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 REPLY BRIEF

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CERTIFICATE OF FILING

I, Matthew J. Hemphill, hereby certify that I filed the attached Appellant's Reply 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 Reply 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 5,334 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 — June 27, 2023
Matthew J. Hemphill — Date

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES **Page**

STATUTES AND RULES

BRIEF POINT I

THERE IS NOT SUBSTANTIAL EVIDENCE TO SUPPORT A FINDING THAT GRAHAM HAD AN "ASCERTAINABLE LOSS" REQUIRED FOR THE CONSUMER FRAUD CLAIM.

For Appellees Barry Graham and Jacklynn ("Jackie") Graham (collectively "Graham") to recover under their consumer fraud claim, there must be substantial evidence that they suffered an ascertainable loss. *See* IOWA CODE § 714H.5(1) (2019). In *Poller v. Okoboji Classic Cars, LLC,* 960 N.W.2d 496 (Iowa 2021), the Iowa Supreme Court held that the plaintiffs did not sustain an ascertainable loss because they were not required to pay more than the contract price for restoration of their classic car. *Poller*, 960 N.W.2d at 523. The record supports that conclusion here as well.

Although Graham does not take a position in this appeal whether the agreement between them and Appellant, Bradshaw Renovations, LLC ("Bradshaw"), was a fixed price contract or a time and materials contract, the evidence at trial overwhelmingly supports the conclusion this was a fixed price contract. Correspondingly, there is not

substantial evidence that the contract was for time and materials. This point is important because Graham has not paid any more than the contract price and so, under *Poller*, has not sustained the required ascertainable loss.

The original estimate detailed specific construction services and aspects of the project Bradshaw would provide. (App. at 458-462). The price for these services as stated in the estimate was $136,168.16. (App. at 458-462). This estimate was accepted by Graham and constituted the parties' contract. (App. at 650: 2-5; App. at 463). When asked at trial, "So you're going to get that scope of work at that price; correct?," Jackie responded, "Yes." (App. at 650:15-17). Later when again asked, "So you believe you were getting the scope of work detailed in Exhibit C[1] for the total price at the bottom, correct?," Jackie again answered, "Yes." (App. at 683:22-25). Clearly, Graham's own testimony establishes that the contract was for a fixed price.

Of course, in the course of such a project, the scope of

[1] Exhibit C is the same document as Exhibit 1 with the inclusion of three pages of emails between Bradshaw and Jackie.

the work might expand, and Graham admitted at trial they agreed to an additional $4,010.20 for some work beyond the original contract, bringing the total contract price to $140,178.36. (App. at 665:5-13). The agreement for this additional work was exactly like the initial contract: specified services would be provided for a specified sum. Again a fixed price contract.

Consistent with Jackie's testimony that they agreed to pay a stated sum for the services specified in the estimate, there is no reference or statement in the contract that Graham would be charged on the basis of labor hours and materials. The contract does not even specify a labor rate. Jackie admitted at trial that she knew nothing about the labor hours or labor rates until the dispute arose in May of 2020. (App. at 651:1-9). Surely, if they thought they were being charged on a time-and-materials basis, they would have expected the invoice to detail the time spent and cost of materials. But, this information was not pertinent to Graham because this was not a time and materials contract.

In suggesting the agreement between the parties may

be a time and materials contract, Graham argues that because Bradshaw submitted overly detailed invoices and the original contract refers to the word "estimate" several times the agreement must be a time and materials agreement. (Graham Brief pp. 55-57). But both parties understood the scope of services would likely change throughout the course of the project. (App. at 651:1-14; App. at 510:16-25). A change in the scope of services, assuming the parties agreed upon the change and any related cost changes, means the fixed amount would necessarily change as the project moves forward. Understood in context, the word "estimate" is entirely accurate and does not change the contractual arrangement for stated services at a fixed price to a time and materials agreement. Likewise, providing a customer unnecessary but likely appreciated detail and information in an invoice regarding exactly what was done on a project since the prior invoice does not change the nature of a contract to a time and materials one.[2] Further, Bradshaw

[2] Similarly, Bradshaw's diligent and substantive responses to Jackie's requests for information after the dispute arose does not suddenly amend the agreement from a fixed price to a time and materials

notes Graham's answer to the petition refers to the parties' agreement as a "not-to-exceed contract" and not as a time and materials contract. (App. at 20). In light of this evidence, the record simply does not contain substantial evidence that the parties' contract was a time and materials contract.

In their brief, Graham claims that even if the contract was a fixed price contract, they were overcharged $19,689.43. (Graham Brief, p. 50). Whether Graham was "overcharged" was hotly disputed at trial, but what wasn't disputed was that Bradshaw provided additional construction services beyond the original scope of work specified in the contract. Moreover, the evidence established that Graham has not paid for this additional work. Thus, regardless of any alleged overcharging, Graham did not *overpay* on the contract. Consequently, there is not substantial evidence that Graham has sustained an ascertainable loss.

In summary, Graham's argument the agreement

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contract. *See* App. at 153-226; Bradshaw Brief, pp. 25-27

between the parties was a time and materials contract is a mischaracterization of the evidence and a position not supported by the evidence in the record. Graham agreed at trial they had contracted for the specified scope of services at an agreed upon cost of approximately $140,000.00. Graham received all of the specified services they believed they were supposed to receive and an expansion of the scope of the original services and paid approximately $140,000.00 to Bradshaw. Thus, there is no "ascertainable loss" as required for proof of the consumer fraud claim. This Court should reverse the district court's rulings denying the motions for judgment notwithstanding the verdict and new trial on Graham's consumer fraud claim.

BRIEF POINT II

THE EVIDENCE GRAHAM RELIES UPON TO SUPPORT THEIR CLAIM THAT BRADSHAW ACTED WILLFULLY AND WANTONLY DOES NOT MEET THE STANDARD OF CLEAR, CONVINCING, AND SATISFACTORY EVIDENCE FOR TREBLE DAMAGES.

In order to recover statutory treble damages, Graham had to prove "by a preponderance of clear, convincing, and

satisfactory evidence" that the underlying prohibited practice was done by the Defendant in such a way so as to constitute "willful and wanton disregard for [their] rights or safety." IOWA CODE § 714H.5(4) (2019). "A showing of willful and wanton disregard requires a showing of actual or legal malice." *McClure v. Walgreen Co.*, 613 N.W.2d 225, 231 (Iowa 2000).

Graham argues the following alleged actions are clear, convincing, and satisfactory evidence that Bradshaw acted in willful and wanton disregard for Graham's rights:

- Bradshaw took different positions at trial on whether the contract was for a fixed price or a time and materials contract;
- Bradshaw's course of performance for emailing invoices detailing changes in the scope of the project was not done in accordance with the contract terms;
- Bradshaw testified Jackie told him they were refinancing their home and Bradshaw would be paid for all its work;

- Bradshaw failed to advise Graham of a one-year warranty;
- Bradshaw testified that removal of a tree root did not add an additional expense to the project;
- Bradshaw failed to produce timecards regarding labor hours worked;
- Bradshaw "billed for time it did not work"; and
- Bradshaw billed for items it did not actually use on the project.

(Graham Brief, pp. 58-60).

As the following discussion will show, these cited actions do not meet the high standard of clear, convincing, and satisfactory evidence to support a finding of willful and wanton conduct directed toward Graham. Bradshaw will address each issue in the order presented in the brief.

Nature of the contract. Bradshaw did not take different positions with respect to the nature of the contract and never took the position at any point in the case that the contract with Graham was anything other than a fixed price contract. Graham cites no evidence in the record where

Bradshaw ever took a position inconsistent with Bradshaw's assertion that the contract was for a fixed price. Graham only offers an unsupported *allegation* that "Bradshaw's argument *appeared* more consistent with a 'time and materials' interpretation." (Graham Brief, p 58 (emphasis added)). That Graham contends Bradshaw's argument "appeared" more consistent with a time and materials contract is a far cry from clear, convincing and satisfactory proof that Bradshaw in fact took different positions on this issue. Any suggestion to the contrary is a mischaracterization of the evidence and without merit.

Changes to the contract. On the issue of changes to the scope of construction services in the agreement, Bradshaw submitted documentary evidence that all changes to the original contract were discussed and agreed upon between Bradshaw and Graham prior to additional or changed work being done.[3] Following completion of a certain aspect of the

[3] The Graham brief refers to the lack of "change orders" in the record. (Graham Brief, p. 21). The contract does not refer to "change orders" and neither Barry nor Jackie Graham testified they believed they were entitled to "change orders."

project where the scope of services changed, Bradshaw detailed the changes in writing with an invoice and submitted the invoice via email. The contract does not expressly state the *agreement for* additional or changed work has to been in writing, only that the changes to the original agreement do need to be detailed and sent in writing.

For example, one of the first tasks on the project was for Bradshaw to demolish the existing basement. This work was done prior to September 3, 2019, which is the date Josh Bradshaw sent Jackie an email stating he will "send over a revised estimate" after the demolition work was done. (App. at 146). Further, in the same email Josh references a conversation with Jackie "last week" regarding changes to the project cost. (App. at 146). So, the parties verbally discussed additional work in the basement, agreed upon the additional work, the work was done, and a bill was subsequently sent detailing the expenses. As Jackie testified at trial, "this is exactly how I thought things were supposed to go." (App. at 603:11-12). The evidence at trial was clear this is how Bradshaw handled the changes

subsequently: a verbal conversation and approval from Graham followed by completing the work and including it on the next invoice. At trial Graham did not identify any additional work completed by Bradshaw on their home that they had not previously authorized.

Ultimately, the parties had different interpretations as to the process for adding services to the agreement. The jury found in favor of Graham on this point. Nonetheless, there is not clear and convincing evidence that Bradshaw was specifically attempting to cause harm to Graham or to deceive Graham by its process for documenting changes the parties followed. To the contrary, the evidence showed Graham was aware of the extra work before it was done and was promptly billed for it in an itemized invoice. This conduct does not constitute clear and convincing evidence of malice so as to support treble damages.

Bradshaw's testimony that Jackie assured Bradshaw would be paid. Both parties testified at trial there were no significant issues between them with the project until submission of the final bill in May 2020. Bradshaw's

testimony regarding an assurance from Jackie that Bradshaw would be paid was evidence that the parties continued to be on good terms before their dispute arose and resulted in litigation. This testimony is not evidence of willful and wanton conduct in an attempt to harm Graham. In fact, this trial testimony could not possibly constitute willful and wanton conduct directed to Graham supporting an award of treble damages. Treble damages can be awarded only when the "*prohibited practice or act*" constitutes willful and wanton disregard. IOWA CODE § 714H.5(4). Bradshaw's testimony occurred more than two years following completion of the project and cannot be considered a prohibited practice or act under chapter 714H.[4] (App. at 546:17- 23).

One-year warranty. Bradshaw testified at trial that he did not recall expressly advising Graham of a one-year warranty. Bradshaw further testified he believed it was a

[4] Further, Graham was clearly expecting another invoice in May at the end of the project. Barry sent Josh Bradshaw a text message on May 18, 2020, stating they were "ready for this final bill that's coming in." (App. at 232).

common understanding or knowledge that general contractors provide one-year warranties. (App. at 571:19-25). He did testify he would have been "happy to" go back to the Graham home to complete warranty or punch-list work. (App. at 572:23- 24).

Ultimately, Bradshaw was mistaken regarding the Graham's awareness of the warranty. However, Bradshaw's mistake is not *clear, convincing, and satisfactory evidence* of willful and wanton conduct or malice. Further, the failure to advise of the warranty had nothing to do with any of the billing practices or Graham's claimed fraud damages in this case and may not now be cited as a prohibited practice or act in support of the erroneous treble damage award.

Tree removal. Bradshaw testified the discovery of a root ball under the deck was a surprise and not something he was aware of when he initially priced the project. (App. at 521:9-20). To address this issue, Bradshaw used an excavator to take out the root ball and then hauled it away in a container. (App. at 521:22-25). The tree excavation and disposal were part of the waste removal billed to Graham on

the October 31, 2019, invoice. (App. at 522:7-20). Concrete removal and disposal was also part of the waste removal line item. (App. at 522:14-20; App. at 236).

Graham again mischaracterizes the evidence in asserting Bradshaw "lied to the jury" about the issue causing the project to go over budget. Bradshaw had budgeted for trash removal, and when this additional trash—the root ball—arose early in the construction process, it did not cause the trash-removal budget to be exceeded, as Josh testified. But that testimony is not inconsistent with Bradshaw's assertion that eventually the budget for trash removal did exceed the estimate, based on the fact that the budgeted capacity for trash removal was used on the unanticipated discovery of the tree stump and the necessity to haul it away, causing the incurrence of costs over the budget for later trash removal of items that had been budgeted.

Graham takes Josh's testimony out of context and presents it removed from the reality of the situation. The most that can be said about this issue is that the link between the root ball work and the trash removal budget may not have been made with the most clarity at trial.

Nonetheless, this testimony is certainly not *clear* and *convincing* evidence of willful and wanton conduct supporting treble damages. Moreover, Bradshaw's trial testimony was never claimed to be "a prohibited act or practice" at trial, so regardless of which party is right on this point, whether Bradshaw testified inconsistently at trial as Graham claims cannot support treble damages under the consumer fraud statute.

Timecards. The discovery issue regarding the timecards is a red herring and irrelevant in full to any claim of willful and wanton conduct directed towards Graham while the project was on-going. The alleged conduct regarding the timecards occurred during litigation of the case and well after the time for actions directed or aimed at Graham supporting treble damages. Thus, this issue may not form the basis for statutory treble damages as it occurred well after completion of the project.

Further, Graham raised this issue at trial, sought sanctions at trial, and was denied sanctions as the issue

was a discovery dispute that Graham failed to pursue during the discovery phase of the case. Specifically, a spreadsheet summary exhibit was prepared and provided to Graham in discovery summarizing labor hours. Graham did not inquire further into the summary exhibit. (App. at 593:4-25; App. at 594:1-3). In any event, this issue is irrelevant to the willful and wanton conduct element of damages.

Allegedly billing for time not worked. Bradshaw had several hours of time into the project prior to beginning the actual physical work, including a site visit, working on project details, corresponding with Graham, and lining up sub-contractors before beginning work. (App. at 508:4-25; App. at 509:1-25). Given the contract was not time and materials, as demonstrated above, Bradshaw did not bill Graham for "time it did not work" on the construction project. Bradshaw kept track of all of its time spent on the project, including hours designing the project, discussing it with Graham, and visiting the site, among other preliminary work, on a spreadsheet. (App. at 416). None of this time was billed to Graham on any of the invoices. *See*

App. at 234-247.

Josh Bradshaw testified he kept track of the time spent on estimates for his "own personal notes as to how much time is involved on the job." (App. at 581:11-19). Moreover, it was not included as a prohibited act or practice for purposes of compensatory damages, and as a result cannot support an award of treble damages.

Allegedly billing for items not used on project. There is *no* evidence Bradshaw billed Graham for items not used on the project. It was undisputed at trial that Bradshaw had other projects going on at the same time as the Graham project and that Bradshaw or its employees would go to the store and buy materials for several of the jobs in one trip, so it was not surprising that materials not used on the Graham job would appear on Bradshaw receipts. (App. at 658:23-25; App. at 659:1-23). *Importantly, none of the additional items about which Graham complains appear on Bradshaw's invoices for the Graham project. See* App. at 464-474. At trial, Jackie testified she could not find any invoices where Bradshaw had billed her for these additional

items. (App. at 661:3-25; App. at 662:1-25; App. at 663:1-4). Claims that Graham was charged for materials not used on the project are not supported by the evidence.

For the reasons stated, none of the evidence or issues cited by Graham meet the high burden of *clear, convincing, and satisfactory evidence* that any claimed prohibited practice or act constituted willful and wanton conduct. Moreover, a careful review of Graham's alleged support for treble damages reveals that it does not constitute clear, convincing and satisfactory evidence of any actual or legal malice required for an award of statutory treble damages.

BRIEF POINT III

BRADSHAW'S WORK THAT IS THE SUBJECT OF THE EQUITABLE CLAIMS WAS NOT WITHIN THE ORIGINAL SCOPE OF SERVICES DETAILED IN THE PARTIES' CONTRACT AND THEREFORE, THESE CLAIMS ARE NOT BARRED BY THE UNCLEAN HANDS DOCTRINE.

Graham argues Bradshaw is unable to recover under the equitable claims asserted for two reasons: (1) the work for which Bradshaw seeks to be paid was the subject of the written agreement, and (2) Bradshaw is barred from recovery

by the doctrine of unclean hands. Neither assertion is supported by the record.

Scope of contract. Throughout this matter, Graham has denied liability for Bradshaw's breach of contract claim on the basis that the additional construction services for which Bradshaw sought to recover were not within the scope of the work described in the contract and Graham had not otherwise agreed to add this additional work to the contract. Graham argued at trial that they did not agree to the additional work totaling $18,779.15 over and above the original agreement. (App. at 622:14-25; App. at 623:1-10). Jackie was adamant they did not agree to pay for this additional work. (App. at 622:14-18).

There is no dispute additional work was performed by Bradshaw. An entirely new electrical service was installed in the home, expanded plumbing services were provided, a new water heater installed, the attic stairs were relocated, and a black-splash was installed in the kitchen: all undisputedly provided by Bradshaw to Graham and not included in the original contract. *See* Bradshaw Brief, Section II(D). Graham's

belated argument that this additional work was included in the contract is inconsistent with their defense of Bradshaw's contract claim and the jury's verdict on that claim and is flawed in its oversimplification.

Graham argues the written contract was for a finished basement, new kitchen with an addition, and new access to the attic. (Graham Brief, p. 63). A review of the original agreement shows, however, that the contract was not that expansive. For example, the electrical work in the written agreement was only "for addition" to the home and "misc. as needed." (App. at 149). Bradshaw's equitable claims seek payment for this work beyond just the addition and miscellaneous work: Bradshaw provided new electrical service throughout the entire home—an expansion of the work Graham knew and approved. Upon request to provide a list of changes in the scope of services, Jackie stated under oath "The electrical had to be updated. We always knew that the electrical was going to change because we had an older home. We just didn't know how much. The countertops changed, flooring changes, plumbing changed." (App. at 652:4-7). Barry

Graham agreed the scope of services expanded from the original contract. (App. at 674:24-25; App. at 675:1). Specifically, he testified he knew the electrical and plumbing scope of work expanded and he "100 percent agree[d]" those services were necessary for the project. (App. at 675:5-11).

Regarding plumbing, the contract details work for plumbing labor and materials "for first floor of space" (specifically omitting the first-floor bathroom), and an allowance for certain plumbing fixtures in the kitchen and plumbing for the new bathroom in the basement. (App. at 149, 151). However, once work was underway on the project "almost all the plumbing in the home" was redone due to the age and condition of the piping and fixtures, and consequently, the plumbing "scope of work was enlarged." (App. at 541:11-25; App. at 542:1-11). The plumbing work performed by Bradshaw was far beyond the scope of work contemplated in the original agreement.

The original contract does not cover, address, or otherwise itemize an expense for construction of new attic stairs. *See* Exhibit C. It is undisputed a new attic staircase was

constructed. (App. at 654:7-16).

Jackie acknowledged at trial the contract did not include installation of a back-splash above the counter tops in the kitchen. (App. at 653:11-15; App. at 145-152). Jackie admitted the back-splash was installed. (App. at 653:5-10).

Similarly, the contract does not address installation of a new water heater, which Jackie acknowledged under oath at trial. (App. at 145-152; App. at 652:16-20). A new water heater was installed in the home. (App. at 652:13-14).

Clearly, additional work was provided by Bradshaw to Graham and for Graham's benefit. Graham has already successfully argued in defending Bradshaw's breach of contract claim that this additional work was not covered by the contract nor added to the contract. Now, Graham argues in resisting Bradshaw's equitable claims the additional work *was* covered by the written agreement. Graham cannot have it both ways.

"It is a 'well-settled principle' that a "party who has with knowledge of the facts, assumed a particular position in

judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party." *Kinseth v. Weil- McLain*, 913 N.W.2d 55, 74 (Iowa 2018) (holding this principle also applies when inconsistent positions are taken in the same proceeding). Here, after the jury verdict was rendered and before the district court ruled on Bradshaw's equitable claims, Bradshaw alerted the trial court to the inconsistency of Graham's positions. *See* App. at 76. Nonetheless, the district court denied recovery. *See* App. at 122-124. This ruling is reversible error.

Clean hands doctrine. The defense of the clean hands doctrine "is not favored by the courts." *Butler v. Butler,* 114 N.W.2d 595, 619 (Iowa 1962). Said defense "is reluctantly applied by the courts and is *always scrutinized* with a very critical eye." *Id.* (internal quotation omitted) (emphasis added).

The defense of unclean hands states one who seeks to recover on an equitable claim "must come with clean hands." *Grandon v. Ellingson,* 144 N.W.2d 898, 904 (Iowa 1966). Whether the doctrine applies to bar a claim such as Bradshaw's "depends upon the connection between

[Bradshaw's] iniquitous acts and [Graham's] conduct which [Bradshaw] relies upon as establishing his cause of action." *Id.*

"A party is not barred from relief because of misconduct not connected with the matter in controversy; and this is true, although the misconduct may be directly connected with the subject matter of the suit. The equitable rule that a plaintiff asking relief must come into equity with clean hands has reference only to the relations between the parties, and arising out of the transaction." *Id.* at 905 (internal quotation omitted). In *Grandon*, the Court refused to apply the clean hands doctrine where the plaintiff's alleged misconduct did not involve the contract provision at issue in the plaintiff's equitable claim. *Id.* at 904-05. The Court held that while the plaintiff's alleged misconduct was connected to the subject matter of the contract, it was collateral to the conduct forming the basis of the equitable claim, and so the doctrine did not apply. *Id.* The same analysis applies here.

Graham's position is Bradshaw may not recover on the equitable claims due to the finding of willful and wanton

disregard for Graham's rights. (Graham Brief, p. 69-70). As discussed above, Graham itemized eight reasons supporting the finding of willful and wanton conduct: (1) Bradshaw's position with respect to whether the contract was fixed price or time and materials; (2) Bradshaw's interpretation of the contract with respect to changes in the scope of work; (3) Josh's trial testimony regarding Jackie's assurances of payment; (4) Bradshaw's failure to expressly tell Graham of the one-year warranty of its work; (5) Josh's trial testimony that the tree root caused the project to go over budget; (6) Bradshaw's production of a spread sheet showing labor time instead of producing the numerous timecards showing this time; (7) Bradshaw's billing for time not worked; and (8) Bradshaw's billing for materials not used on the project. *See* Graham Brief, pp. 58-60. None of the claimed reasons supporting the claim of willful and wanton conduct had any relation at all *to the work that is the subject of the equitable claims*: new electrical service for the entire home, new plumbing and piping for the entire home, new water heater, back-splash installation, and construction of attic stairs. As in

Grandon, while the alleged conduct cited by Graham to support its consumer fraud claim is connected with the subject matter in controversy in the equitable claims, that conduct is collateral to the basis for Bradshaw's equitable claims. Consequently, the doctrine of unclean hands is not applicable and is not a viable defense to these claims.

Bradshaw respectfully submits the analysis of the equitable claims comes down to the following question: Did Graham receive services benefitting them and their home that were not a part of the original written agreement? There can be no dispute under this record that the answer to this question is yes. Graham acknowledged receiving the additional services, and in deciding the contract claims, the jury found that this additional work was not part of the parties' contract. Bradshaw respectfully submits this Court, in its de novo review, should reverse the district court ruling denying Bradshaw recovery on the two equitable claims.

BRIEF POINT IV

THE DISTRICT COURT DID NOT ERR OR ABUSE ITS CONSIDERABLE DISCRETION IN ITS ATTORNEY FEE ORDER AND THAT ORDER SHOULD BE AFFIRMED.

The district court properly exercised its wide and considerable discretion in its ruling on the Graham attorney fee award and there is no reason to reverse that ruling on the few issues raised by Graham in the cross-appeal.

Attorney fees are not recoverable "unless authorized by a statute or contract." *NevadaCare, Inc. v. Dept. of Human Services*, 783 N.W.2d 459, 469 (Iowa 2010). The consumer fraud statute provides for recovery of attorney fees in Iowa Code § 714H.5(2), which details several factors for the district court to consider in entering its fee award. A district court in general has considerable and wide discretion to determine the amount of attorney fees when they are awarded. *City of Riverdale v. Diercks*, 806 N.W.2d 643, 659 (Iowa 2011). Here, the district court properly exercised its discretion by limiting recoverable attorney fees to those services related to the consumer fraud claim.

Graham seeks to recover $1,865.75 from eight specific billing entries.[5] (Graham Brief, pp. 76-77). The January 10 and 11, 2022, billing entries reference reviewing invoices, receipts, and notes for "preparing trial strategy" (January 10) and then "continued" said review on January 11. (Graham Brief, p 77). These two entries are not limited to the fraud claim, and the district court properly exercised its discretion in deciding that "preparing trial strategy" broadly encompassed all claims.

As for the last two entries on January 21 for preparation of "Exhibit A," that exhibit goes beyond calculating the fraud damages and includes discussion of Graham's breach of contract claim for "certain defective work" and provides details of said damage claim. App. at 502-503). Thus, the district court properly refused to award the full amount of this service as recoverable attorney fees.

The district court properly exercised its wide and considerable discretion in determining the attorney fee

[5] Bradshaw concedes the first four cited entries for review (June 18, 19, 23, and 29, 2020) apply to the Graham fraud claim by their description. If this Court affirms recovery for Graham on the consumer fraud claim, these four entries are recoverable.

award in this matter. The few billing entries cited by Graham do not warrant reversal of the attorney fee award and this Court should affirm the attorney fee award.

In the "Conclusion" of their brief, Graham requests an award of appellate attorney fees and for a chance to make application for those fees. "An award of appellate attorney fees is not a matter of right, but rests within our discretion." *In re Marriage of Berning*, 745 N.W.2d 90, 94 (Iowa Ct. App. 2007). The ability of a party to pay and the "needs" of a party making a request are factors considered in determining whether appellate fees should be awarded. *Id*

Bradshaw resists the request for appellate attorney fees. There is no evidence in the record regarding the needs of Graham for an award of fees or the ability of Bradshaw to pay fees. Further, Graham has no right to recover attorney fees related to Graham's breach of contract claim or the equitable claims raised by Bradshaw. In the event this Court considers an award of appellate fees, any amount must include consideration of the appellate issues raised in the briefs for which frees are not recoverable.

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COST CERTIFICATE

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

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