

State of New Hampshire
Supreme Court

NO. 2015-0140

2015 TERM

SEPTEMBER SESSION

Trevor Yanusvewski

v.

Marc Wilson and Marc & Nathan Auto Service, Inc.

RULE 7 APPEAL OF FINAL DECISION OF THE
NASHUA DISTRICT COURT

BRIEF OF APPELLEE/CROSS-APPELLANT, MARC WILSON

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QUESTIONS PRESENTED

- I. Did the court err by not awarding Mr. Wilson storage fees?
Preserved: COUNTERCLAIM (Aug. 18, 2014), *Appx.* at 17.

- II. Did the court err by not awarding Mr. Wilson his markup on parts?
Preserved: MOTION TO RECONSIDER AND REOPEN ¶¶ 2a & 2b (Feb. 13, 2015), *Appx.* at 39; WILSON'S FOF-ROL ¶¶ 19, 23-25 (Jan. 28, 2015), *Appx.* at 35.

STATEMENT OF FACTS

I. Marc Wilson is Trevor Yanusvewski's Regular Car Mechanic

Marc Wilson operates the smallest of small businesses, a one-man car repair shop. He does general auto repairs, “rebuilding motors, transmissions, doing brake jobs, oil changes,” mufflers, and tune-ups, but also answers the phone, and does the billing and bookkeeping. *Trn.* at 39, 45. The business is called “Marc & Nathan Auto Service, Inc,” and Nathan is not Mr. Wilson’s partner, but his young son. Corporation papers lapsed long ago. *Trn.* at 39, 62-63. Mr. Wilson’s shop is in a rented commercial garage in Hudson, New Hampshire, with a plain white overhead door. *Trn.* at 10.

Mr. Wilson operates a “motor vehicle repair facility,” *Trn.* at 6, 45, 64; YANUSVEWSKI’S FINDINGS OF FACT (hereinafter FOF) ¶1 (Jan. 28, 2015), *Appx.*¹ at 32; *see* RSA 358-D:1, I, but does not do automobile restoration, which he considers a separate speciality. *Trn.* at 39, 64. This is the first and only time Mr. Wilson has done a restoration, *Trn.* at 39, and he vows never to attempt another. *Trn.* at 61-62.

Mr. Wilson described where in his shop he displays statutory consumer warnings, *see* RSA 358-D:11, his labor rate, his storage fee, *Trn.* at 66, 94, that he provides estimates upon request, *Trn.* at 65-66, 94, and that OSHA and insurance prohibit unaccompanied presence of the public. *Trn.* at 66, 94. But Mr. Yanusvewski testified he did not see them. *Trn.* at 10, 15. Though no pictures were in evidence, the court found the statutory signage was present. ORDER (Feb. 6, 2015), *Appx.* at 24 at 3, 6 (“[T]his Court found [Mr. Wilson’s] testimony to be credible relative to the posting of the appropriate notices required under RSA 358-D:11.”).

Except for this case, the cars Mr. Wilson repairs are in and out of his shop on the same

¹Citations to “*Appx.*” refer to the appendix filed with Mr. Yanusvewski’s brief.

day or within a few days. Each time a part is added or labor is expended, it gets appended to the customer's bill. Invoices get closed out and filed when the customer pays. *Trn.* at 49-50, 58.

Before this case, the parties knew each other because Mr. Yanusvewski's day-to-day car is an Acura; Mr. Wilson was its mechanic for routine maintenance and repairs. *Trn.* at 22, 50; ORDER (Feb. 6, 2015) at 1. During the entire five year period covered by this case, from 2009 to 2014, Mr. Yanusvewski continued to use Mr. Wilson as his mechanic for the Acura. *Trn.* at 35, 50-53; ORDER (Feb. 6, 2015) at 2. In all their time doing business, Mr. Yanusvewski never asked Mr. Wilson for an estimate or a guarantee. Mr. Wilson always provided Mr. Yanusvewski a bill, and Mr. Yanusvewski always promptly paid. *Trn.* at 35-36, 77-78. Consequently, the parties had an on-going relationship, mutually understanding the terms on which the other operated. ORDER (Feb. 6, 2015) at 5-6.

II. Mustang #1 Cannot Be Restored

Late 1980s and early 1990s third-generation Ford Mustangs were American-made rear-wheel-drive two-door muscle cars esteemed by their aficionados for being heavy in engine but light in body.

In September 2009, Mr. Yanusvewski towed to Mr. Wilson's shop a blue 1990 Mustang, known herein as Mustang #1. *Trn.* at 4-5, 8, 39-40. It had already been torn apart by another mechanic, and Mr. Yanusvewski brought it to Mr. Wilson in pieces, along with some replacement parts and paint of the color and type Mr. Yanusvewski preferred. *Trn.* at 7; WILSON'S FINDINGS OF FACT (hereinafter FOF) ¶ 1 (Jan. 28, 2015), *Appx.* at 35; ORDER (Feb. 6, 2015) at 1. Mr. Yanusvewski wanted Mr. Wilson to restore the car as a "sports vehicle for pleasure driving," including rejuvenation of the body, renovation of the interior, and installation of stereo components. *Trn.* at 5-7. For this Mr. Yanusvewski was willing to pay \$3,000, which added to what

he had already invested, he calculated would cost him a total of \$4,400. *Trn.* at 11.

After about a month for evaluation, Mr. Wilson determined Mustang #1 was not restorable because the floors and roof supports were rusted, the trunk and firewall trunk were rotted, and the body was full of holes. Mr. Wilson's assessment was that there was no point in fixing it, and the only way to get rid of it would be a salvage yard. *Trn.* at 11-12, 41; WILSON'S FOF-ROL ¶1; ORDER (Feb. 6, 2015) at 1. Mr. Yanusvewski was upset upon learning this because he had paid another shop for new fenders and other work. *Trn.* at 41. Mr. Wilson returned all the parts to Mr. Yanusvewski, which had an estimated value of about \$800, *Trn.* at 8, 31, and did not bill Mr. Yanusvewski for the evaluation. *Trn.* at 12, 15, 40.

Mr. Yanusvewski did not ask Mr. Wilson for a written estimate regarding Mustang #1. *Trn.* at 9-11. During his testimony regarding Mustang #1, however, Mr. Yanusvewski said Mr. Wilson gave him an oral estimate of "\$2,000 to \$3,000," plus an oral agreement to be consulted before going above that cap. *Trn.* at 9-11 (testimony prior to questions regarding second car).

III. Mustang #2 is a Restoration Project

A month later, in November 2009, Mr. Yanusvewski invited Mr. Wilson on a drive to New Boston where Mr. Yanusvewski had identified another Mustang of similar vintage. Based on Mr. Wilson's assessment, Mr. Yanusvewski bought the 1988 car, known here as Mustang #2, and had it towed to Mr. Wilson's shop in Hudson.² *Trn.* at 12, 14, 41-42, 59, 68; INVOICE FROM WINSLOW TO YANUSVEWSKI (Exh. 1) (Nov. 29, 2009) (not included in appendix); WILSON'S FOF-ROL ¶¶ 2-3; ORDER (Feb. 6, 2015) at 2.

The plan was to do a restoration, *Trn.* at 40; ORDER (Feb. 6, 2015) at 1, using Mustang #2 as a base; the engine, transmission, and other parts from Mustang #1 and other sources;

²Mustang #1 is a 1990 model. Mustang #2 is a 1988. Both were based on Ford's "Fox" body. *See, e.g.*, <<http://www.americanmuscle.com/buying-a-foxbody-mustang.html>>.

resulting in an amalgam of components from various compatible years. *Trn.* at 11, 14, 44, 59.

The parties both testified, and the court agreed, that Mr. Yanusvewski did not request a written estimate for the Mustang #2 restoration project, neither at its inception nor as matters between the parties worsened. *Trn.* at 9, 15 (Mr. Yanusvewski); *Trn.* at 42, 44, 47, 65, 67 (Mr. Wilson). ORDER (Feb. 6, 2015) at 5 (Mr. Yanusvewski “readily acknowledged that he did not request a written estimate in advance of any work being performed on the 1988 Ford Mustang.”); WILSON’S FOF-ROL ¶¶ 4, 18.

Mr. Yanusvewski acknowledged that any estimate Mr. Wilson made would have been “an approximation because he didn’t know exactly what he was in for,” and because subcontractors would be pricing the painting. *Trn.* at 9, 29.

Nonetheless, Mr. Yanusvewski testified the parties had an oral agreement that restoration of Mustang # 2 would cost “\$2,000 to \$3,000,” although he acknowledged that that price was discussed in the context of Mustang #1. *Trn.* at 9-11. His direct testimony was:

Q: [W]as there another conversation about the work that was going to have to be done on Mustang number 2 versus the work that was going to be done on Mustang number 1?

A: Well, yes, there was going to be an increase of what Marc had to do because he would have to pull the engine out of Mustang number 1, put it into Mustang number 2. As well as any other parts needed from Mustang number 1 to put to 2. But he was certainly willing to do that because as he had said, it was going to be a lot easier than fixing the rust on Mustang number 1.”

...

Q: [W]hen you had that conversation with Mr. Wilson after you brought Mustang number 2 to the shop, did the terms of the financial understanding change at all?

A: No, the terms financially didn’t change.

Trn. at 14-15.

Mr. Wilson does not dispute that conversation, but regarding Mustang #2 testified that

if asked, he would not have been able to make an estimate:

I didn't give him an estimate. Unfortunately, when you're doing a restoration job, you have to tear the car apart to check for rust and any major problems with the car before you could even remotely come close to giving an idea of a price. So in order to give an estimate, I would have to literally tear the entire car apart right down to the frame to give an accurate estimate.

Trn. at 40, 44.

Mr. Wilson is capable of making reliable estimates for such jobs as an oil change, a muffler replacement, a tune-up and spark plugs, but not for a restoration job, "because there's so many hidden items that are in there that you don't know until you take it apart." *Trn.* at 45.

Moreover, he could not give an estimate for portions of the job outside of his expertise:

I am not a body guy. What I could do and what I can accomplish is only so much. I had to send it out to guys who do the actual rust repair, welding of the car, painting of the car. So without them standing there saying it's going to be this, this, this, this, I wouldn't have been able to.

Trn. at 47, 64-65. Mr. Wilson testified he told this to Mr. Yanusvewski. *Trn.* at 42. The court understood that Mr. Wilson "could not provide an estimate of the cost of completion." ORDER (Feb. 6, 2015) at 5.

On whatever terms, the parties entered a contract for the Mustang #2 restoration project. ORDER (Feb. 6, 2015) at 2-3 (Although no documentary evidence of "terms and conditions of their original agreement," court finds "[p]arties ... entered into an oral agreement [that Mr. Wilson] would proceed with the repair and restoration work of the 1988 Ford Mustang.").

IV. Commencement of Restoration on Mustang #2

Soon Mr. Wilson commenced work, removing the motor, transmission, wiring, suspension parts, body panels, and the interior from Mustang #1, leaving only a "big pile of rust that we pretty much swept up and threw in the dumpster," and doing some preliminary work

on Mustang #2. INVOICE³ (Exh. 2) at 1-2 (Jan. 18, 2010), *Appx.* at 53; *Trn.* at 42-43, 44. On January 18, 2010, Mr. Wilson presented Mr. Yanusvewski with a bill for about \$1,200, which Mr. Yanusvewski promptly paid, and Mr. Wilson closed out the invoice. ORDER (Feb. 6, 2015) at 2; YANUSVEWSKI'S FOF ¶¶ 3-4; WILSON'S FOF-ROL ¶ 5; *Trn.* at 16-17, 44, 90.

Upon being paid, Mr. Wilson continued work, installing steering components, brake system components, the transmission, parts to adapt the transmission cannibalized from Mustang #1, and other items. INVOICE (Exh. 2) at 3-4 (Jan. 18, 2010), *Appx.* at 54; *Trn.* at 46. On March 2, 2010, Mr. Wilson presented Mr. Yanusvewski with a second bill, for about \$1,000, which Mr. Yanusvewski again promptly paid, and Mr. Wilson closed out the second invoice. ORDER (Feb. 6, 2015) at 2; YANUSVEWSKI'S FOF ¶¶ 3-4; WILSON'S FOF-ROL ¶ 5; *Trn.* at 18, 45-46.

V. May 21, 2010 Running Invoice Never Paid

Upon being paid the second time, Mr. Wilson continued work. The record contains a 3-page invoice dated May 21, 2010 containing notations of Mr. Wilson's efforts. INVOICE (Exh. A) (May 21, 2010), *Appx.* at 55. The invoice contains numerous entries for parts, several entries for labor, four entries for towing, two entries for amounts paid to subcontractors, and one entry for storage fees. The entries do not indicate dates of service. *Id.*

Mr. Yanusvewski contests the bill in its entirety, and consequently refused to pay it, arguing alternately that it was never presented to him, that he did not authorize the work it reflects, that it was beyond the amount he was willing to pay for the project, that parts were inappropriately marked up, and that subcontractor charges were fabricated.

³The parties acknowledge an error on the January 18, 2010 invoice, which indicates the car being worked on was the 1990 Mustang rather than the 1988. *Trn.* at 17 (Mr. Yanusvewski); *Trn.* at 68 (Mr. Wilson).

A. Presentment

Mr. Yanusvewski disputes the entire May 2010 invoice, claiming that after the first two invoices he repeatedly requested another, but did not receive it until this litigation years later. *Trn.* at 19, 20, 25, 31; YANUSVEWSKI'S FOF ¶ 9.

Mr. Wilson testified, however, that he presented Mr. Yanusvewski the May 2010 invoice and demanded payment each time Mr. Yanusvewski was in the shop for maintenance on his Acura. Mr. Wilson presented the invoice on its initial date of May 21, 2010, *Trn.* at 48, and then also in August 2010, September 2011, July 2012, October 2012, December 2012, March 2013, and August 2013. *Trn.* at 49-53, 61, 78; ORDER (Feb. 6, 2015) at 3.

Because work was completed during some of these intervals, but payment had never been made, the May 2010 invoice was never closed, and continued open in Mr. Wilson's system as a running invoice. Thus Mr. Wilson presented Mr. Yanusvewski growing versions of the invoice, ultimately showing \$9,037.26 in parts and labor, although always dated from its May 2010 inception date. *Trn.* at 50, 57-59, 78-81, 84-85, 97; INVOICE (Exh. A) (May 21, 2010), *Appx.* at 29.

B. Authorization for the Project and for Charges Beyond Estimate

Mr. Yanusvewski disputes the entire May 2010 invoice and all the work it reflects because he claims he did not authorize \$8,378 of work shown on the bill, *Trn.* at 26-27, that except for a specific transmission wiring harness, he did not authorize any work over \$3,000, *Trn.* at 24-25, that Mr. Wilson never told him costs were going above that amount, *Trn.* at 25, 32, and that he was not aware Mr. Wilson had done any additional work after the first two invoices. *Trn.* at 33.

Mr. Wilson countered that the parties specifically discussed completion of the restoration, including both at the inception of the project and after the second (March) invoice,

Trn. at 42, 47-48, that he never made an estimate or promised a notification trigger, that Mr. Yanusvewski had paid the first two invoices promptly upon presentment, and that without Mr. Yanusvewski's authorization Mr. Wilson would never have risked undertaking the work. *Trn.* at 61.

C. Parts Markup

Mr. Yanusvewski disputes portions of the bill because during trial he showed that the prices for which Mr. Wilson acquired parts were lower than the prices shown on the invoice, indicating a markup on the price of parts. *Trn.* at 76. Mr. Wilson acknowledged, for instance, that the oil pan on the first page of the invoice cost him \$60 but he charged Mr. Yanusvewski \$80 for it, *Trn.* at 68-69, 71, 74, and that the heater core cost \$20 but he charged \$76. *Trn.* at 76.

Mr. Wilson conceded he marked up prices but pointed out that all mechanics do it, noted that as a member of the industry he essentially buys in bulk and thus auto parts outlets give him a price less than retail, apprised that there is a website which lists "retail" price of parts, suggested that a member of the public buying the part would pay that retail price, and asserted that he had no duty to distinguish the two prices on his invoice. *Trn.* at 72, 74-75, 76, 78. He also argued that his practice complies with the statutory requirement that invoices list the "retail" price of each part. *Trn.* at 69-71; *see* RSA 358-D:10, I(c).

Mr. Yanusvewski admitted he was not aware Mr. Wilson had used his own money to pay for parts. *Trn.* at 32-33, 54; ORDER (Feb. 6, 2015) at 5.

D. Subcontractor Fees

Mr. Yanusvewski disputed the charges for both body-shop subcontractors, and cross-examined Mr. Wilson against the subcontractors' invoice exhibits.

Mr. Yanusvewski suggested the subcontractor fees were fabricated because the identity of the subcontractors was not disclosed beforehand, *Trn.* at 28-29, he did not see the car during

painting, *Trn.* at 31, bills from both subcontractors were dated the same day, *Trn.* at 86-88, the car model-year appearing on one of the invoices was wrong, *Trn.* at 88, the word “mileage” was misspelled, *Trn.* at 88, an invoice was unsigned, *Trn.* at 88, and because the invoices were not presented to Mr. Yanusvewski nearer the time of service. *Trn.* at 29. Mr. Wilson explained that two subcontractors were necessary to complete the work, the date of billing was a bookkeeping matter, the model-year was copied from a component coming from another car, the vendor did not habitually sign invoices, and that he presented Mr. Yanusvewski the charges by showing the amounts on the May 2010 bill. *Trn.* at 86-88.

Mr. Yanusvewski admitted he was not aware Mr. Wilson had also used his own money to pay for subcontractor painting. *Trn.* at 32-33, 54; ORDER (Feb. 6, 2015) at 5.

VI. Restoration Project Stops and Starts

Mr. Wilson testified that although Mr. Yanusvewski wanted to drive the car by the summer of 2012 or 2013 and thus insisted on deadlines for completion, *Trn.* at 50, Mr. Yanusvewski stopped paying because work had not progressed to certain levels, *Trn.* at 55 (would not pay until interior installed); *Trn.* at 48-49 (would not pay until body work done), or because the project was not fully completed. *Trn.* at 32, 48, 50. Mr. Wilson said Mr. Yanusvewski told him he had run out of money for the project, *Trn.* at 30-31, 49-50, and thus Mr. Yanusvewski instructed Mr. Wilson to cease efforts for a period from August 2010 to February 2012. *Trn.* at 30, 51, 94; ORDER (Feb. 6, 2015) at 3.

On October 10, 2013, Mr. Yanusvewski drove to Mr. Wilson’s shop, when “a heated exchange ensued, and Mr. Yanusvewski was arrested for allegedly pushing Mr. Wilson.” Eventually “[t]he criminal charge was nolle prossed [sic] with the proviso that Mr. Yanusvewski obtain an anger management evaluation.” SMALL CLAIMS COMPLAINT ¶¶ 10-11 (July 11, 2014), *Appx.* at 3; *Trn.* at 36-37.

Meanwhile, Mr. Wilson was busy with work for his paying customers, *Trn.* at 18-19, and could not afford to continue to put his own money into the project. *Trn.* at 56. After the assault, Mr. Wilson declined to do anything further. OBJECTION TO WRIT OF REPLEVIN ¶ 18 (July 28, 2014), *Appx.* at 7; ORDER (Feb. 6, 2015) at 3-4 (parties presented no evidence regarding progress).

Mr. Yanusvewski testified he stopped paying because he was unable to view the car, *Trn.* at 20-23, 27-28, 31-32, 35, 98, because Mr. Wilson hid it from him, *Trn.* at 21-22, 27, and that he attempted to see it “at least a hundred times.” *Trn.* at 35; YANUSVEWSKI’S FOF ¶ 8. Mr. Wilson testified he attempted to involve Mr. Yanusvewski in the progress of restoration including meeting at subcontractors’ shops, ORDER (Feb. 6, 2015) at 5, and that he kept the car immobile in his shop on jack stands obvious to see when Mr. Yanusvewski came in with his Acura. *Trn.* at 27-28, 46, 49. Nonetheless, when he eventually surveyed Mustang # 2 in August 2014 after this suit was filed, Mr. Yanusvewski was disappointed that:

it was stuffed into a dark corner of his garage wedged in between a couple other vehicles. The tires were flat. The harnesses underneath the steering column were all hanging down. You couldn’t even see a hood latch. So I couldn’t even pull the hood. The key to the trunk didn’t work. The car would not start. The door panels were not there. So all of the electrical was hanging out of those. None of my stereo equipment was installed which he said he had installed. I had a steering stabilizer over the engine which wasn’t present. It looked terrible.

Trn. at 28.

VII. Impasse: Mr. Yanusvewski Won’t Pay and Mr. Wilson Won’t Work

Given Mr. Wilson’s unwillingness to work without being paid, and Mr. Yanusvewski’s unwillingness to pay until work was completed, the parties reached an impasse. Efforts on the project had ceased, and when Mr. Yanusvewski requested possession of the car, *Trn.* at 56, Mr. Wilson refused to relinquish until Mr. Yanusvewski settled his bill. WILSON’S FOF-ROL ¶ 21.

Although Mr. Wilson does not charge his customers for storage when he is actively working on a car, when a job is done or the customer stops a job, but the car remains, he bills for storage. *Trn.* at 94. Because work ceased from August 2010 to February 2012, Mr. Wilson added \$75 per day storage fee to his invoice, totaling \$29,625. INVOICE (Exh. A) at 3 (May 21, 2010); *Trn.* at 58, 94.

Currently Mustang #2 remains on jack stands in a corner of Mr. Wilson's shop, partially restored. *Trn.* at 27-28, 46, 49, 54.

STATEMENT OF THE CASE

In July 2014 Mr. Yanusvewski filed duplicative small claims and civil suits against Mr. Wilson, alleging damages and statutory unfair business practices. Mr. Wilson counter-claimed, alleging breach of contract for parts and labor and for storage fees. SMALL CLAIMS COMPLAINT (July 11, 2014); SMALL CLAIMS COMPLAINT (July 14, 2014) (not included in appendix, but identical); COUNTERCLAIM (Aug. 18, 2014), *Appx.* at 17.

Mr. Yanusvewski also requested possession of the car, to which Mr. Wilson objected. *Id.*; OBJECTION TO WRIT OF REPLEVIN (July 28, 2014), *Appx.* at 7. The court preliminarily denied replevin, but ordered the car be made available for inspection, *id.* (margin order); NOTICE OF DECISION (Aug. 4, 2014) (not included in appendix), and consolidated the cases.

After a hearing in January 2015, the court reviewed the history of the parties' business relationship, the genesis of the restoration project first as to Mustang #1 and then Mustang #2, the impossibility of Mr. Wilson providing an estimate for the project, the breakdown in communications after May 2010, and the impasse of non-payment and non-completion. The court lamented the dearth of corroborating or expert evidence on any of the disputed facts. ORDER (Feb. 6, 2015) at 3-4.

The court denied Mr. Yanusvewski's request for damages on the grounds that he had never requested a written estimate and Mr. Wilson could not have provided one had it been requested, that Mr. Yanusvewski was familiar with Mr. Wilson's manner of operation, that the court believed Mr. Wilson had posted requisite notices, and that the court believed Mr. Wilson had presented invoices which Mr. Yanusvewski's had refused to pay. ORDER (Feb. 6, 2015) at 4-7.

The court also denied Mr. Wilson's request for storage fees because, while it found Mr. Wilson posted the notices, there was no corroborating evidence Mr. Yanusvewski knew he was

incurring fees, and consequently no contract regarding storage was formed. ORDER (Feb. 6, 2015) at 7. Although the court granted Mr. Wilson's demand that Mr. Yanusvewski pay the outstanding bill representing the parts and labor Mr. Wilson put into the car, it disallowed Mr. Wilson his marked-up costs for parts and subcontractors because there was no corroborating evidence it was industry practice. ORDER (Feb. 6, 2015) at 7-8.⁴

Finally, the court ordered Mr. Wilson provide Mr. Yanusvewski a new invoice omitting markups, ordered Mr. Yanusvewski to pay that amount within 30 days, and upon that payment ordered Mr. Wilson to relinquish the car and its parts to Mr. Yanusvewski. ORDER (Feb. 6, 2015) at 8.

Mr. Yanusvewski requested reconsideration, which the court denied. MOTION TO RECONSIDER AND REOPEN (Feb. 13, 2015), *Appx.* at 39, 44 (margin order). Mr. Yanusvewski also asked the court to reopen the case on the grounds that he had located one of the painting subcontractors, using information on an invoice that was part of the record, and had found alleged discrepancies between the invoice in the record and his post-trial sleuthing. *Id.*; PLAINTIFF'S RESPONSE TO DEFENDANT'S OBJECTION (Feb. 24, 2015), *Appx.* at 51. Mr. Wilson objected, saying that Mr. Yanusvewski could have found this information before trial, that he had already been subject to cross-examination on the matter during trial, and that the invoice information presented at trial was accurate and thus there was no prejudice. OBJECTION TO MOTION TO RECONSIDER AND REOPEN (Feb. 20, 2015), *Appx.* at 46. The court agreed with Mr. Wilson and denied Mr. Yanusvewski's request to reopen the case. MOTION TO RECONSIDER AND REOPEN (Feb. 13, 2015), *Appx.* at 44 (margin order).

Mr. Yanusvewski requested a stay of judgment pending appeal, which the district court

⁴The court order includes a citation to "RSA 29-625." It is believed that is a typographical error derived from the amount of storage fees requested, \$29,625.

granted. MOTION FOR STAY OF EXECUTION OF JUDGEMENT (Mar. 5, 2015) (not included in appendix) (margin order). Mr. Yanusvewski filed this appeal, and Mr. Wilson cross-appealed.

SUMMARY OF ARGUMENT

Mr. Wilson first argues that because this case concerns restoration rather than repair of a car, RSA 358-D does not apply, and that the court was therefore correct in declining to award damages. He also argues that the statute does not apply because there is no guarantee in this context, and that the court did not graft a “pattern and practice” element onto the statute.

Mr. Wilson also suggests that the court was correct in not reopening the case for new evidence because, as it held, Mr. Yanusvewski had plenty of opportunity to discover the allegedly differing invoice before trial.

Mr. Wilson then requests a remand for an award of storage fees because he appropriately posted storage fees signage, and because he was not solely responsible for the lengthy presence of the car in his shop which prevented him from otherwise making productive use of his business space. Finally, Mr. Wilson requests the court order that Mr. Yanusvewski pay the standard and common retail price for parts as shown on his invoice, which include a markup.

ARGUMENT

I. **RSA 358-D Does Not Apply Because This is a Restoration, Not a Repair**

Mr. Yanusvewski alleges that the court should have applied RSA 358-D:10, II, and thus awarded him damages.

To claim damages under that statute, Mr. Yanusvewski must prove that each of its elements apply to the facts of the case. *O'Brien v. New Hampshire Democratic Party*, 166 N.H. 138, 143 (2014) (damages under robocall statute applied to voter, not candidate). Mr. Yanusvewski has not met his burden pursuant to RSA 358-D because he cannot show that Mustang # 2 was a “motor vehicle,” that Mr. Wilson operated a “motor vehicle repair facility,” or that Mr. Yanusvewski was a “customer.”

A. **Mustang #2 is Not a Motor Vehicle**

RSA 358-D:1, II describes “motor vehicle” as “any vehicle defined by RSA 259:60,” which in turn defines “motor vehicle” as “any self-propelled vehicle not operated exclusively on stationary tracks.” Although “[n]othing in the statute requires that a motor vehicle actually be operable,” *State v. Osgood*, 135 N.H. 436, 437 (1992) (highway enforcement of person gliding downhill on inoperable motorcycle), here there was not merely a broken part needing mending. Both Mustang # 1 and Mustang # 2 had to be towed to Mr. Wilson’s shop along with some of its pieces, and thus it appears neither was capable of being “self-propelled.”

Mustang # 1 was determined by Mr. Wilson to be incapable of ever being restored. Whether Mustang # 2 will ever be capable of self-propulsion is not answered by the evidence, but by seeking “restoration” rather than “repair,” Mr. Yanusvewski conceded that until Mr. Wilson finishes his work, it is not. Whatever else it requires to be roadworthy, until restoration is completed it is not yet a “motor vehicle.”

Moreover, in several contexts New Hampshire statutes address automobile restoration.

In the context of solid waste management, RSA 149-M:4, VIII-b distinguishes an “end-of-life motor vehicle” from one that is “being kept for repair or restoration.” In the context of junkyard regulation, RSA 236:91, II distinguishes a “motor vehicle” from “junk,” which includes “wrecked automobiles, or parts thereof.” These statutes recognize the degradation process of automobiles and the possibility of restoring something that was an “end-of-life motor vehicle” or “junk” into something that may someday become a “motor vehicle.”

Mr. Yanusvewski made no effort to show Mustang # 2 was a “motor vehicle,” but rather testified how un-together and “terrible” it looked. Until restoration is complete, it is far from being “self-propelled.” Thus RSA 358-D does not apply to the restoration project here, and Mr. Yanusvewski is not entitled to any relief the statute provides.

B. Mr. Wilson’s Shop is Not a Motor Vehicle Repair Facility for This Restoration Job

RSA 358-D, entitled “Regulation of Motor Vehicle Repair Facilities,” defines the sorts of shops and customers it applies to. It defines “motor vehicle repair facility” to mean “any person who performs services or repair work on any motor vehicle,” RSA 358-D:1, I, and defines a “customer” as a person who seeks “any service or repair work on a motor vehicle.” RSA 358-D:1, IV.⁵

In its normal operation, doing oil changes, muffler replacements, and tune-ups, Marc & Nathan Auto Service, Inc. is undoubtably a “motor vehicle repair facility” because Mr. Wilson

⁵New Hampshire statutes separately regulate the operation of businesses that restore cars.

“Motor vehicle business” shall mean a business which is principally engaged in one or more of the following activities: buying, selling, or exchanging motor vehicles requiring registration for use upon a way, motor vehicle mechanical service, motor vehicle collision repair service, *the reconditioning and restoration of motor vehicles*, and the sale of motor vehicle parts. For the purposes of this definition, “principally engaged” means that the business derives at least 51 percent of its annual gross income from the motor vehicle business or, if there was no income in the prior year, 51 percent of the assets of the business are directly related to the motor vehicle business.

RSA 259:60-a (emphasis added); *see also* RSA 261:22 (defining “motor vehicle salvage facility”).

“performs services or repair work on . . . motor vehicle[s].” RSA 358-D:1, I. Likewise, when Mr. Wilson’s regular patrons come for routine maintenance, they are a “customer” because they seek “service or repair work on a motor vehicle.” RSA 358-D:1, IV. Thus Mr. Wilson concedes, for example, that the statute would apply to work regularly done on Mr. Yanusvewski’s Acura.

But this is *restoration* case. Mr. Yanusvewski did not seek, and Mr. Wilson did not provide, mere “service or repair.” The job here was to take two antiques that by themselves were not “motor vehicles,” add parts from other junks of the same vintage, and hopefully realize one working car.

The statute here, RSA 358-D, is intended to protect the every-day consumer of motor vehicle repair: to prevent practices such as misrepresenting used parts as new or overcharging on parts or labor, and to ensure complete information on invoices so such misbehavior can be detected. *E.g.*, RSA 358-D:10, II(d) (invoice shall itemize the “number of hours, or portion thereof, of labor charged in performing the work and the retail cost of such labor”); RSA 358-D:10, III. (“The invoice shall state clearly if any used, rebuilt, or reconditioned parts have been supplied or if a part of a component system supplied is composed of used, rebuilt, or reconditioned parts.”). *See also* 1977 N.H. SENATE JOURNAL at 803, Committee Report (Apr. 26, 1977) (“This bill is the result of many letters that people have written feeling that perhaps they had been ripped off when they had their automobiles repaired. . . . It will take care of the problems that people have had concerning automobile repairs having the garage people list how much its going to be before they start the payments.”). *See generally* Ian Ayres & F. Clayton Miller, “*I’ll Sell It to You at Cost*”: *Legal Methods to Promote Retail Markup Disclosure*, 84 NW U. L. REV. 1047 (1990); Annotation, *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.

Mr. Yanusvewski made no effort to show that for this job Mr. Wilson’s business was a

“motor vehicle repair facility.” Thus RSA 358-D does not apply to the restoration project here, and Mr. Yanusvewski is not entitled to any relief it affords.

C. Purported Guarantee

Mr. Yanusvewski invokes RSA 358-D:10, II to claim damages against Mr. Wilson. The statute provides:

Upon completion of any service or repair work . . . a motor vehicle repair facility shall prepare an invoice [which] shall state clearly whether or not the motor vehicle repair facility will guarantee the work and, if so, the terms of the guarantee and the period for which it will be in effect.

RSA 358-D:10, II.

Although he does not specify how the statute was allegedly violated, it is assumed that because Mr. Wilson’s invoice was devoid of “guarantee” language, it is that about which Mr. Yanusvewski is complaining.

Warranties of merchantability and fitness, however, are “primarily directed at the operative essentials of a product,” such as a malfunction. *Tracy v. Vinton Motors, Inc.*, 296 A.2d 269, 272 (Vt. 1972). See *Buttrick v. Arthur Lessard & Sons, Inc.*, 110 N.H. 36, 39 (1969) (“new car guarantee” applies to “malfunction of the lights”). Because Mustang # 2 has never been operable, a claim for breach of guarantee is not ripe.

On the other hand, if Mr. Yanusvewski is contending that Mr. Wilson did not guarantee his price estimate, he failed to make that allegation. Moreover, the facts are plain and the court affirmed that Mr. Wilson could not have made an estimate, and that if he did it was with regard to Mustang # 1 and not Mustang # 2.

Thus, the lack of a “guarantee” in Mr. Wilson’s invoice is of no importance here, and cannot be a basis for damages.

D. Pattern and Practice

Mr. Yanusvewski alleges that the court grafted onto 358-D a “pattern and practice” element that does not appear in the statute, and therefore unlawfully denied him damages.

In its order the court repeatedly referred to the history of the parties’ interactions, especially regarding Mr. Yanusvewski’s Acura, to show what of Mr. Wilson’s business practices Mr. Yanusvewski did or did not know. Nothing in the court’s order created a “past practices and history” exception to the statute, and nothing in Mr. Yanusvewski’s brief makes clear what effect such an exception might have had.

Accordingly, the court made no error in declining to award damages pursuant to RSA 358-D.

II. Evidence Was Properly Closed at the End of Trial

Mr. Yanusvewski claims that the court should have re-opened the case based on his discovery of alleged discrepancies between a subcontractor invoice entered as an exhibit at trial, and his conversation with that subcontractor after trial. He blames his failure to find the alleged discrepancy on “accident, mistake or misfortune.” YANUSVEWSKI’S BRF. at 21.

But Mr. Yanusvewski concedes that he located the subcontractor and was able to converse with him based on accurate contact information contained on the subcontractor invoice; acknowledges that he had a copy of the subcontractor invoice before trial (indeed the invoice was Mr. Yanusvewski’s own trial exhibit, *Trn.* at 33); offers no explanation for not finding out about the alleged discrepancy before trial; and recognizes that “where a party’s inaction is caused by its own neglect, there is no ‘accident, mistake or misfortune.’” YANUSVEWSKI’S BRF. at 21.

Moreover, even if the all of Mr. Yanusvewski’s allegations are accurate, there is no prejudice. As he acknowledges, the fabrication at most would have been relevant to the assessment of Mr. Wilson’s credibility as a witness. YANUSVEWSKI’S BRF. at 24. Because nearly half the trial was Mr. Wilson’s testimony, the court had plenty of opportunity to assess veracity, and the court’s 8-page order reflects at length on its assessments of the credibility of both parties’ statements.

Accordingly, the court did not err in closing the record at the end of trial.

III. Court Should Have Awarded Mr. Wilson Storage Fees Because the Languishing Project Prevented Mr. Wilson From Making Productive Use of His Space

Though Mr. Wilson posted signage regarding his storage fees, because Mr. Yanusvewski had theretofore been a standard customer whose Acura would come and go within a day or so in the normal course of business, he was not aware of Mr. Wilson's storage policies.

Mustang # 2 was stored on jacks in a portion of Mr. Wilson's shop, thus occupying space which cost Mr. Wilson some portion of his rent, heat, and light, and of which he could not otherwise make profitable use. And he had no choice – he was a bailee with a duty to care for the car.

As the court noted, Mr. Wilson continually spent his own money on the restoration project in an effort to help it reach completion. He was therefore not the cause of delay necessitating lengthy storage. As such, the court erred in not awarding Mr. Wilson some amount of storage fees based on his posted policy. *C.f. Pelkey v. Dan's City Used Cars, Inc.*, 163 N.H. 483, 493 (2012) (storage separate from towing) *aff'd on other grounds*, 133 S. Ct. 1769 (2013). *See also* RSA 450:1 (“Any person who maintains a public garage, ... for the parking, storage or care of motor vehicles ... brought to his premises or placed in his care by or with the consent of the legal or equitable owner shall have a lien upon said motor vehicle ..., so long as the same shall remain in his possession, for proper charges due him for the parking, storage or care of the same.”).

To the extent that responsibility for the impasse was shared, this court should remand for a determination of what portion of the delay was caused by Mr. Yanusvewski's instructions to cease work and his refusal to pay, and to assess storage fees based on that period.

IV. Court Should Have Allowed Mr. Wilson to Charge Markups on Parts

The court required Mr. Wilson re-submit his bill to Mr. Yanusvewski minus markups on parts he installed on Mustang # 2.

Markups, however, are standard in many industries. *See, e.g., Skandinavia, Inc. v. Cormier*, 128 N.H. 215, 220 (1986) (discussing price markup on insulating underwear); *New Hampshire Retail Grocers Ass'n v. State Tax Comm'n*, 113 N.H. 511, 513 (1973) (whether tobacco tax to be calculated before or after retailer price markup on tobacco products); *State v. Story*, 97 N.H. 141, 159 (1951) (state's expert discussing markups on construction materials used in state building projects). For some products, the law requires markups to prevent unfair competition, and an area of the law has developed regarding whether such laws are constitutional. *See, e.g., McIntire v. Borofsky*, 95 N.H. 174, 176 (1948) (mandated markups on cigarettes); Annotation, *Validity, Construction, and Application of State Statutory Provision Prohibiting Sales of Commodities Below Cost*, 41 A.L.R.4th 612.

Car mechanics mark up the price of parts to pay for the mechanic's knowledge of what part to order, and to defray the cost of acquiring the part. There is no harm because the ultimate price of the part to the consumer is the same as would have been paid had the consumer bought the part at a retail store. The statute cited by Mr. Yanusvewski requires:

Upon completion of any service or repair work for which a charge is made, a motor vehicle repair facility shall prepare an invoice which itemizes ... [a]ll parts supplied having a value in excess of \$.50 and the *retail* cost of each such part.

RSA 358-D:10, I(c) (emphasis added).

The purpose of the statute, with which Mr. Wilson's invoices complied, is to ensure a customer gets an honest invoice with an itemized list of parts and their retail price, not to prevent markups or to disclose mechanics' proprietary relationships with their part suppliers.

Accordingly, the court erred in disallowing Mr. Wilson his usual markup, and this Court should remand for recalculation of the amount Mr. Yanusvewski owes him.

CONCLUSION and REQUEST FOR ORAL ARGUMENT

For the foregoing reasons, this Court should affirm the court's ruling regarding damages and maintaining closure of the record upon the end of trial. The Court should also remand for a determination of the amount of storage fees for which Mr. Yanusvewski is liable, and a recalculation of Mr. Wilson's invoice to include his markup of parts.

Oral argument is requested because RSA 358-D has never been construed in this jurisdiction; and because the amounts in dispute between drivers and mechanics are generally small, its construction is unlikely to be regularly presented. *See Brooks v. R. A. Clark's Garage, Inc.*, 117 N.H. 770 (1977) (construction of prior version of RSA 358-D).

Respectfully submitted,

Marc Wilson
By his Attorney,

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Dated: September 29, 2015

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CERTIFICATION

I hereby certify that the decision being appealed is addended to this brief. I further certify that on September 29, 2015, copies of the foregoing will be forwarded to Joseph C. Fricano, Esq.

Dated: September 29, 2015

Joshua L. Gordon, Esq.

ADDENDUM

ORDER (Feb. 6, 2015). 27