never provide estimates. (Vol. I. Tr. P. 184-186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107-108)

OCC received the car on November 26. (APP-114, Exhibit 4). By all accounts, the car was in excellent condition, except for some minor surface rust and a dent, and contained all major parts such as the chassis, body, engine, radiator, etc. (APP-114, Exhibit 4; Vol. I. Tr. P. 40, 152-154; Vol. II Tr. P. 14-15).

At this time, the Pollers had not discussed what was to be fully done to the car. (APP-127, Exhibit C P. 5). However, the Pollers notified OCC that they would be coming to OCC between Christmas and New Years and could discuss these items then. (APP-127, Exhibit C P. 5; Vol. I. Tr. P. 163-164).

The Pollers met with OCC on December 27, 2013. (Vol. I. Tr. P. 19). Deb discussed placing a $10,000 deposit down payment for the work performed with Torrence. (Vol. I. Tr. P. 21). OCC had never taken a down payment before but allowed the Pollers to do so. (Vol. II. Tr. P. 73). Additionally, Torrence indicated that OCC would be providing monthly invoices so the Pollers could track the costs of the project. (Vol. I. Tr. P. 21-22). The Pollers also indicated what they wanted done to the '31 Chevy. According to Linn's meeting notes, OCC was to restore the car to its original condition, with only slight modifications to the paint color and implementation of a stereo. (APP-410, Exhibit D).

In their meetings with OCC, the Pollers (specifically Al Poller) discussed the estimated costs of the project. (Vol. I. Tr.

P. 20; Vol. I. Tr. P. 172). OCC stated the car would cost between $40,000-$45,000 to complete. (Vol. I. Tr. P. 20; Vol. I. Tr. P. 172). Agreeing with this estimate, the Pollers authorized OCC to complete the restoration. (Vol. I. Tr. P. 20; Vol. I. Tr. P. 172).

Over the next several months, OCC worked on the car and would occasionally email the Pollers to show them the car's progress and ask them for decisions regarding aspects of the restoration. (APP-123, Exhibit C).

In June 2014, OCC notified the Pollers that it was not going to make the mid-August time frame originally agreed upon. (APP-186, 202, Exhibit C P. 64 & P. 80). In July, Deb visited OCC to check on the car's progress. (Vol. I. Tr. P. 27). She spoke with Torrence about sending monthly invoices as OCC had yet to provide any or give any update as to the costs up to that point. (Vol. I. Tr. P. 27).

By August, the Pollers still had not received any invoices. (APP-115, Exhibit 6). On August 1, Linn emailed several photos of the car and requested more money be put down for the work completed. (APP-115, Exhibit 6). On August 5, the Pollers

responded that they had not yet received any of the promised monthly invoices and requested all invoices be sent. (APP-115, Exhibit 6). On August 6, the Pollers received six invoices from OCC. (APP-412-453, Exhibits F1–F6). According to these invoices, OCC had used the $10,000 initial down payment and the Pollers owed an additional $39,560.27. (APP-412-453, Exhibits F1–F6). Flabbergasted by the amount of money requested, the Pollers requested itemization of all work done and a breakdown of the costs. (APP-116, Exhibit 7; Vol. I. Tr. P. 53). Before this request was completed, OCC sent another invoice indicating over $25,0000 worth of work had been completed since the August 6 invoices were submitted. (APP-117, Exhibit F7).

Pursuant to the Pollers' understanding as to the project's costs, they continued to make payments on the outstanding balance until they reached the agreed upon amount of $45,000. (Vol. I. Tr. P. 30 – 31; APP-119, Exhibit 11). This last payment was provided on November 13, 2014. (Vol. I. Tr. P. 30 – 31; APP-119, Exhibit 11). At that time, OCC was requesting $50,694.93

in addition to the $45,000 already paid. (APP-411, Exhibit F). By December 31, 2014, the alleged final outstanding bill was $66,705.70. (APP-411, Exhibit F).

Deb and her son visited OCC and attempted to see the completed car on December 26, 2014. (Vol. I. Tr. P. 31; APP-117, Exhibit 8). However, OCC refused to allow them to do so until the bill was paid in full. (Vol. I. Tr. P. 31 – 33; APP-117, Exhibit 8; APP-118, Exhibit 9). At this point, the Pollers had seen the car only through pictures and during the one visit in July 2014. (Vol. I. Tr. P. 32). Based upon the terms of the agreement from December 2013, the Pollers refused to pay any more money. (Vol. I Tr. P. 30 – 31). In January 2015 the Pollers arranged to have an appraiser view the car so that they could seek insurance, which OCC also refused to allow. (Vol. I. Tr. P. 34). The '31 Chevy remains in the possession of OCC and OCC continues to send invoices to the Pollers. (Vol Tr. P. 46). In addition to the amount for the services provided, OCC continues to add monthly storage fees to the Pollers invoices. (Vol. I. Tr. P. 46).

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

ARGUMENT

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

Iowa Code chapter 537B protects consumers from deceptive practices and acts by individuals providing services and repairs to motor vehicles. Iowa Code § 537B.2. Chapter 537B is similar to acts adopted throughout the country and, likewise, serves to protect consumers:

> In response to the perceived problems of fraud and deceptive practices in the automobile repair industry, a number of jurisdictions have enacted statutes under which automobile repairers are required to conform with certain requirements, such as giving the customer a written estimate of all charges, returning the replaced parts, and informing the customer of his or her rights.

Zitter, 78 A.L.R. 6th 97. Here, the Pollers are entitled to protection under chapter 537B.

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

Judge Vaitheswaran, in her special concurrence, correctly determined that the Pollers, OCC, and the Pollers' car satisfy the definitions of "consumer," "supplier," and "motor vehicle,"

respectively, in section 537B.2. (Court of Appeals Op. at 12–14.) But as no published Iowa case illuminates the nuances of those terms, guidance from this Court is needed. This Court should adopt Judge Vaitheswaran's conclusion.

First, the Pollers are "consumers" and OCC is a "supplier" as defined in chapter 537B.[2] The Pollers pled and OCC admitted that an agreement was formed for OCC to restore the '31 Chevy. (APP-5, Amended Petition; APP-52, Amended Answer). Additionally, the types of restoration, repair and service work performed have been routinely recognized to fall within statutes similar to section 537B.2. *See Levin v. Lewis*, 431 A.2d 157 (N.J. Super. Ct. App. Div. 1981) (per curiam) (recognizing "restoration" on antique cars constitutes a repair or service under New Jersey's Consumer Fraud Act); *see also Schreiber v. Kelsey,* 133 Cal.Rptr. 508 (Cal. Ct. App. 1976)

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[2] Chapter 537B defines "consumer" as "a person contracting for, or intending to contract for, repairs or service upon a motor vehicle used primarily for farm or personal use" and "supplier" as "a person offering to contract for repairs or service upon a motor vehicle." Iowa Code § 537B.2(1), (3).

(same under California's Consumer Fraud Act); *Morris v. Gregory,* 661 A.2d 712 (Md. 1995) (same under Maryland's Consumer Fraud Act); *Webb v. Ray,* 688 P. 2d 534 (Wash. Ct. App. 1984) (same under Washington's Consumer Fraud Act); *Jagodzinski v. Jessup,* 572 N.W.2d 515, 247 (Wis. Ct. App. 1997) (same under Wisconsin's Consumer Fraud Act); *Schuster v. Dragone Classic Motor Cars, Inc.*, 98 F.Supp.2d 441, 448-49 (S.D.N.Y. 2000) (same under Connecticut's Consumer Fraud Act).

Second, the '31 Chevy is a motor vehicle.[3] At the time of the delivery, the car was complete with all major and necessary components provided, (Vol. I. Tr. P. 152–154; Vol. I Tr. P. 167), and although inoperable, was still a motor vehicle, *see In re Bailey*, 326 B.R. 750, 758 (Bankr. S.D. Iowa 2004) ("[T]he ordinary and common meaning of the term 'motor vehicle' [in

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[3] Section 537B.2(2) defines "motor vehicle" as "a motor vehicle as defined in section 321.1"—i.e., "a vehicle which is self-propelled and not operated upon rails"—"which is subject to registration." Iowa Code §§ 321.1(42)(a), 537B.2(2).

section 321.1(42)(a)] includes an inoperable vehicle that can be made operable by reassembling one [or] more of its parts or by repairing one or more of its parts").

Additionally, a "motor vehicle" is one that "is subject to registration." Iowa Code § 537B.2(2). If the car was in the Pollers' possession, it would be subject to registration under New Jersey law. (Vol. I. Tr. P. 34); *see* N.J. Stat. Ann § 39:3-4.

Further, section 537B.2(2) defines "motor vehicle" as in section 321.1. Notably, section 321.1 defines the term "motor vehicle" but also defines the term "*completed* motor vehicle." Iowa Code § 321.1(12A), (42)(a). If the legislature intended chapter 537B to apply only to completed motor vehicles, it would have said as much. Accordingly, Chapter 537B applies to OCC's restoration of the '31 Chevy.

B. OCC was engaged in Deceptive Acts or Practices

"It is an unlawful practice for a supplier to commit a deceptive act or practice under chapter 537B." *Id.* § 714.16(2)(*k*). A violation of section 714.16 is considered a consumer fraud and a private cause of action may be pursued.

Id. §§ 714H.2-.3, .5. Here, OCC committed several violations of chapter 537B.

A supplier violates section 537B.3 when it fails to inform a customer of the right to a written or oral estimate, to provide a written or oral estimate, to mark the consumer's response on the form described in section 537B.3, and/or to provide the estimate before any work on a motor vehicle. *Id.* § 537B.3. Here, OCC did not comply with ***any*** of section 537B.3's provisions and therefore committed a deceptive practice or act.

OCC's shop manager testified he was not aware of chapter 537B, that OCC does not have a written form as required under section 537B.3, and that OCC did not notify the Pollers of their right to a written or oral estimate. (Vol. I. Tr. P. 185–87). OCC also admitted that it never provided an estimate regarding the work. (APP-52, Amended Answer). When Deb asked for an estimate before shipping the car in November 2013, OCC declined to provide one and merely told her that it charges $65 per hour plus materials cost. (APP-112, Exhibit 2; APP-113, Exhibit 3). Further, because OCC does not have the section

537B.3 form, it could not indicate the Pollers' response regarding an estimate on the form. (Vol. I. Tr. P. 184–88). According to all of OCC's testifying witnesses and despite the language of Chapter 537B, OCC has a clear policy to never provide estimates to customers. (APP-113, Exhibit 3; Vol. I. Tr. P. 184–186; Vol. II. Tr. P. 68; Vol. II. Tr. P. 107–108).

Importantly, the Pollers were denied two important notices required by section 537B.3: notice of OCC's reasonably anticipated completion date and notice of their right to impose a budgetary cap on the project. *See* Iowa Code § 537B.3(1) (____Call me if repairs and service will be more than $_____).

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

monthly invoices and indicated that those invoices were important to them. (Vol. I. Tr. P. 22). When it became apparent significant work was being completed, the Pollers began demanding invoices to know how much the car would cost. (APP-115, Exhibit 6). Upon eventual receipt of the invoices, they were shocked by the charges and requested an itemized explanation. (Vol. I. Tr. P. 54; APP-116, Exhibit 7). By blatantly disregarding section 537B.3, OCC denied them the opportunity to cap the restoration expenses and avoid any unexpected charges.

Notably, when asked during trial if there was a limit to what OCC would put into the car, OCC's shop manager agreed there was no limit. (Vol. II. Tr. P. 48). In fact, he testified that it did not matter if the total cost of restoration would be $200,000, the Pollers would still be responsible for the full amount. (Vol. II. Tr. P. 48). This type of predatory behavior of motor vehicle restoration, repair and service shops is exactly what the Motor Vehicle Service Trade Practices Act is designed to prevent.

Under the lower courts' and OCC's logic, when the Pollers agreed to have OCC repair the vehicle, OCC was given a blank check for the vehicle and if the Pollers refused to pay, OCC could hold the vehicle hostage under the guise of an artisan lien. *See* Iowa Code § 577.1. This clearly runs contrary to the consumer protections provided in sections 537B.6 and 714.16.

OCC violated section 537B.6(5) and (6), which provide it is a deceptive practice to:

> 5. Fail to disclose prior to the commencement of any repairs or service, that a charge will be made for disassembly, reassembly partially completed work, or any other work not directly related to the actual performance of the repairs or service. A charge so imposed must be directly related to the actual amount of labor or parts involved in the inspection, repair, or service.
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> 6. Charge for any repair or service which has not been authorized by the consumer.

The invoices reveal OCC charged (1) for disassembly, boxing parts, removing parts from crates, etc.; (2) a 30% mark up on all parts used for the Pollers' car; and (3) for shop supplies and disposal of hazardous materials. (SUPP APP-3, Exhibit 12;

Vol. I. Tr. P. 45-46; Vol. I. Tr. P. 38–40; Vol. I. Tr. P. 45–46; Vol. I. Tr. P. 51; APP-113, Exhibit 3; Vol. I. Tr. P. 199–200). It is undisputed that OCC did not disclose it would impose such charges prior to commencing the work and that the Pollers never authorized those items. (Vol. I. Tr. P. 38–40, 45–46, 51, 199–200; APP-113, Exhibit 3). OCC also performed a "show quality" restoration to the car, which included at least 40-50 extra hours of labor. (Vol. II. Tr. P. 43–45). The Pollers were never informed OCC was going to perform a "show quality" restoration. (Vol. II. Tr. P. 47–48; APP-410, Exhibit D). Further, after OCC refused to allow them to see the vehicle in December 2014 and the Pollers' subsequent refusal to pay any amount greater than the agreed upon $45,000, OCC began charging storage fees for the car. (Vol. I. Tr. P. 46–47; Vol. I. Tr. P. 200-201).

C. The Pollers suffered an ascertainable loss

In affirming the district court, the court of appeals, on an issue not decided by the district court, determined that the Pollers "could not have established entitlement to actual

damages even if they proved violations of Iowa Code sections 537B.3 and 537B.6." (Court of Appeals Op. at 9.) In making this determination, the court has placed Iowa in the clear minority of jurisdictions and places Iowa consumers in an unwinnable position.

First and foremost, it cannot be overlooked that OCC remains in possession of the motor vehicle. At least one court has recognized that this fact alone constitutes an ascertainable loss. *Hoffmaster v. Robinson*, 534 A.2d 435 (N.J. Super. 1996). Indeed, the plain language of section 714H.5 establishes that OCC's retention of the '31 Chevy constitutes an "ascertainable loss." Section 714H.5(1) states that when "[a] consumer who suffers an ascertainable loss of ***money*** or ***property*** as a result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages." (emphasis added). Here, because the Pollers were denied possession of their '31 Chevy, they sought damages in the amount of money previously paid. (APP-78–79). Specifically, they are requesting reimbursement of $45,000. Without question, the loss of the

car (which an expert opined was valued at $37,900) is a loss of property and the $45,000 paid by the Pollers is a loss of money. (APP-605). Similarly, the judgment ordered by the district court and affirmed by the court of appeals is a further loss of money that has been obtained through violations of chapter 537B. There is simply no question that the Pollers have sustained an ascertainable loss of money ***and*** property.

Further, many jurisdictions throughout the country have recognized that even if the consumer has paid for the work and has received the car, the consumer is still entitled to damages procured in violation of a motor vehicle consumer protection statute. *See, e.g.*, *Osteen v. Morris*, 481 So.2d 1287, 1289-90 (Fla. Dist. Ct. App. 1987); *see also See* Zitter, 78 A.L.R.6th 97, § 33.

In *I-5 Truck Sales & Service Co. v. Underwood*, a Washington appellate court interpreted Washington's prior Automotive Repair Act, which is similar to Iowa Code chapter 537B, and recognized that the "statute [is] clear and specific terms prohibits the automotive repairman from charging for

labors and parts without first supplying a written estimate…In such an event the court may not resort to judicial construction in order to rectify what may appear to be an unfair and injudicious result." 645 P.2d 716, 720 (Wash. Ct. App. 1982), *superseded by statute as stated in Clark v. Luepke*, 809 P.2d 752 (Wash. Ct. App. 1991). Importantly, the Washington court recognized that "[n]ot only is a repairman prevented from charging for work done in violation of these statutory duties, RCW 46.71.50 prohibits a repairman from asserting a possessory or chattel lien for any amount not reflected in a written estimate or the amount in excess of a written estimate in cases where the repairman has failed to obtain the customer's additional consent." *See also Webb*, 688 P.2d at 537.

In addition to their claimed ascertainable loss from the payment of $45,000 and not receiving the car, the Pollers suffered ascertainable losses regarding other specific violations of section 537B.6(5)-(6). These violations occurred because OCC improperly charged for certain items and for items the

Pollers did not authorize, such as charges for undisclosed markups and for shop supplies and hazardous waste expenses. As the Pollers were never notified of these potential charges, they amount to violations of section 537B.6.

The Pollers were also improperly charged for labor that was not directly related to the actual repairs. This includes things such as dismantling an engine, uncrating the engine, unloading from shipping, assembling, removing body, etc. All of which also constitute violations of section 537B.6.

Finally, the Pollers were charged for "redos" and an unagreed upon upgrade to a "show quality" restoration. In total these extra and unagreed upon charges amounted to an inflation of $15,303.37 to the overall billed charged to the Pollers. Again, this is an ascertainable loss of money sufficient to allow the Pollers to succeed on their section 714H.5 claim.

In affirming the district court, the court of appeals relied upon *Kaskin v. John Lynch Chevrolet-Pontiac Sales, Inc.*, 767 N.W.2d 394, 402 n.6 (Wis. Ct. App. 2009), in finding that the Pollers suffered no ascertainable loss because they "authorized"

the work to be performed. While it is certainly true the Pollers consented to OCC performing a restoration of the vehicle, it is also abundantly clear the Pollers ***never*** authorized OCC to perform a $112,000 restoration on a car that ultimately has a value of only $37,900. Indeed, the Pollers were never provided any timely invoices. Instead after providing an initial down payment of $10,000, they did not receive another invoice for almost nine months, which then requested an additional $39,000. (APP-411) Then three weeks later, another $25,000 without itemization. *Id.* And then finally, another nearly $40,000. *Id.* Finally, when the Pollers wanted to see the finished product, they were denied the ability to even see the vehicle. Simply put, this type of predatory behavior is the exact reason the Iowa legislature enacted Chapter 537B. However, following the logic of the court of appeals means that it will almost never provide any real protection to Iowa consumers. This Court should not let this type of behavior stand.

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

OCC counterclaimed for breach of contract for the unpaid invoice balances. The district court found a contract existed between the Pollers and OCC as a result of OCC's November 6, 2013 email indicating that the work would be completed on a time-and-material basis at $65 per hour. However, any contract between the Pollers and OCC was made in contravention of chapter 537B and, therefore, should not be enforced to the Pollers' detriment.

It is "well-established Iowa law that contracts made in contravention of a statute are void and Iowa Courts will not enforce such contracts." *Bank of the West v. Kline*, 782 N.W.2d 453, 462-63 (Iowa 2010) (citing *Pike v. King*, 16 Iowa 49, 52 (1864)); *see also Milholin v. Vorhies*, 320 N.W.2d 552 (Iowa 1982). In particular, OCC induced the Pollers to enter into the November 6, unlimited cap, time-and-materials contract without providing them the opportunity to establish a cost limit as required under section 537B.3. This whole dispute could have been avoided had OCC simply abided by the law.

Indeed, avoiding the kind of unexpected and excessive expense underlying this case is the point of statutes like chapter 537B. *See, e.g.*, *Osteen*, 481 So.2d at 1290 ("It was apparently the intent of the legislature to protect consumers against misunderstandings arising from oral estimates of motor vehicle repairs and the legal disputes and litigation that result from the 'fait accompli' nature of claims for repair work already done."); *See also Kaskin*, 767 N.W.2d at 403 ("[A] repair shop, which finds itself outside the law and which has taken money from a consumer after violating the law, causes pecuniary loss to the consumer because of the violation. This is so because the consumer has been prevented from exercising a statutory right—the right of informed consent."). It is illogical and against clear public policy to allow OCC to collect for monies it attempted to earn in violation of chapter 537B. This result must occur, even if the Pollers were unable to establish any monetary damages.

Courts throughout the country have recognized that violations of similar Acts bar recovery by the mechanic. *See*

Zitter, 78 A.L.R. 6th 97, § 33 (collecting cases). However, the court of appeals holding puts Iowa in the definitive minority of jurisdictions holding otherwise. Only one other state has specifically held otherwise and its pertinent statute is distinguishable from chapter 537B. *See id.* § 34 (citing *Clark v. Luepke*, 826 P.2d 147 (Wash. 1992)).

Additionally, the court of appeals erred in holding OCC could pursue and recover on its breach-of-contract counterclaim, *even if it had violated chapter 537B*, because section 714H.5 limits chapter 537B damages to "actual damages" and the Pollers did not suffer actual damages (according to the district court and court of appeals). This reasoning improperly conflates the resolution of the Pollers' chapter 537B claim with OCC's breach-of-contract counterclaim and disregards alternative remedies for a chapter 537B violation.

First and most importantly, the Pollers' ability to prove they suffered an ascertainable loss from OCC's violation of chapter 537B has no bearing on whether the Pollers are liable

to OCC for breach of contract. Rather, it is OCC's violation of chapter 537B—regardless of actual damages to the Pollers—that determines whether OCC has a valid and enforceable contract. To hold otherwise would deprive chapter 537B of its teeth.

Additionally, such a holding fails to acknowledge that section 714H.5(1) permits equitable relief, including injunctive relief, in addition to and regardless of recovery of any actual damages. The possibility of equitable relief is an acknowledgement that, sometimes, ascertainable loss cannot be proven but that the chapter 537B violation, nevertheless, cannot be ignored. Iowa consumer protection statutes protect consumers even when ascertainable loss cannot be established. Permitting a mechanic to recover for the auto owner's breach of a contract that violates those same consumer protection laws is nonsensical, allows the mechanic to benefit from its violation of the law, and erodes the robust protections in those laws.

Further review is appropriate and needed to clarify that an auto mechanic cannot recover for an auto owner's breach of a contract that violates chapter 537B.

CONCLUSION

The Pollers respectfully request this Court grant further review, vacate the decision of the court of appeals, and reverse the district court. Specifically, this Court should hold that OCC violated Chapter 537B. Accordingly, this Court should remand to the district court for the purposes of entering an award of damages, exemplary damages, and trial and appellate attorney fees. Additionally, this Court should reverse the district court's finding in favor of OCC's breach-of-contract counterclaim.

REQUEST FOR ORAL ARGUMENT

The Pollers respectfully request oral argument in this matter.

ATTORNEY'S COST CERTIFICATE

The undersigned hereby certifies that the true cost of producing the necessary copies of the foregoing Application for Further Review was $0.00 as it was electronically filed.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This application for further review complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because:

[X] this application has been prepared in a proportionally spaced typeface using Bookman Old Style in 14 point font and contains 5,546 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.1103(4)(*a*).

By: _____ Dated: September 8, 2020
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CERTIFICATE OF SERVICE

I certify on September 8, 2020, I will serve this application for further review on the Appellee's Attorneys, John R. Walker and Jordan M. Talsma, by electronically filing it.

I further certify that on September 8, 2020, I will electronically file this document with the Clerk of the Iowa Supreme Court.

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IN THE COURT OF APPEALS OF IOWA

No. 19-0875
Filed August 19, 2020

AL POLLER and DEB POLLER,
Plaintiffs-Appellants,

vs.

OKOBOJI CLASSIC CARS, LLC,
Defendant-Appellee.

Appeal from the Iowa District Court for Dickinson County, Don E. Courtney, Judge.

Plaintiffs appeal the decision of the district court finding defendant did not violate Iowa Code chapter 537B (2016) and that plaintiffs were in breach of contract. **AFFIRMED.**

Matthew G. Sease of Sease & Wadding, Des Moines, for appellants.

John R. Walker, Jr. and Jordan M. Talsma of Beecher, Field, Walker, Morris, Hoffman & Johnson, P.C., Waterloo, for appellee.

Considered by Vaitheswaran, P.J., and Mullins and Ahlers, JJ.

PER CURIAM.

Al and Deb Poller wanted to restore a 1931 Chevrolet. They shipped the partially disassembled vehicle from New Jersey, where they lived, to Okoboji Classic Cars, LLC (OCC) in Iowa, where Deb grew up.

OCC did not give the Pollers an estimate of the total cost of the restoration work, as requested. However, OCC did provide an hourly rate and agreed to do the restoration work on a time-and-materials basis at that hourly rate, resulting in charges totaling $112,396.15. The Pollers declined to pay the entire amount and sued the company, alleging violations of the Motor Vehicle Service Trade Practices Act, Iowa Code chapter 537B (2016). OCC counterclaimed for breach of contract. The district court found no violations of chapter 537B and concluded the Pollers breached their contract with OCC by only paying $45,000 toward the outstanding balance. The court entered judgment in favor of OCC for $67,396.15, plus interest.

On appeal, the Pollers argue the district court erred in (1) refusing to find violations of chapter 537B and (2) concluding OCC proved its breach-of-contract claim. "In a law action tried to the court, our review is for the correction of errors at law, and the district court's findings of fact are binding on us if they are supported by substantial evidence." *Wolf v*. *Wolf*, 690 N.W.2d 887, 892 (Iowa 2005).

I. Iowa Code chapter 537B

Chapter 537B prescribes certain "trade practices" and prohibits "deceptive act[s] or practice[s]" by "supplier[s]" who repair or service motor vehicles for "consumer[s]." Iowa Code §§ 537B.3, 537B.6. A "consumer" is defined as "a person contracting for, or intending to contract for, repairs or service upon a motor vehicle used primarily for farm or personal use." *Id*. § 537B.2(1). A "supplier" is

defined as "a person offering to contract for repairs or service upon a motor vehicle." *Id*. § 537B.2(3). A "motor vehicle" means a "vehicle which is self-propelled and not operated upon rails," "which is subject to registration." *Id*. § 537B.2(2) (incorporating definition set forth in Iowa Code section 321.1). The Iowa Consumer Fraud Act creates a private right of action for violations of chapter 537B and authorizes actual and treble damages as well as attorney fees. *See id.* §§ 714.16(2)(k), 714H.3(1)(f); *State ex rel*. *Miller v*. *Vertrue*, *Inc*., 834 N.W.2d 12, 31 n.8 (Iowa 2013) (citing Iowa Code section 537B.6 among the statutes that "incorporate the remedies provision of the [Consumer Fraud Act]").

As a preliminary matter, OCC argues that chapter 537B does not apply "due to the nature of the work it performs." Specifically, OCC asserts vehicle restoration differs from vehicle repair. OCC raised the issue in a pretrial motion but did not pursue it at trial or in a post-trial motion. The district court did not decide the issue. Based on these omissions, the Pollers assert error was not preserved. OCC responds that we are authorized to affirm the district court's ruling on this alternate ground. *See DeVoss v*. *State*, 648 N.W.2d 56, 61 (Iowa 2002) ("We have in a number of cases upheld a district court ruling on a ground other than the one upon which the district court relied *provided* the ground was urged in that court."). We assume without deciding that the chapter applies to a vehicle restoration shop and to a partially disassembled vehicle. With that assumption in mind, we turn to the district court's fact findings.

The court pertinently found that "[i]n July of 2013, while visiting family in the area . . . Deb [Poller] inquired as to the potential costs" of completing "the restoration of their '31 Chevy." Deb "was told that it was OCC's policy not to give

estimates or quotes regarding restoration projects because the uniqueness of each project, with its own variables and unknown conditions, [made it] impossible to give usefully accurate estimates." "A few months after returning to New Jersey, the Plaintiffs decided to have OCC restore their '31 Chevy."

"On November 6, 2013, Deb sent an email to [OCC] stating that their '31 Chevy was ready to ship but stipulated that it was conditioned upon OCC giving her a quote." OCC responded by noting it "could not give an estimate as to the total cost of her restoration project because of the nature of restoration projects in general[], and specifically because he was not familiar with the condition of the [Pollers'] '31 Chevy or their expectations of the restoration, which would be determined on an ongoing basis by the [Pollers]." OCC offered to restore the car "on a 'time and materials' basis," at "$65 per hour for OCC's shop time and expenses for parts and other services." "Deb shipped" the vehicle after receiving that email. OCC followed up by confirming receipt of the car and an expected completion time of one and one-half to two years. Deb responded, "NO WAY!!! Talk to [the office manager], I have been on the schedule since summer." OCC apologized for the confusion, described the time frames as "worst case scenarios," and stated they were "willing to schedule [the] car in now." The company manager stated:

> 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 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.

Deb responded by stating they would "be in Okoboji between Christmas and New Years" and would "see [him] in person at that time." She continued, "Sound good? Thank you very much for the push."

At the December 2013 in-person meeting, the Pollers disclosed that they wanted OCC "to restore" the vehicle "to its original condition, with various modifications to the paint color and the implementation of a stereo." Deb offered a down payment of $10,000. The office manager explained OCC had never taken a down payment before but she would accept it. "Additionally, [the office manager] indicated to Deb that OCC would be providing monthly invoices to the [Pollers] so they could track the costs of the project." Al said "he was told the car would cost between $35,000–$40,000, maybe an additional $5000–$10,000 depending on what customized changes they made."

"On January 4, 2014, [OCC] notified the [Pollers] that OCC would begin disassembling the engine next week because he had found a business in South Dakota that would work on the engine and ship it back to OCC a couple of weeks later which would allow OCC to start rebuilding the engine." There was subsequent communication about parts. There was further communication about progress on the vehicle.

In the summer of 2014, "Deb visited OCC to check on the progress of the '31 Chevy. At the time of this meeting, OCC had not provided any invoices to the [Pollers] or given any update as to the costs spent up to that date."

"Shortly after the visit," OCC sent an email asking the Pollers for additional money. "Al replied on August 5, 2014, contending that they never received any monthly bills from OCC. Al explained that when they paid the $10,000 they were

told they would be getting monthly invoices. Al asked that they send invoices so everyone can be on the same game plan." Six invoices were sent to the Pollers. The district court stated:

> According to these invoices, after OCC had used the $10,000.00 initial down payment, the [Pollers] owed an additional $39,560.27. The [Pollers] requested itemization of all the work that had been done and a breakdown of the costs for the work that had been performed. Before this request was completed, OCC sent another invoice at the end of August indicating that over $25,000 worth of work had been completed since the August 6, 2014 invoices were submitted. The [Pollers] made the following payments by check to OCC: $10,000.00 on December 27, 2013, $15,000.00 on September 11, 2014; $10,000.00 on October 6, 2014; and $10,000.00 on November 13, 2014. At the time the Plaintiffs made their final payment, OCC was requesting an additional $50,694.93. By December 31, 2014, the [Pollers'] final outstanding bill was $66,705.70.

The court ultimately discounted Al Poller's testimony that OCC gave them an oral estimate of $45,000 as "contrary to the weight of evidence on the record and [the Pollers'] own claim that OCC did not provide them with an estimate in [their] cause of action asserted under Iowa Code [section] 537B.3."

Substantial evidence supports the district court's detailed findings, including the credibility finding against Al Poller. *See Etchen v. Holiday Rambler Corp.*, 574 N.W.2d 355, 360 (Iowa Ct. App. 1997) ("The district court has a better opportunity than the appellate court to evaluate the credibility of witnesses.").

Based on these findings, the court first addressed provisions of Iowa Code chapter 537B requiring suppliers to provide consumers with written estimates. The court concluded, "[B]y providing Plaintiffs with their hourly labor rate, OCC complied with the requirements of Iowa Code § 537B.3(2)(b)," which "permissibly grants OCC the choice to write the written estimate on the authorization form or state an hourly labor charge." The court further concluded, "Deb's action of

shipping the ’31 Chevy was an acceptance of OCC’s offer, authorizing OCC to restore her ’31 Chevy based upon their $65.00 per hour time plus the cost of materials.” The court finally stated, “What Deb’s action of shipping the ’31 Chevy was not, was a consumer authorizing, in writing or orally, repairs or services upon a motor vehicle prior to the commencement of the repairs or services, which would trigger the requisite authorization form and mandatory conspicuous disclosure pursuant to Iowa Code § 537B.3(1) & (3).”

The court proceeded to the question of whether OCC engaged in deceptive acts or practices. The court determined all “the work was authorized” and concluded that the Pollers “failed to prove any of the alleged OCC violations of Iowa’s ‘Motor Vehicle Service Trade Practices Act.’” As a result, the court rejected their “inchoate claim for treble damages, based on § 537B deceptive acts, pursuant to Iowa Code § 714H.5(4).”

The Pollers contend that, contrary to court’s conclusions, they were entitled to a written estimate of the total cost of the restoration, they “were denied” notices of “a reasonably anticipated completion date” and “their right to place [a] budgetary cap on the project,” and OCC engaged in deceptive practices. We need not decide whether OCC violated the disclosure and fraud provisions of the chapter because the Pollers did not establish that they sustained actual damages.[1]

[1] The district court found no entitlement to damages based on its conclusions that OCC did not violate any provisions of chapter 537B. But the court evaluated the Pollers’ claimed losses in the context of OCC’s breach-of-contract counterclaim, affording us a sufficient record to assess the question. *See McKee v. Isle of Capri Casinos*, *Inc.*, 864 N.W.2d 518, 532–33 (Iowa 2015) (noting claim of consumer fraud “rises or falls with her breach of contract claim”).

We begin with the statutory remedy. Iowa Code section 714H.5 states, "A consumer who suffers an ascertainable loss of money or property as the result of a prohibited practice or act in violation of this chapter may bring an action at law to recover actual damages." With certain exceptions not applicable here, "actual damages" are "all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount." Iowa Code § 714H.2(1). "'Proximately caused' or proximate causation is a legal term of art that refers to the 'scope of liability.'" *Deng v. White*, No. 18-1672, 2019 WL 6358427, at *5 (Iowa Ct. App. Nov. 27, 2019) (quoting *Thompson v. Kaczinski*, 774 N.W.2d 829, 837 (Iowa 2009)).

As noted, the district court found the work performed by OCC was authorized, a finding that is supported by substantial evidence. In the context of OCC's breach-of-contract claim, the court also determined "every stage of the restoration process was a work in progress that involved the [Pollers] in the decision matrix that led to the ultimate cost of the time and materials billed." These findings refute the Pollers' assertion that OCC upgraded the quality of the restoration without their permission. Finally, the court determined the Pollers failed to mitigate their damages by terminating the agreement or "indicat[ing] that they did not want to authorize further restoration after receiving the bill and paying initially $35,000 and an additional $10,000 in November 2014." *See Deng*, 2019 WL 6358427, at *5 ("Deng's harm—the loss of her property—was the result of her not taking charge of her property after it was removed from the apartment, not the Defendants' actions in removing the property.").

Based on the court's findings, and particularly the finding that all the work was authorized, the Pollers could not have established entitlement to actual damages even if they proved violations of Iowa Code sections 537B.3 and 537B.6. *Cf*. *Kaskin v*. *John Lynch Chevrolet-Pontiac Sales*, *Inc*., 767 N.W.2d 394, 402 n.6 (Wis. Ct. App. 2009) ("[A] customer finding a violation of the written estimate requirement has not suffered a pecuniary loss if the customer admits to authorizing the repairs. However, if the customer does not admit to authorizing the repairs and the trial court finds that the customer did not authorize the repairs as a matter of fact, then the shop *may never collect for the unauthorized repairs under any legal theory*. The lack of customer authorization is never a technical violation." (citations omitted)).

As noted, the Pollers also requested exemplary damages pursuant to Iowa Code section 714H.5(4) for "willful and wanton disregard for the rights or safety of another." The court's findings on the breach-of-contract counterclaim make it abundantly clear that the standard was not satisfied. *See Scibek v*. *Longette*, 770 A.2d 1242, 1249–51 (N.J. Super. Ct. App. Div. 2001) (finding no "ascertainable loss" resulting from a repair shop's "failure to provide a written estimate and obtain a written authorization"). Accordingly, we conclude the Pollers were not entitled to exemplary damages.

As for the Pollers' claim for attorney fees, the statute premises an award on an award of actual damages. *See* Iowa Code § 714H.5(2). Because the Pollers were not entitled to actual damages, we conclude they were not entitled to attorney fees.

II. Breach-of-Contract Counterclaim

The Pollers contend, "It is illogical and against clear public policy to allow OCC to collect for monies it attempted to earn in violation of a consumer protection statute." We would agree if Iowa had a strict liability statute. But, as noted, section 714H.5 limits damages for violations of chapter 537B to "actual damages" incurred "as the result of a prohibited practice." OCC, then, is not foreclosed from recovering damages on its breach-of-contract counterclaim based on its violation of chapter 537B.

Alternatively, the Pollers contend, "Even if OCC had not violated Iowa Chapter 537B, OCC breached the parties' contract before any breach by the Pollers." They point to OCC's failure "to provide monthly invoices as agreed to between the parties." As noted, the district court found that Deb was told "OCC would be providing monthly invoices to the [Pollers] so they could track the costs of the project." But the court placed the onus on the Pollers to follow up when they did not receive them. The court stated:

> Following the $35,000 payment, OCC continued to work on behalf of the [Pollers] without any dispute, emails, or communication complaining about the billing that was occurring on a monthly basis beginning in August [2014] and continually occurring through the end of the project. OCC continued to work to complete the project as quickly as they could while simultaneously requesting that the consistent and delinquent ongoing billing be caught up. Ultimately, rather than stopping the project, after giving the [Pollers] that opportunity, it was completed. Unfortunately, by this time in the project, the [Pollers] were approximately $67,000 behind in payments.

Substantial evidence supports the district court's findings that the Pollers failed to insist on adherence to the policy of providing monthly invoices and acquiesced in continued work without the invoices. Accordingly, we are not persuaded by the

Pollers' contention that OCC's non-compliance foreclosed OCC's claim for contract damages.

AFFIRMED.

All judges concur, except Vaitheswaran, P.J., who concurs specially.

VAITHESWARAN, P.J. (concurring specially).

As a preliminary matter, I would find that Okoboji Classic Cars, LLC (OCC) preserved the issue of whether Iowa Code chapter 537B (2016) applies by raising the issue before trial. I would also find that chapter 537B applies to OCC. First, I would find OCC contracted for the "repairs" or "service" of a motor vehicle. Iowa Code § 537B.2(3). OCC's manager testified that OCC did "mechanical work," "body work," and "upholstery work." He informed Deb Poller that OCC would "clean the car up" and would perform "additional body work." He also communicated with Deb about car parts that would be obtained and installed. Based on these undisputed facts concerning the nature of OCC's work, I would conclude OCC met the definition of "supplier." *See Schuster v*. *Dragone Classic Motor Cars*, *Inc*, 98 F. Supp. 2d 441, 448 (S.D.N.Y. 2000) (noting Connecticut "statute defines 'motor vehicle repair shop' . . . as including any qualified person having a suitable place of business and equipment engaged in repairing '*any* motor vehicle,' and it is clear that 'antique, rare or special interest' automobiles are considered 'motor vehicles'" (footnotes omitted)); *Montgomery v*. *Nostalgia Lane*, *Inc*., 891 N.E.2d 994, 999, 1001 (Ill. App. Ct. 2008) (stating "Defendant's written estimate stated that defendant would address the 'engine, trans[mission], drive train, interior, body,' and would 'detail and color all items correctly, replace + restore all trim.' One can hardly imagine how these tasks do not amount to 'automotive repair,'" and concluding "the term 'automotive repair' encompasses the restoration of a vintage car to or near its original state"); *Morris v*. *Gregory*, 661 A.2d 712, 717 (Md. 1995) ("[T]he restoration of an antique car is not distinguishable, for purposes of [the Maryland Automobile Repair Facility Act], from

body work on any other vehicle, as the Legislature has not provided such an exception.").

Second, I would conclude the partially disassembled car shipped to OCC was a "motor vehicle" within the meaning of the statute. *See* Iowa Code § 537B.2(2). If that were not the case, there would be no reason to require the disclosure of "reassembly" charges. *See id*. § 537B.6(5); *Montgomery*, 891 N.E.2d at 1001 ("[The Illinois Automotive Repair Act] requires an estimate to disclose disassembly costs when the diagnosis requires that the entire car be taken apart, which is precisely what defendant does in performing its service."). Additionally, OCC's manager referred to the shipped Chevrolet as "the car and parts" and characterized the ensemble as "a really nice car." A former employee similarly testified the vehicle "was very complete." He said "the major components were there, the motor, transmission, frame, running gear, wheels." And Al Poller testified the car was "[a]lmost drivable." *See In re Bailey*, 326 B.R. 750, 757 (Bankr. S. D. Iowa 2004) ("[T]he Court concludes 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."); *cf*. *Nelson v*. *Merchs*. *Bonding Co*., 425 N.W.2d 433, 436 (Iowa Ct. App. 1988) ("The Code contemplates that a vehicle or motor vehicle will be an apparatus by which people or property may be transported. Specifically excluded is a device which must be moved by human power. The assembly of parts at issue here was incapable of movement since any means of propulsion (such as an engine) was lacking. These parts, even when assembled, are not capable of

transporting people or property."). Deb also testified the vehicle would have to be "[r]egistered and insured" if she wanted to drive it on the New Jersey roadways.

Finally, there is no question the Pollers satisfied the definition of "consumer." *See* Iowa Code § 537B.2(1).

Next, I would address the Pollers' claim that OCC violated sections 537B.3(2)(b) and 537B.3(3). Section 537B.3(2)(b) states:

> If a written estimate is requested, the supplier may write the written estimate on the authorization form or on another form. If the nature of repairs or service is unknown at the time that the estimate is given, the supplier may state an hourly labor charge for the work. If the consumer so requests, a copy of the written estimate shall be provided to the consumer prior to the commencement of any repairs or service.

Id. § 537B.3(2)(2)(b). Section 537B.3(3) states:

> If a consumer orally authorizes repairs or service upon a motor vehicle prior to the commencement of the repairs or service, the supplier shall inform the consumer of the right to receive a written or oral estimate. The supplier shall note the consumer's response on the form described in subsections 1 and 2. If the consumer requests an estimate, the supplier shall provide the estimate to the consumer prior to commencing the repairs or service.

Id. § 537B.3(3). Section 537B.3(2)(b) does not authorize substitution of an hourly labor charge for an estimate, if a consumer requests an estimate. Iowa Code section 537B.3(3) governing oral authorization to perform service similarly states, "If the consumer requests an estimate, the supplier shall provide the estimate to the consumer prior to commencing the repairs or service."

The Pollers requested an estimate. The district court found OCC did not provide an estimate. That finding was supported by the OCC manager's testimony that he informed Deb, "we don't give estimates"; "we don't do quotes on cars." When asked if this was an OCC policy, he responded, "Yes, it is." He admitted he

was unaware of chapter 537B's requirements to provide estimates. OCC's office manager similarly testified it was not OCC's policy to give estimates, as did the employee in charge of the auto body department. In my view, OCC's failure to provide an estimate prior to commencing repairs or service violated Iowa Code section 537B.3(2)(b) and (3).

I recognize the Pollers shipped the vehicle to Iowa. But I am not convinced that act obviated the need to comply with those statutory requirements. Although I would concede substantial evidence supports the court's determination that the shipment amounted to an acceptance of an offer to proceed on a time-and-materials basis,[2] I believe the statute still required OCC to provide an estimate upon request before commencing work.

Nor am I convinced that the act of shipping the vehicle constituted a waiver of the Pollers' request for an estimate. Chapter 537B does not authorize a waiver and, indeed, characterizes any efforts by a supplier to condition performance of services on a waiver a deceptive act or practice. *See* Iowa Code § 537B.6(2); *cf*. *Schuster*, 98 F. Supp. 2d at 449 ("The statute expressly permits a customer to waive in writing the right to an estimate . . . ."); *Siam Motors*, *Inc*. *v*. *Spivey*, 136 So. 3d 692, 694 (Fla. Dist. Ct. App. 2014) (finding "[t]he trial court correctly stated in the final judgment that even if Spivey waived the initial written estimate by leaving the vehicle at the shop with its keys, Siam Motors was still required to comply with [Florida Statutes] section 559.905(5)," which "states that 'upon

[2] There is evidence that would support a contrary determination, but our standard of review requires us to focus on the evidence supporting the fact findings actually made, which I agree were detailed and thorough.

completion of diagnostic work necessary to estimate the cost of repair, the shop shall notify the customer as required in [section] 559.909(1),'" but concluding the trial court erred in holding a verbal estimate was insufficient to satisfy the statute).

True, the Pollers could have curtailed their relationship on or after the December 2013 meeting. But, in my view, whether they could have taken action to mitigate their expenses has no bearing on whether OCC violated chapter 537B. *Cf*. *Kaskin v*. *John Lynch Chevrolet-Pontiac Sales*, *Inc*., 767 N.W.2d 394, 403 (Wis. Ct. App. 2009) ("It is not the consumer's burden to prove that he or she would have done something differently had the proper information been given. Rather, the burden is wholly upon the repair shop.").

Having found a violation of the requirements to provide an estimate, I would also find a violation of Iowa Code section 537B.6(1), which makes it "a deceptive act or practice for a supplier to: [f]ail to comply with the requirements of section 537B.3."

All that said, I agree the Pollers did not prove actual damages resulting from the violations. I also agree with the district court's disposition of the breach-of-contract counterclaim. For these reasons, I too would affirm.