IN THE SUPREME COURT OF IOWA

No. 22-1721

Polk County No. LACL148948

BRADSHAW RENOVATIONS, LLC,

Plaintiff, Counterclaim Defendant, and Appellant,

vs.

BARRY GRAHAM and JACKLYNN GRAHAM,

Defendants, Counterclaim Plaintiffs, and Appellees.

APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY,
HONORABLE SARAH CRANE, JUDGE

APPELLANT'S BRIEF

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CERTIFICATE OF FILING

I, Matthew J. Hemphill, hereby certify that I filed the attached Appellant's Brief on the 27th day of June, 2023, by filing it electronically with the Clerk of the Supreme Court, through the Iowa Electronic Document Management System.

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I hereby certify:

On the 27th day of June, 2023, the within Appellant's Brief was served on all other parties to this appeal or review, by serving it electronically on the following counsel for the opposing party through EDMS:

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) or (2) because the brief contains 9,561 words excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word in font size 14, Bookman Old Style.

/s/ Matthew J. Hemphill
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June 27, 2023
Date

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STATEMENT OF THE CASE

Nature of the Case.

This case arose from a dispute between a contractor, Appellee Bradshaw Renovations, LLC ("Bradshaw") and homeowners, Appellees/Cross-Appellants Barry Graham ("Barry") and Jacklynn Graham ("Jackie") (collectively "Graham"), over a renovation project. Bradshaw sued Graham for amounts due under Bradshaw's final invoice, submitted after completion of *all the work* the parties originally contemplated *and* an agreed-upon expansion of the scope of service that benefited the Graham home. Bradshaw sought damages under a breach of contract theory and under the equitable doctrines of unjust enrichment and quantum meruit. Graham counterclaimed against Bradshaw for breach of contract based on alleged deficiencies in Bradshaw's work and for consumer fraud based on alleged improper charges, despite paying nearly the exact amount of the original agreement between the parties and acknowledging the home renovation project expanded in scope from the original agreement.

Bradshaw appeals following an adverse jury verdict and

judgment entry for Graham on breach of contract and consumer fraud and the district court's adverse ruling on Bradshaw's equitable claims for recovery of amounts due under an agreement between the parties for construction services.

On appeal, Bradshaw asks that the appellate court reverse the judgment against it on Graham's consumer fraud claim as well as the district court's adverse judgment on Bradshaw's equitable claims. Alternatively, Bradshaw requests a new trial on the consumer fraud and equitable claims.

Course of Proceedings.

Bradshaw filed a petition against Graham on October 19, 2020, asserting claims for breach of written contract, unjust enrichment, and quantum meruit. (App. at 7-17). Graham filed an answer denying liability, asserting affirmative defenses, and alleging counterclaims for breach of contract and statutory consumer fraud on November 30, 2020. (App. at 18-28). Bradshaw then filed an answer to the counterclaims denying liability and asserting affirmative defenses on December 21, 2020. (App. at 29-31).

The parties' breach of contract claims and Graham's statutory consumer fraud claim, based upon Bradshaw's billing practices, were tried to a jury beginning August 22, 2022. The jury returned a verdict on August 25 denying Bradshaw's breach of contract claim, finding in favor of Graham in the amount of $16,000.00 on their breach of contract claim, and finding for Graham on the consumer fraud claim in the amount of $10,000.00 of actual damage and $30,000.00 of treble statutory damages for a total of $56,000.00. (App. at 32-35).

The parties then submitted Bradshaw's equitable claims for the court's consideration on written closing arguments. (App. at 72-79; App. at 88-99). Bradshaw also filed motions for judgment notwithstanding the verdict and a new trial on September 9, 2022. (App. at 80-87). Graham resisted both motions and applied for attorney fees pursuant to the consumer fraud statute on September 13, 2022. (App. at 100-107; App. at 108-114). Bradshaw resisted Graham's application for attorney fees on September 23, 2022. (App. at 115-120).

The district court entered its ruling on all post-trial matters on October 7, 2022 ("Ruling"), denying Bradshaw equitable relief, entering judgment in favor of Graham pursuant to the jury verdict in the amount of $56,000.00, awarding attorney fees and costs in the amount of $34,391.00 in Graham's favor, and denying Bradshaw's post-trial motions for a new trial and judgment notwithstanding the verdict. (App. at 121-132). Bradshaw timely filed a notice of appeal on October 12, 2022. (App. at 133-134). Graham filed a notice of cross-appeal on October 28, 2022. (App. at 135-136).

Statement of Facts.

A. Party Background.

Joshua Bradshaw ("Josh") is the sole owner of Bradshaw Renovations, LLC, which he created in 2008. (App. at 506:1-15). Bradshaw is a general contracting construction entity handling everything from minor construction issues to single-family home construction and "full remodels" of single-family homes. (App. at 507: 1-15). Josh has worked in construction since approximately 2000. (App. at 505:12-25).

Barry and Jackie are a married couple and at all times pertinent to this matter resided at 6640 Roseland Drive, Urbandale, Iowa. (App. at 598:13-21; App. at 599:10-12). Prior to the construction at issue in this matter, their home, nearly 100 years old, had two bedrooms, one bathroom, and a basement that was only partially finished. (App. at 599:16-22).

In the summer of 2019, Graham began planning to have an addition constructed to their home. (App. at 599:23-25). The addition would consist of a new kitchen, an additional bathroom, and additional bedrooms for their children. (App. at 600:1-20). Graham and Bradshaw began discussions in June 2019 regarding details for the addition to the home. (App. at 600:21-24). The parties met at the home and began several discussions over the course of several weeks regarding project details. (App. at 508:1-25; App. at 509:1-10).

B. Contract Between the Parties.

The preliminary discussions between the parties resulted in Bradshaw preparing a written "estimate" detailing

the scope of work and estimated "cost," dated July 31, 2019. (App. at 458-462). The estimate included a description of each part or stage of the construction together with a lump-sum cost for that part or stage. (App. at 458-462). The costs were based upon square footage of the home and what the customer asked for. (App. at 510:18-23). Based on the requested scope of work, Bradshaw estimated the cost of materials, its own labor expenses, and subcontractor expenses.[1] (App. at 510:11-25; App. at 511:1-13; App. at 512:7-125; App. at 513:1-9). Bradshaw also included company profit in the costs for each service. (App. at 513:1-18). The company profit is a markup on the anticipated labor and material costs (Bradshaw's and the subcontractors') and is included in the figures shown on the estimate. (App. at 513:10-12).

As noted above, the estimate provided lump sum allowances for the tasks to be performed. (App. at 458-462;

[1] Bradshaw uses subcontractors for work requiring licensed professionals, such as electrical and plumbing, as well as work that can be done more efficiently with large crews and specialized equipment, such as drywalling and insulation.

App. at 576:14-15). It did not include a specific labor rate, nor a promise to charge Graham a certain labor rate. (App. at 463; App. at 516:11-23). In addition, the estimate contained no representation that Bradshaw had not included a profit margin on the labor and materials that would be provided for Graham's construction project. (App. at 463; App. at 651:1-9).

Graham was satisfied with the scope of services and the total costs of $136,168.16 for that work. (App. at 510:1-7). Bradshaw then presented a contract to Graham incorporating the estimate, which Jackie signed on August 1, 2019. (App. at 463). The contract, like the estimate, did not promise a certain labor rate and made no representations with respect to the factors used by Bradshaw to estimate the cost for the work. (App. at 463). The contract expressly stated the estimate, Exhibit 1, was an offer from Bradshaw with Jackie's signature constituting acceptance of the offer. (App. at 463).

Bradshaw was aware at the time he prepared the estimate that Graham had a budget for the project. (App. at

510:15). Nonetheless, Bradshaw cannot "anticipate everything" that might arise that would change the scope of the project. (App. at 510:18-23). Once a project of this magnitude is underway, there will be changes in some regard. (App. at 510:16-17). For example, at the outset of a project, as happened here, it is unknown whether the existing electrical service can be saved or whether the home will have to be re-wired due to the age of the existing electrical service. (App. at 510:24-25; App. at 511:1-7). For this reason, the contract provided a process for Bradshaw to notify Graham when work beyond the original scope of services was required:

> Any changes to the scope of services detailed herein that the parties agree to make following customer's acceptance of this estimate shall be in writing and fully detailed via an email from [Bradshaw] to customer at the email address provided by customer below. Upon receipt, customer shall immediately inform Bradshaw in writing and via email if the changes detailed are inaccurate. Failure by customer to respond in writing via email within [three] days from receipt of any said email constitutes acceptance by customer of the proposed changes detailed by Bradshaw.

(App. at 463).

Bradshaw included this language in the contract as a

way to keep the customer up to date with changes in the scope of the project that occurred as work progressed. (App. at 514:22-25). As Josh explained at trial, any changes would be emailed to Jackie and if they had a problem with the price they would notify Bradshaw so the parties could "resolve it before we get to the end." (App. at 517:9-17).

C. Construction Work and Changes to Scope of Services.

The initial steps of construction involved demolition, including some excavation, in the basement. (App. at 518:14-22). After removing the interior basement walls and flooring, Bradshaw discovered problems with the underlying concrete floor that had to be remedied. (App. at 519:14-20). The additional work on the basement floor added $3,000.00 to the original estimate. (App. at 519:14-20). Bradshaw prepared a revision to reflect this change and emailed it to Jackie *after* the work was done. (App. at 145-152). Jackie found these steps agreeable. (App. at 602:8-19; App. at 603:11-12).

Following the initial excavation and interior basement demolition work in early September, the project began in

earnest in October with the demolition of the deck and the back part of the home and excavation for the foundation of the addition. (App. at 521:1-8). Invoice number 4334 dated October 31, 2019, was emailed to Jackie on November 6, 2019, with a notation in the email about additional work done by the foundation company. (App. at 478; App. at 470). Other differences from the estimate were detailed, including the permit expense being more than originally estimated and the discovery of a tree root ball upon demolition of the deck that required removal to proceed. (App. at 522:11-25; App. at 523:1-7). All the changes reflected in the October invoice were also discussed with Jackie in person. (App. at 523:8-16). Graham verbally agreed to the changes to the scope of work and at no point advised Bradshaw not to do any of the necessary work. (App. at 523:4-8). The October invoice was paid without any question, complaint, or issue raised by Graham. (App. at 524:25; App. at 525:1-14). There were no hidden charges or deception or attempts to mislead by Bradshaw with respect to the October 2019 invoice. (App. at 525:14-20).

The next phase of work involved concrete in the basement, back fill, framing and plumbing prep work. (App. at 525:25; App. at 526:1-2). Bradshaw emailed the invoice for that work, number 4363, dated January 23, 2020, to Jackie the same day. (App. at 480-481). The January invoice included changes for increases in trucking dirt from the home, additional shingles, a decrease in the estimate for framing materials, and a portion of the windows, which ultimately went over budget. (App. at 527:7-24; App. at 528:1-13). The additional dirt carried away from the property after excavation was "unforeseen" at the time of the estimate in July and is "hard to anticipate exactly what you are going to end up with" regarding excess dirt. (App. at 528:14-25). All changes were discussed with Graham, and there was no objection; they wanted the project to continue moving forward. (App. at 529:25; App. at 530:1-6). They were pleased with the project and paid the January invoice in full without any objection or question raised. (App. at 530:7-12; App. at 531:8-20). There were no hidden charges or any attempt to deceive Graham on the January invoice. (App. at 531:21-25;

Tr, day 1, p. 64, Ll 1-8).

Following the January 3, 2020, invoice, the next stages of work were the electrical wiring, plumbing, insulation, and drywall. (App. at 532:11-16). The next invoice, number 4411, was dated February 12, 2020, and emailed to Jackie. (App. at 532:17-23; App. at 482-485).

The February invoice included a significant expansion of the scope of services regarding the electrical work for the home. (App. at 533:22-25; App. at 534:1,19-25; App. at 535:1-4). The city of Urbandale required a "complete home update" for the electrical system and wiring in the home due to its age, which was not anticipated in the original contract. (App. at 535:3-7). These electrical issues were discussed with Graham prior to the work being done, and there was no objection. (App. at 535:8-16). Graham acknowledged the electrical work was needed and was beyond the initial scope of services. (App. at 651:18-25; App. at 652:1-7; App. at 674:20-25; App. at 675:1-11). The changes on the February invoice were discussed with Graham prior to work being done. (App. at 535:25; App. at 536:1-3). The February invoice

also included charges relating to costs and installation of a new water heater. (App. at 536:17-25). The water heater, requested by Graham, was not originally included in the contract. (App. at 537:2-16).

All the changes and differences in scope of work detailed in the February invoice were discussed with Graham ahead of time without any objection and the invoice was sent via email without any response from Graham, and it was paid in full. (App. at 538:2-25; App. at 539:1-11). The February invoice did not include any hidden charges or attempts to mislead, deceive, or confuse Graham in any regard. (App. at 539:12-22).

Following the February invoice, the next invoice, number 4444, was dated March 17, 2020. (App. at 464-465). The work covered on the March invoice included cabinetry, trim, carpentry, painting, plumbing, flooring, and doors and other hardware. (App. at 464-465). Around the time the March invoice was sent, the Covid-19 pandemic had taken hold and the Grahams were home more frequently and interacting with Bradshaw numerous times daily. (App. at

540:1-14). The plumbing work detailed in the March invoice included an expansion of scope of service due to the age of the home and required Bradshaw to redo "almost all the plumbing in the home." (App. at 541:19-25). The additional plumbing work was necessary and discussed and agreed upon with Graham prior to completion of the work. (App. at 542:4-19). It was not possible at the time of preparing the estimate to know the extent of the plumbing issues that would be uncovered once the project was underway. (App. at 542:20-25; App. at 543:1-2).

All changes detailed in the March 2020 invoice were discussed with Graham without any objection and the invoice was emailed to Jackie. (App. at 545:14-24). Graham raised no objection and paid Bradshaw $28,000.00, which was approximately $625.00 more than the invoice amount. (App. at 465; App. at 546:8-17). At that time, Bradshaw and Jackie discussed funding for the project, and Jackie referenced a refinance on the home to pay for the remaining work. (App. at 546: 17-23; App. at 547:11-17). To this point there were no issues at all between Bradshaw and Graham. (App. at

547:20-24; App. at 548:21-23). There was no attempt from Bradshaw to withhold information, include hidden charges, mislead or confuse Graham with the March invoice. (App. at 549:4-12). The remaining work to be done was painting, siding, trim work and countertops. (App. at 549:13-19). After payment of the March invoice, Graham had paid Bradshaw a total of $140,098.79.

D. Final Invoice and Dispute.

The final invoice, number 4469, dated May 15, 2020, in the amount of $18,779.15, was emailed to Jackie on May 19, 2020. (App. at 473-474; App. at 487). Up to the time of sending the final invoice, Graham had indicated they would pay Bradshaw and were "reassuring" to that extent and at no point were there any red flags raised regarding payment. (App. at 550:7-17). The May invoice included labor and materials for siding, electrical trim, plumbing trim, completion of bedrooms in the basement, exterior steps, trash removal and dirt work, and a credit for over-payment on the prior bill. (App. at 473-474). The invoice included work to complete a backsplash on the wall above the counter in the

kitchen that was not included in the original contract, but requested by Graham. (App. at 551:9-15). A change regarding the exterior paint, requested by Graham, was for two different colors rather than one solid color contemplated in the contract. (App. at 552:8-19). All changes detailed in the May invoice from the original scope were discussed with Graham. (App. at 555:6-9). There were no hidden charges, misleading charges, or attempts to deceive Graham on the last invoice. (App. at 555:18-24).

No part of the May invoice was paid by Graham. (App. at 556:20-24). Following submission of the final invoice, Jackie, over the course of several days, requested all subcontractor invoices, receipts for materials, and the hard data for Bradshaw's labor cost on the project. (App. at 557:6-20). Bradshaw produced a summary of labor hours for its employees and one hundred fifty-one pages of all subcontractor invoices and all receipts for materials. (App. at 416; App. at 255-405; App. at 558:1-3, 10-16). Bradshaw

responded in good faith to all requests for information.[2] (App. at 558:16-23). Josh Bradshaw offered more than once to sit down and meet with Barry and Jackie to discuss the final bill, but they declined. (App. at 557:21-25). The parties exchanged many emails from May 19, 2020, and in the days following issuance of the final invoice. (App. at 177-226).

Typically, at the completion of a job, Bradshaw would return to the property to complete punch list items that are noted by the customer. (App. at 560:3-13). Here, however, upon learning Graham had hired an attorney, Bradshaw decided not to go back to the home to complete punch list items. (App. at 559:6-13).

E. Bradshaw's Breach-of-Contract Claim

Bradshaw asserted Graham breached their contract by failing to pay the final invoice. (App. at 7-17; App. at 561:21-25). Graham defended on the basis that Bradshaw was not entitled to recover sums in excess of $140,098.79, the

[2] An issue arose at trial regarding the lack of production of timecards that provided a basis for the information Bradshaw produced in Exhibit Q. The district court denied Graham's motion for discovery sanctions at trial as untimely given the summary exhibit was produced during discovery without further issue from Graham. (App. at 586-594).

amount they had already paid, because Bradshaw had not followed the procedure for changes to the scope of work set out in the parties' contract. Bradshaw claimed that it had complied with this procedure. There was no dispute that Bradshaw had performed the work for which it billed.

The breach of contract claim was submitted to the jury who returned a verdict in favor of Graham. This verdict was apparently based on a jury finding that Bradshaw's interpretation of the contractual procedures for changes in the scope of work was incorrect.

F. Graham's Breach of Contract Counterclaim.

Graham asserted a counterclaim for breach of contract, claiming deficiencies in Bradshaw's work in several respects. Graham hired Mark Parlee as their expert witness, who produced a report claiming approximately $24,000.00 of work is necessary to resolve issues with the Graham home. (App. at 417-457; App. at 668:17-23).

In response to the counterclaim for breach of contract, Bradshaw designated Randy Krohn as an expert witness who prepared his own written report and testified at trial. (App. at

488-491). Krohn did identify some issues at the Graham home that needed addressed, but ultimately concluded many of Graham's complaints were punch list items not completed due to the dispute between the parties. (App. at 597:1-24). In total, the cost of repair under the Krohn report was $7,925.00 which included $4,400.00 for new siding. (App. at 488, 490). Regarding the siding, Krohn testified that before re-siding the home, he would attempt less expensive alternatives and that the house did not need to be re-sided. (App. at 595:1-25; App. at 596:1-6).

The jury returned a verdict in favor of Graham on their breach of contract claim in the amount of $16,000.

G. Graham's Counterclaim for Consumer Fraud.

Graham's consumer fraud claim was based on Bradshaw's billing practices. Graham asserted the contract between the parties was a time and materials contract. (App. at 493; App. at 686:9-15). In a "time and materials contract," the contractor's charges are based solely on the cost of materials used and the labor charges incurred for the work completed. (App. at 515:23-25; App. at 516:1-4). Graham claimed Bradshaw overcharged

them in the amount of $41,000 based on their claim that Bradshaw promised to charge $45 per hour for labor and not take a profit markup on labor and materials. (App. at 493; App. at 647:13-24; App. at 686:9-15). Graham asked the jury to award $22,468.91 for their fraud damages, the amount of the alleged overcharges that they had actually paid. (App. at 686:17-18). They also sought statutory treble damages of $67,000. (App. at 686:19-21).

Bradshaw disputed that the contract was a time and materials contract. (App. at 516:8-10). Jackie admitted the estimate did not state an hourly rate for labor expense nor did it state they were only charged for labor hours and materials. (App. at 651:1-9). And Bradshaw confirmed it did not bill Graham for labor based on an hourly rate. (App. at 576:2-12).

Bradshaw asserted there was no fraud because Graham received the scope of services they contracted for at the start of the project for the agreed upon price. Graham paid Bradshaw a total of $140,098.79. (App. at 475). Both Jackie and Barry testified that for this amount, they received all the work described in the original contract *and* the additional work

Bradshaw did beyond the original contract, all of which benefited Graham. (App. at 664:2-19; App. at 666:21-25; App. at 667:10-13; App. at 675:2-11). Bradshaw disputed that his billings were contrary to the contract signed by Graham. (App. at 562:20-25; App. at 563:1-5).

The jury awarded $10,000 to Graham for consumer fraud and found Bradshaw's conduct was willful and wanton in disregard of Graham's rights. The jury then awarded treble damages of an additional $30,000. (App. at 32-35). Bradshaw appeals this verdict.

H. Bradshaw's Equitable Claims.

Bradshaw sought damages of $18.779.15, the amount of the final invoice, under the equitable theories of unjust enrichment and quantum meruit. (App. at 72-79). Given the jury verdict against Bradshaw on its breach of contract claim, Bradshaw argued recovery of the amount of the final invoice was necessary to compensate the company for the reasonable value of services undisputedly provided Graham over and above the contracted services.

Graham argued for no recovery on either equitable claim

due to (1) Bradshaw had "unclean hands"; (2) the existence of an express contract precluded recovery under an equitable theory; and (3) Bradshaw failed to prove the elements of unjust enrichment. (App. at 88-99).

The district court denied Bradshaw's equitable claims. It ruled the written contract precluded recovery:

> The Parties contracted for a procedure to approve changes to the scope of work. The impact of the contractual procedures for changes to the scope of work was directly at issue in the breach of contract claim. To allow implied contract theories for an expanded scope of work would allow a Party to avoid the procedure established by the contract in an effort to recover.

(App. at 123). Bradshaw appeals this ruling.

Routing Statement.

This case involves application of existing legal principles, and, thus, the Supreme Court should transfer this case to the Iowa Court of Appeals. Iowa R. App. P. 6.1101(3)(2).

Preservation of Error.

Bradshaw moved for directed verdict regarding the Graham consumer fraud claim. (App. at 676-682). Specifically,

Bradshaw sought directed verdict on the consumer fraud claim arguing Graham did not present substantial evidence of (1) a prohibited practice, (2) intent by Bradshaw for Graham to rely upon any prohibited practice, (3) suffering an ascertainable loss, or (4) a willful and wanton disregard of Graham's rights. (App. at 676-680; App. at 681:1-8).

Following the jury verdict on August 25, 2022, Bradshaw moved for judgment notwithstanding the verdict and a new trial on September 9, 2022. The district court denied said motions by ruling entered October 7, 2022, and Bradshaw filed its notice of appeal on October 12, 2022. Thus, all issues herein are preserved for appellate review.

BRIEF POINT I

THE DISTRICT COURT ERRED IN DENYING THE MOTIONS FOR DIRECTED VERDICT, JUDGMENT NOTWITHSTANDING THE VERDICT, AND FOR NEW TRIAL ON THE CONSUMER FRAUD CLAIM BECAUSE THERE WAS NEITHER SUBSTANTIAL NOR SUFFICIENT EVIDENCE OF THE REQUIRED ELEMENTS OF CONSUMER FRAUD.

The district court committed legal error when it denied Bradshaw's motions for directed verdict, notwithstanding the verdict, and for new trial on Graham's consumer fraud claim.

The district court should have directed a verdict in Bradshaw's favor or ordered a new trial on the consumer fraud claim because there was neither substantial nor sufficient evidence at trial (1) that Bradshaw committed a prohibited practice, (2) that Graham suffered an "ascertainable loss of money," or (3) that Bradshaw's conduct constituted "willful and wanton disregard" for the rights of Graham.

Standard of Review.

When reviewing a ruling on a motion for directed verdict and motion for judgment notwithstanding the verdict, appellate courts review the rulings for correction of errors at law. *Godfrey v. State,* 962 N.W2d 84, 99 (Iowa 2021). Evidence is viewed in the light most favorable to the party against whom the motion was made. Iowa R. App. P. 6.904(3)(b).

A directed verdict is appropriate if there is not substantial evidence on each element of the claim presented by the party against whom the motion is made. *McClure v. Walgreen Co.,* 613 N.W.2d 225, 231 (Iowa 2000). A district court should grant a motion for judgment notwithstanding

the verdict if the moving party previously moved for directed verdict and "was entitled to a directed verdict at the close of all evidence." Iowa R. of Civ. P. 1.1003. "The purpose of the rule is to allow the district court an opportunity to correct any error in failing to direct a verdict." *Easton v. Howard,* 751 N.W2d 1, 4 (Iowa 2008). A motion for judgment notwithstanding the verdict stands "on the grounds raised in the movant's motion for directed verdict." *Id.* at 4-5. In analyzing such a motion the question is "was there sufficient evidence to generate a jury question?" *Id.*

Denial of a motion for new trial asserted on a discretionary ground is reviewed for an abuse of discretion. *Ladeburg v. Ray*, 508 N.W.2d 694, 696 (Iowa 1993). When ruling upon a motion for new trial, the district court has broad, but not unlimited, discretion in determining whether a verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.904(3)(c). Findings of fact in a law action "are binding upon the appellate court if supported by substantial evidence." Iowa R. App. P. 6.904(3)(a).

The rules of procedure detail several specific reasons

supporting motions for new trial, including if "the verdict, report, or decision is not sustained by sufficient evidence, or is contrary to law." Iowa R. of Civ. P. 1.1004. Additionally, case law establishes a district court has discretion to order a new trial when a verdict fails to administer substantial justice between the parties. *Lehigh Clay Prods. v. Iowa Dep't of Trans.,* 512 N.W2d 541, 543 (Iowa 1994). A new trial may be granted if a "verdict fails to effectuate substantial justice" or if the verdict is "not sustained by sufficient evidence" *Hovengale v. Wright,* 340 N.W.2d 783, 785 (Iowa Ct. App. 1983).

A. Overview of Consumer Fraud Statute.

"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." IOWA CODE § 714H.5(1) (2019). Prohibited practices and acts are defined as "a practice or act [a] person knows or reasonably should know is an unfair practice, deception, fraud, false pretense, or false promise, or the misrepresentation, concealment, suppression, or omission of

a material fact, with the intent that others rely upon the unfair practice, deception, fraud, false pretense, false promise, misrepresentation, concealment, suppression, or omission in connection with the advertisement, sale, or lease of consumer merchandise, or the solicitation of contributions for charitable purposes." IOWA CODE § 714H.3(1) (2019). A party "alleging an unfair practice, deception, fraud, false pretense, or false promise, or misrepresentation, must prove that the prohibited practice related to a material fact or facts." *Id.*

"Actual damages" is defined by the statute as "all compensatory damages proximately caused by the prohibited practice or act that are reasonably ascertainable in amount." IOWA CODE § 714H.2(1) (2019). Exemplary damages may be recovered if a "finder of fact finds by a preponderance of clear, convincing, and satisfactory evidence that a prohibited practice or act in violation of [Chapter 714H] constitutes willful and wanton disregard for the rights or safety of another." IOWA CODE § 714H.5(4) (2019). A successful claimant in a consumer fraud action is awarded reasonable

attorney fees. IOWA CODE § 714H.5(2) (2019).

B. Graham's Claim of Consumer Fraud.

As noted above, Graham's consumer fraud claim was based on Bradshaw's billing practices. Graham claimed Bradshaw promised to charge $45 per hour for labor and not take a profit markup on labor and materials. (App. at 493; App. at 647:13-24; App. at 686:9-15). Bradshaw denied any such promises.

As proof of their damages, Graham submitted Exhibit 8,[3] which listed all alleged overcharges by Bradshaw. This exhibit claimed labor overcharges, based on an hourly rate that exceeded $45, in the amount of $24,461.25, and profit up-charges totaling $13,791.76. The remaining "improper charges" were materials that appeared on receipts furnished by Bradshaw that were not used on the Graham project, totaling $732.09.

Graham claimed damages of $22,468.91 and the

[3] Exhibit 8 is Graham's answer to an interrogatory requesting an itemization of its claimed damages for its breach of contract claim and its statutory consumer fraud claim.

amount of the alleged $41,000 in overcharges they claimed paid. The jury awarded Graham $10,000.

C. No Ascertainable Loss.

Bradshaw contends there is not substantial evidence that Graham suffered an ascertainable loss. *See* IOWA CODE § 714H.5(1) (2019). The Iowa Supreme Court discussed the concept of "ascertainable loss" as referenced in the consumer fraud statute in *Poller v. Okoboji Classic Cars, LLC,* 960 N.W2d 496 (Iowa 2021). That case involved the restoration of the plaintiffs' classic automobile by the defendant. *Poller*, 960 N.W.2d at 502. The defendant charged the plaintiffs a total of $112,396.15 for the restoration, but plaintiffs claimed they had been told the restoration would be done for only $45,000. *Id.* Consequently, the plaintiffs made payments totaling $45,000 and refused to pay the $67,396.15 balance. *Id.* The plaintiffs claimed the defendant violated the Motor Vehicle Service Trade Practices Act (MVSTPA), a violation of which is an unfair trade practice under the Consumer Fraud Act. *Id.* at 502-03.

Although the Iowa Supreme Court affirmed on appeal

the finding that the defendant had committed an unfair trade practice, the Court held the plaintiffs in that case did not suffer an ascertainable loss:

> While [the defendant] has undoubtedly failed to comply with the provisions of the MVSTPA, the [plaintiffs] have not demonstrated a reasonably ascertainable loss caused by [the defendant's] failings, particularly in light of our holding that [the defendant] cannot seek to enforce the contract to collect the balance of the amount it claims the [plaintiffs] owe them. The [plaintiffs] have paid [the defendant] a total of $45,000. The testimony makes it clear that the [plaintiffs] in fact expected to pay up to $45,000 for the restoration services. In light of our holding on the lack of enforceability of the underlying contract, there is no showing that they would have paid less than this amount had [the defendant] complied with all of the provisions of the MVSTPA.

Id. at 523; *accord McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 532-33 (Iowa 2015) (holding gambler suffered no ascertainable loss from being denied bonus on slot machine where she was not entitled to bonus and had "made money on her gambling that evening, so she had no out-of-pocket loss").

The rationale and holding of the Iowa Supreme Court in *Poller* clearly applies to the present case. Here, the July 2019

estimate formed the basis for the contract and detailed the scope of services the parties originally contemplated Bradshaw would provide to Graham for an original total price of $136,168.16. (App. at 410-415). The initial work in September 2019 added $3,000.00 to this total, which Graham did not dispute at trial. Graham also acknowledged they agreed to pay an additional $1,010.20 after September 19, 2019. (App. at 665:5-13). Based upon Jackie's testimony, Graham admitted they had agreed to pay a total of $140,178.36. Graham paid Bradshaw a total of $140,098.79, leaving a balance *owed* of $79.57. (App. at 664:24-25; App. at 665:1, 17-25). Graham acknowledged receiving construction of a new addition on the home with a finished basement, new kitchen, new stairwell, and new flooring, as specified in the estimate. (App. at 664:1-16). Graham received what was agreed upon in the original contract. (App. at 664:17-19).

Not only did Graham receive and pay what they testified they expected, Graham acknowledged receiving an expanded scope of services as the project went forward. It is undisputed

that Bradshaw provided, and Graham acknowledged as received, a new electrical system and wiring throughout the home, updated plumbing, a water heater, and back splash above the counter tops that were not contemplated in the estimate. (App. at 410-415). Graham did not pay for any of these services. As of the date of the last invoice in May 2020, Graham's expectation was to pay a total of $140,178.36 for the services provided. Graham paid *less than* this amount and Bradshaw provided *more* services than contemplated by the estimate. The jury determined that Bradshaw was not entitled to any sums over and above the payments Graham had already made. Therefore, here, as in *Poller*, Graham sustained no ascertainable loss.[4]

In summary, there is not substantial evidence of an ascertainable loss. The failure of the district court to grant a directed verdict and grant the motion notwithstanding the

[4] The breach of contract damages the jury awarded Graham were for claimed deficiencies in the work based on Mr. Parlee's report, not for any overpayment by Graham. The fraud claim was based on alleged overbilling, not these alleged deficiencies in the work. Consequently, the damages awarded under the breach of contract claim are not relevant to the fraud claim and do not constitute the necessary ascertainable loss "as a result" of the alleged prohibited act.

verdict on Graham's consumer fraud claim is legal error.

D. No Prohibited Practice.

Graham had the burden to prove Bradshaw engaged in a prohibited "practice or act" under Chapter 714H. IOWA CODE § 714H.3(1). Graham argued that Bradshaw engaged in fraud based upon improper billing practices. Specifically, Graham claimed that (1) Bradshaw represented its hourly labor rate was $45, but billed labor at a higher rate; (2) Bradshaw represented that it would make no upcharges on labor and materials, yet added a profit; and (3) various items that appeared on receipts were improperly billed to Graham.[5] (App. at 493, App. at 496).

The claims that Bradshaw billed improperly because its costs included labor at a rate higher than $45 per hour and included a profit margin rest on the allegation that the

[5] Although the parties' disagreement regarding how changes to the scope of work were to be made under the contract took up a considerable amount of evidence and argument, that issue was pertinent only to Bradshaw's breach of contract claim, which is not an issue on appeal. As a review of Exhibit 8, detailing Graham's alleged damages from "improper charges" shows, Bradshaw's billing for changes to the scope of work is *not* a basis for any of the allegedly improper charges. Therefore, Bradshaw's actions with respect to changes to the scope of work cannot constitute the necessary "prohibited act" because those actions did not result in the claimed damages.

contract was a time and materials contract. Nowhere in Exhibit 1, the estimate, or Exhibit 2, the contract, does it state the agreement between the parties is a "time and material" contract. There is no labor rate stated on either document. There is no estimate of labor hours necessary to complete the project stated on either document. The reference to $45 as an hourly labor rate was never represented by Bradshaw, or discussed between the parties, until an email exchange *after* the dispute arose when the project was completed. (App. at 651:1-9; App. at 178-179). Graham admitted there is no reference to material or labor cost in the contract. (App. at 651:1-9). Graham *was not* overcharged the labor rate because there was no representation by Bradshaw when the parties entered the contract. The agreement was not based upon time and materials. There was no evidence at trial Bradshaw represented a certain labor rate or that there was no profit charge to Graham at any point prior to the completion of the work.

Moreover, at no point did Bradshaw tell Graham the cost of the project would be calculated on a time and

materials basis. Bradshaw detailed at trial what factors into the estimating process and that he includes profit for his company as he estimates labor expense. (App. at 510:11-25; App. at 511:1-7). Josh Bradshaw testified expressly the agreement was not a time and materials contact. (App. at 516:8-10).

Bradshaw's actions when the dispute arose are not substantial evidence that the contract was based on time and materials. When Graham questioned the final invoice in May 2020, Bradshaw responded to all emails and requests for information from Jackie. He produced all subcontractor invoices and material receipts he had in his possession for the project. His attempts to explain the extra work that had been done and its cost was a good faith attempt to resolve the issue regarding changes to the scope of work. They are not evidence that the parties had a time and materials contract. Josh's actions following the dispute over the final billing were not fraudulent, misleading, or deceptive, nor are they evidence of any prior fraud or deceit.

There is not substantial evidence to support a finding

that the parties agreed that Bradshaw would charge $45 an hour for labor or that he would not include a profit margin in its cost. Accordingly, there is not substantial evidence that Bradshaw committed a prohibited act by using a rate above $45 an hour for labor and including a profit markup in determining the costs of the construction services provided to Graham under the contract.

Graham also alleged Bradshaw charged them for certain materials not used or pertinent to their project totaling $642.09. *See* App. at 501-502 (Items 17-26). The *sole* basis for this allegation is receipts Bradshaw provided to Jackie after the dispute arose (App. at 255-405). Bradshaw was performing other construction projects for other customers at the same time the Graham project was ongoing. (App. at 658:23-25; App. at 659:1-2). Bradshaw needed to purchase materials for these other projects and would purchase materials for all ongoing construction projects during one trip to the store. (App. at 659:3-10). There is no evidence that Bradshaw charged Graham for items purchased from the store and not used on their project. *The detailed invoices*

produced by Bradshaw include the cost of materials and do not include the items referenced by Graham. See App. at 234-247. When pressed for specifics on this issue, Jackie was unable to indicate where they were overcharged for these items on the invoices. (App. at 660:1-25; App. at 661:1-25; App. at 662:1-25). There is not substantial evidence to show that Bradshaw engaged in a prohibited practice by charging Graham for materials not used on their project.

For the foregoing reasons, the district court erred in failing to grant either the motion for directed verdict or the motion notwithstanding the verdict on the basis that there was not substantial evidence that Bradshaw committed or otherwise engaged in a prohibited practice under the consumer fraud statute.

E. No Willful or Wanton Conduct.

In order for a consumer fraud claimant to recover statutory treble damages, he or she must prove "by a preponderance of *clear, convincing, and satisfactory* evidence" the underlying prohibited practice was done or engaged in by the Defendant in a way to constitute "willful and wanton

disregard for the rights or safety" of the claimant. IOWA CODE § 714H.5(4) (2019) (emphasis added). The "willful and wanton disregard" standard in the consumer fraud statute requires the same proof necessary for a punitive damage award. IOWA CODE § 668A.1(a) (2019).

The Iowa Supreme Court has repeatedly held that "[A] key feature of punitive damages [is] that they are never awarded as of right, no matter how egregious the defendant's conduct." *Brokaw v. Winfield-Mt. Union Cmty. Sch. Dist.*, 788 N.W.2d 386, 395 (Iowa 2010) (citation omitted). Thus, "[a] showing of willful and wanton disregard requires a showing of actual or legal malice." *McClure,* 613 N.W2d at 231. "Mere negligent conduct is not sufficient" to meet this standard. *Id.* at 229. "Actual malice is characterized by such factors as personal spite, hatred, or ill will. Legal malice is shown by wrongful conduct committed or continued with willful or reckless disregard for another's rights." *Id.* at 231. Moreover, as noted above, malice must be shown by *clear, convincing and satisfactory* evidence. IOWA CODE § 714H.5(4).

The record in this case does not contain *clear, convincing*

and satisfactory evidence supporting a finding that actual malice was proved. Bradshaw reasonably believed the contract was for a fixed cost and defined scope of services and not a time and materials contract, and he billed on that basis. Although the actual cost of labor and materials would be irrelevant in a fixed cost contract, as noted above, Bradshaw responded to Graham's requests for information when Jackie expressed concern over the last invoice. He provided the information requested in a good-faith attempt to resolve the dispute over the expanded scope of services. His actions both during the performance of services and after the dispute arose did not demonstrate any "personal spite, hatred, or ill will" toward the Grahams.

In addition, the evidence consistently shows that the parties got along very well during the several months of construction prior to the May invoice. (App. at 548:6-8). Bradshaw employee Carter Christianson testified he conversed daily with Jackie, she was friendly, there were no complaints, and she was pleased with the work while it was in progress. (App. at 582:14-22; App. at 583:1-10). Jackie

stated there were frequent conversations, all friendly, the parties all got along well, and Graham considered inviting Bradshaw employees over to the house for a barbeque. (App. at 656:15-25; App. at 657:1-5). There is simply no substantial evidence of any "personal spite, hatred, or ill will" toward the Grahams, and certainly, no *clear, convincing and satisfactory* evidence to support a finding of actual malice.

The record also lacks *clear, convincing and satisfactory* evidence of legal malice, i.e., willful or reckless disregard for another's rights. When Graham expressed concerns regarding the last invoice, Bradshaw provided records to show the work done that provided the basis for its invoices and billing. The crucial fact here is Graham paid what they expected at the start of the project and received the scope of service, and more, that they expected to receive at the start of the contract. They did not overpay Bradshaw. Bradshaw's estimate (Exhibit 1) was prepared factoring in what it anticipated for profit and expected for the cost of labor for the project. The agreement does not reference an hourly labor rate. The $45 rate only came up as a reference point *after the*

dispute arose to indicate to Jackie that Bradshaw was not earning a large profit on this job. (App. at 178-179). Josh provided the total number of hours worked, 1,630, and the labor expense of $73,383 and further said Bradshaw typically charges higher rates on other jobs to account for the company's overhead expense and profit. (App. at 179). Bradshaw never represented to Graham they were being charged $45 an hour for labor. Graham received what they contracted for at the cost they expected. Any errors in billing were minor and certainly not significant enough to support a finding of willful and wanton disregard of Graham's rights.

In summary, this record does not contain clear, convincing and satisfactory evidence of actual or legal malice required for an award of statutory treble damages.

F. New Trial

The jury verdict failed to administer substantial justice between the parties. As indicated above, Graham does not have an ascertainable loss and there is not *clear, convincing and satisfactory* evidence Bradshaw engaged in willful and wanton conduct justifying treble damages for Graham. A new

trial may be granted under these circumstances when the verdict fails to "effectuate substantial justice." *Hovengale*, 340 N.W.2d at 785. For the reasons cited above, the district court erred in failing to grant a new trial on this basis of a failure to effectuate substantial justice.

G. Summary

The consumer fraud statute and case law make clear Graham must have suffered an ascertainable loss due to Bradshaw engaging in a prohibited practice as defined in Chapter 714H. It is undisputed Graham paid the amount of money they contracted for and received the scope of services they originally agreed upon. Graham suffered no ascertainable loss. Further, there is not substantial evidence that Bradshaw engaged in a prohibited practice: it did not represent that it would charge $45 an hour for labor and take no profit, nor did it charge Graham for materials not used on their project. Finally, there is not *clear, convincing and satisfactory* evidence of actual or legal malice in the record so as to support the jury's finding Bradshaw engaged in willful and wanton disregard of Graham's rights. The district court

committed legal error in failing to grant the motions for directed verdict and the judgment notwithstanding the verdict, and for a new trial concerning these issues on Graham's consumer fraud claim.

BRIEF POINT II

THE DISTRICT COURT ERRED IN DENYING EQUITABLE RELIEF TO BRADSHAW ON BOTH THE QUANTUM MERUIT AND UNJUST ENRICHMENT CLAIMS FOLLOWING THE JURY VERDICT.

Following the trial, Bradshaw's two equitable claims, quantum meruit and unjust enrichment, were submitted to the district court. The district court erred in denying equitable relief to Bradshaw on these claims on the basis the claims were for services covered under the parties' written contract. The jury made a contrary finding when it concluded Bradshaw was not entitled to recovery under the written agreement for the additional services provided Graham.

A. Standard of Review.

Appellate review of rulings on equitable claims is de novo. *Homeland Energy Sols., LLC v. Retterath,* 938 N.W.2d 664, 684 (Iowa 2020). Appellate courts, in reviewing a ruling

on an equitable claim, give weight to factual findings of the district court, but this Court is not bound by them. IOWA R. APP. P. 6.904(3)(g) (2023).

B. Unjust Enrichment.

"The doctrine of unjust enrichment is based upon the principle that a party should not be permitted to be unjustly enriched at the expense of another or receive property or benefits without paying just compensation." *Palmer v. Unisys Corp.,* 637 N.W.2d 142, 154 (Iowa 2001). The claim "serves as a basis for restitution" and, despite referenced as a "quasi-contract theory," it is an equitable claim. *Id.* The claim "may arise from contracts, torts, or other predicate wrongs, or it may also serve as independent grounds for restitution in the absence of mistake, wrongdoing, or breach of contract." *Id.* (internal citation omitted).

There are three elements necessary for recovery under an unjust enrichment claim: "(1) defendant was enriched by the receipt of a benefit; (2) the enrichment was at the expense of the plaintiff; and (3) it is unjust to allow the defendant to retain the benefit under the circumstances." *Id.* at 154-55. "Unjust

enrichment is a broad principle with few limitations." *Id.* at 155. "The critical inquiry is that the benefit received be at expense of the plaintiff." *Id.*

An express contract and implied contract generally "cannot coexist with respect to the same subject matter." *Kunde v. Estate of Bowman,* 920 N.W. 2d 803, 807 (Iowa 2018). However, in the context of a construction contract, an implied contract theory "may coexist with written contracts" if there is a situation "where recovery was sought for matters not covered or agreed upon in the contract . . . or where a contract does not address a particular term that the facts and circumstances suggest should be supplied by implication." *Id.* (internal citations omitted). "A builder may recover from an owner for extras ordered or agreed upon which were not covered by the contract." *Nepstad Custom Homes Co. v. Krull,* 527 N.W. 2d 402, 407 (Iowa Ct. App. 1994).

C. Quantum Meruit.

A claim for quantum meruit is an equitable claim for recovery of "the reasonable value of the services provided, and the market value of the materials furnished" for "breach of an

implied-in-fact contract." *Scott v. Grinnell Mut. Reinsurance Co.,* 653 N.W.2d 556, 562 (Iowa 2002) (internal quotation omitted). A party seeking recovery under a quantum meruit claim must prove the following:

> (1) The services were carried out under such circumstances as to give the recipient reason to understand:
>
> (a) They were performed for him and not some other person, and
>
> (b) They were not rendered gratuitously, but with the expectation of compensation from the recipient; and
>
> (2) The services were beneficial to the recipient.

Iowa Waste Sys. v. Buchanan County, 617 N.W.2d 23, 30 (Iowa Ct. App. 2000).

D. Discussion.

In its order denying Bradshaw relief on the equitable claims, the district court concluded the written contract between the parties prevented Bradshaw's equitable recovery. Specifically, the district court held the written agreement detailed the procedure for approving changes to the scope of work and, thus, the basis for Bradshaw's equitable claims

was addressed in the written agreement. (App. at 123-124).

However, the procedure detailed in the written contract is not relevant to whether Bradshaw is entitled to recover under an equitable theory. Equitable recovery is allowed "for matters not covered or agreed upon in the contract." *Kunde,* 920 N.W.2d at 807. Bradshaw seeks recovery for actual additional construction services and material provided to Graham *not covered in the original agreement*.

It is undisputed the scope of services detailed in the original agreement expanded. Graham made no claim Bradshaw failed to actually perform services for which Bradshaw billed Graham. In other words, the payment sought by Bradshaw was for construction work actually completed and otherwise performed. It is also undisputed Graham did not pay Bradshaw for any work beyond the original contract amount. Graham admitted Bradshaw replaced the entire electrical system in the home, provided expanded plumbing services not detailed in the original agreement, installed a backsplash above a countertop, installed a new water heater, and relocated the attic stairs,

among other constructions services. None of these services were included in the original agreement. Thus, they are "matters not covered or agreed upon in the contract." Therefore, the equitable theories apply, and the district court committed legal error in ruling otherwise.

Graham's position at trial was the parties did not agree to the additional scope of services pursuant to the *procedure* detailed in the written agreement. Graham defended Bradshaw's breach of contract claim at trial exclusively on this basis. That is, the original agreement between the parties did not cover the additional construction services, Graham did not agree in writing to the additional services before the work was done, and, therefore, they did not breach the contract in failing to pay for the services.

After the trial, Graham defended the equitable claims in part by stating the expanded services *were covered* by the agreement. (App. at 93-96). Graham cannot have it both ways. Either the original agreement did not cover the expansion of scope of services or it did. The jury agreed with Graham at trial the additional services *were not covered* by

the express contract and denied Bradshaw's breach of contract claim.

There is no dispute Graham received the additional construction services and there is no dispute the additional services benefitted Graham and their home. Further, it is undisputed Graham did not pay for these benefits. This circumstance falls squarely within the elements of unjust enrichment. Graham was "unjustly enriched" through additional construction services to their home at Bradshaw's expense "without paying just compensation."

The court in *Nepstad* stated a home builder "may recover from an owner for extras ordered or agreed upon which were not covered by the contract." *Nepstad,* 527 N.W.2d at 407. The dispute here, regarding the contract, was whether Bradshaw complied with the terms regarding the procedure for changing the scope of services. *There is no dispute that Graham agreed verbally to the additional work. Graham testified at trial they understood they were receiving additional electrical services, for example, than what was originally contemplated in the contract.* (App. at 666:6-25;

App. at 667:1-13).

It is unjust under these circumstances for Graham to retain the benefits of the additional work to which they agreed simply because the process the jury found necessary to add these services to the contract was not followed. The district court erred in denying equitable relief.

Bradshaw further submits the elements of the quantum meruit claim were proven. The additional construction services were clearly performed for Graham on their home and not for some other person. There was no evidence at trial, and Graham did not claim, Bradshaw intended the additional services to be provided for free. Clearly, the additional services were beneficial to the Graham home.

Further, denying recovery under the equitable claims was erroneous because Bradshaw substantially performed the original scope of services *and* the additional scope of services. A contractor is entitled to the price of the agreed-upon work less the "value of any defects in performance." *Farrington v. Freeman*, 99 N.W.2d 388, 391 (Iowa 1959). "Substantial performance" allows for "omissions or

deviations" from the agreement if they "do not impair the structure as a whole, are remediable without doing material damage to the other parts of the building . . . and may without injustice be compensated for by deductions from the contract price." *Id.* Non-completion of punch-list items does not constitute a failure of a contractor to substantially perform a construction contract. *Flynn Builders, L.C. V. Lande*, 814 N.W.2d 542, 546 (Iowa 2012).

Bradshaw performed the work the parties agreed upon in the written contract and as they agreed in writing for changes while the contract was ongoing. The majority of Graham's complaints about the work are punch-list items, as both experts generally agreed. *See* App. at 488-491; App. at 417-457.

Bradshaw respectfully submits this Court should reverse the district court ruling denying Bradshaw recovery on the two equitable claims because the additional services provided to Graham, at Bradshaw's cost, were not covered by the parties' written agreement.

CONCLUSION

The district court erred in failing to grant Bradshaw's motion for directed verdict, judgment notwithstanding the verdict, and motion for new trial for the reasons stated herein. Graham did not suffer an ascertainable loss and there is not *clear, convincing, and satisfactory* evidence of willful and wanton conduct justifying treble damages. Further, the district court erred in failing to grant equitable relief to Bradshaw for the additional services provided Graham.

REQUEST FOR ORAL ARGUMENT

Appellant, Bradshaw Renovations, LLC, respectfully requests to be heard in oral argument upon submission of this case.

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COST CERTIFICATE

COMES NOW Appellant Bradshaw Renovation, LLC, and hereby certifies that the actual cost paid for printing the foregoing Appellant's Brief was $0.00.

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