

IN THE SUPREME COURT OF IOWA

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BRADSAHW RENOVATIONS, LLC	)	
	)	
Applicant/Petitioner/Appellant/ Cross-Appellee,	)	S.C. NO. 22-1721
	)	
VS.	)	
	)	
BARRY GRAHAM and JACKLYNN GRAHAM,	)	
	)	
Resister/Respondent/Appellee/ Cross-Appellant.	)	

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

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APPELLANT’S APPLICATION FOR FURTHER REVIEW OF THE  
DECISION OF THE IOWA COURT OF APPEALS FILED OCTOBER 2,  
2024

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## Questions Presented

1. Did the Court of Appeals err in its ruling on an important question of law not yet settled by the Supreme Court, regarding what constitutes reckless conduct justifying an award of treble damages under the consumer fraud statute?
2. Did the Court of Appeals err in entering a ruling in direct conflict with a decision of this court, *Poller v. Okoboji Classic Cars, LLC* 960 N.W. 2d 496 (Iowa 2021), on an important matter regarding what constitutes an “ascertainable loss” needed to prove a consumer fraud claim?

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## Statement Supporting Further Review

The Iowa Court of Appeals erred in determining substantial evidence in this matter supported an award of statutory damages under Iowa Code § 714H.5(4), an issue of first impression in this state. Specifically, the Court of Appeals held “reckless conduct” meets the statutory requirement for an award of statutory treble damages requiring a claimant to prove “by a preponderance of clear, convincing, and satisfactory evidence” the reckless conduct “constitutes willful and wanton disregard for the rights or safety of another.” Iowa Code § 714H.5(4) (2023). As indicated in the Court of Appeals ruling, this is an issue of first impression in Iowa and, given the availability of treble damages under the statute, this question should be “settled by the Supreme Court.” I.R APP. P. 6.1103(1)(b)(2). (2024).

Additionally, the Court of Appeals ruling is in conflict with *Poller v. Okoboji Classic Cars, LLC*, 960 NW 2d 496 (Iowa 2021), a decision of this Court. This Court in *Poller* held there was no “ascertainable loss,” as required to prove a consumer fraud claim asserted under Iowa Code Chapter 714H, and, thus no damages, on facts the same as this matter. Determining what constitutes “an ascertainable loss” is a threshold question in determining whether consumer fraud claims proceed to the issue of damages and ultimately to a judgment. The Court of Appeals in this matter created uncertainty by entering a ruling

inconsistent with *Poller* and this Court should grant further review to address this inconsistency.

### **Statement of the Case**

Applicant, Bradshaw Renovations, LLC (“Bradshaw”) and Appellees Barry Graham and Jacklynn Graham (collectively “Graham”) entered into a written contract whereby Bradshaw agreed to perform certain construction services on the Graham home in Urbandale, Iowa, for a price certain. The scope of construction services expanded during the course of the work. Graham paid Bradshaw a total of \$140,098.79 for work done on their home. Bradshaw sought payment for an additional \$18,779.15 for the additional work it claimed to have performed on the Graham home beyond the original agreement. Graham refused to pay the additional amount and Bradshaw initiated litigation for breach of contract for the nonpayment of construction services. Graham counter-sued Bradshaw for breach of contract claiming deficiencies in the construction work and Bradshaw’s failure to follow the contractual process for expanding the scope of work. Graham also asserted a consumer fraud claim under chapter 714H of the Iowa Code regarding Bradshaw’s billing practices during the term of the agreement.

The parties tried the case to a jury in August 2022 with the jury returning a verdict in Graham’s favor awarding Graham breach of contract damages in the

amount of \$16,000.00, \$10,000.00 in actual damages on the consumer fraud claim, and \$30,000.00 in statutory treble damages on the consumer fraud claim. The district court subsequently entered judgment in Graham's favor awarding attorney fees pursuant to the consumer fraud statute in the amount of \$25,868.00.

Bradshaw appealed and Graham cross-appealed regarding issues with the attorney fee award. The matter was transferred to the Court of Appeals, which entered a ruling on October 2, 2024, affirming all issues and remanding this matter to the district court for consideration of appellate attorney fees. Bradshaw now applies for further review.<sup>1</sup>

### **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).

Graham owns a single-family home in Urbandale, Iowa, and in the

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<sup>1</sup> No issue is raised in this petition regarding either Bradshaw or Graham's breach of contract claims.

summer of 2019, 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 had 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.**

Based on the requested scope of work, Bradshaw estimated the cost of materials, its own labor expenses, subcontractor expenses, and company profit for each service, which is a markup on anticipated labor and material costs. (App. at 510:11-25; App. at 511:1-13; App. at 512:7-125; App. at 513:1-18). Bradshaw then prepared a written “estimate” detailing the scope of work and estimated “cost,” dated July 31, 2019, that included a description of each stage of the construction together with a lump-sum cost for that part or stage. (App. at 458-462). The estimate did not include a specific labor rate, nor a promise to charge Graham a certain labor rate and made no representation Bradshaw had not included a profit margin built in to the estimated cost. (App. at 463; App. at 516:11-23; App. at 651:1-9).

Graham was satisfied with the scope of services and the total costs of \$136,168.16 for that work and Bradshaw presented a contract to Graham, signed August 1, 2019, incorporating the estimate. (App. at 510:1-7; 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).

**C. Construction Work and Changes to Scope of Services.**

During the initial steps of construction Bradshaw discovered problems with the underlying concrete floor that had to be remedied. (App. at 518:14-22; 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).

Over the course of the work, a similar process was followed. Bradshaw would email Jackie Graham periodic invoices giving a general description of the work done and the lump sum charged for that work. Time and materials were not itemized, and until this dispute arose, Graham never asked for an itemization of time and materials.

In each invoice or the cover email, Bradshaw noted any additional work done beyond the original scope of work. All the changes reflected in these invoices were also discussed with Jackie and/or Barry and Jackie in person, who agreed to the changes in the scope of work. (App. at 523:4-16; App. at

529:25; App. at 530:1-6; App. at 535:8-16; App. at 651:18-25; App. at 652:1-7; App. at 674:20-25; App. at 675:1-11; App. at 545:14-24; App. at 465; App. at 546:8-17). There were no hidden charges or deception or attempts to mislead by Bradshaw with respect to these invoices. (App. at 525:14-20; App. at 531:21-25; App. at 539:12-22; App. at 549:4-12). After payment of the March 2020 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 Graham and included work to conclude the project, including a change regarding the exterior paint and completing a backsplash in the kitchen not included in the original contract. (App. at 551:9-15; App. at 552:8-19; 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). 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. (App. at 558:16-23). Josh 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).

**E. Graham's Counterclaim for Consumer Fraud.**

Graham's consumer fraud claim is based on Bradshaw's billing practices. Graham asserted the contract between the parties was a time and materials contract and they were thus overbilled by Bradshaw. (App. at 493; App. at 686:9-15). 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). Bradshaw disputed the contract was a time and materials contract and the parties agreed Bradshaw never stated it would charge a certain hourly rate for labor or only charge labor hours and materials. (App. at 516:8-10; App. at 651:1-9). Bradshaw hid no information from Graham and freely and voluntarily provided documents to Graham upon request once the dispute arose.

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). Graham agreed that for said 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).

## **ARGUMENT IN SUPPORT OF FURTHER REVIEW**

### **I. THE COURT OF APPEALS ERRED IN DETERMINING THIS CONDUCT JUSTIFIES AN AWARD OF STATUTORY DAMAGES IN A CONSUMER FRAUD CASE, AN ISSUE OF FIRST IMPRESSION IN IOWA.**

In order to recover statutory treble damages for a consumer fraud claim the Iowa Code requires “clear, convincing, and satisfactory evidence that a prohibited practice . . . constitutes willful and wanton disregard for the rights” of the aggrieved party. IOWA CODE § 714H.5(4) (2023). Prior to the court of appeals ruling in this matter, no Iowa court had determined what level of conduct meets the willful and wanton standard for these specific statutory damages.

The “willful and wanton disregard” standard in the consumer fraud statute is similar to the proof necessary for a punitive damage award. *See* IOWA CODE § 668A.1(a)(2023). Punitive damages 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). This standard "requires a showing of actual or legal malice." *McClure v. Walgreen Co.*, 613 N.W. 2d 225, 231 (Iowa 2000). Negligent conduct does not meet this high 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.

This Court has held willful and wanton conduct is "shown when an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." *Cantborn v. Cath. Health Initiatives Iowa Corp.*, 743 N.W. 2d 525, 529 (Iowa 2007) (internal quotation omitted). Further, as noted, the malice required to justify an award of statutory damages must be shown by *clear, convincing, and satisfactory evidence*.

The evidence supporting the statutory damage award is not clear and convincing, as the statute requires, and does not support the court of appeals conclusion Bradshaw acted intentionally and with a conscious indifference to the consequences. From the beginning of this litigation, the parties had differing views of the contract. Graham asserted it was a time-and-materials contract;

Bradshaw believed the contract was for a defined scope of services at a fixed cost. In fact, Bradshaw had billed Graham on that basis, providing a description of the work performed in each billing and the lump sum charged for that work. Graham never objected to these invoices and never requested additional information until after this dispute arose. Bradshaw understands the jury apparently concluded the parties had a time-and-materials contract, but a mere disagreement regarding the terms of a contract does not rise to the level of clear and convincing evidence of willful or reckless disregard for another's rights!

Moreover, Graham did not overpay based on their expectation under the original agreement. Following an amendment early on in the work, the total amount of the contract was \$139,168.16 and Graham paid Bradshaw a total amount of \$140,098.79, which included an additional payment of \$625.91 they provided above the March 2020 invoice amount. There is no action taken "in disregard of a known or obvious risk that was so great" that harm would follow to Graham. Bradshaw provided its raw data on the project once the dispute arose that included the total number of hours worked and what the company paid in labor expense to its employees. Bradshaw *never* represented to Graham they were being charged a certain hourly rate for labor. The first time any hourly rate was referenced is in information provided by Bradshaw to Graham after the dispute arose with the final invoice. At most, Bradshaw engaged in poor communication

and failed to follow the exact steps the contract required to expand the scope of services. The conduct here falls far short of willful and wanton disregard for Graham's rights.

In a very similar case, this Court held a party defending as a consumer fraud claim did not engage in conduct meeting the willful and wanton standard when it overbilled the claimant for work done, but not paid. *See Poller v. Okoboji Classic Cars, LLC*, 960 N.W. 2d 496, 524 (Iowa 2021). The facts in the *Poller* matter are strikingly similar to this case. There, the defendant asserted the claimant approved "modifications and change orders to the original scope" of work the parties agreed upon and that all charges on the invoices were approved verbally by the claimant. *Id.* at 517. The facts there also involved disputes regarding labor charges and a "markup of materials" in addition to the quality of restoration work done on an old vehicle. *Id.*

In addition to finding the claimant had no "ascertainable loss" as required under the consumer fraud statute, this Court determined there was no willful and wanton disregard of the claimant's rights supporting an award of statutory damages. The same issue is present here and the underlying claims nearly identical. The court of appeals erred in holding this record justifies the high standard of proof required for statutory damages in a consumer fraud claim.

**II. THE COURT OF APPEALS ERRED IN ENTERING A RULING IN THIS MATTER IN DIRECT CONFLICT WITH A PRIOR DECISION OF THIS COURT REGARDING WHAT CONSTITUTES AN ASCERTAINABLE LOSS REQUIRED TO PROVE A CONSUMER FRAUD CLAIM.**

The court of appeals ruling in this matter determining Graham sustained an ascertainable loss, an essential element of a consumer fraud claim, is in direct conflict with a prior decision of this Court.

Noted above, the *Poller* case is quite similar factually, despite involving a different industry, to the underlying facts supporting the Graham consumer fraud claim. There, claimant alleged the \$45,000.00 it paid to defendant for restoration of a classic vehicle was sufficient for the work done and consistent with claimant's understanding of what they agreed upon prior to the work beginning. *Poller*, 960 N.W. 2d at 502. Defendant counter-sued for non-payment of work after billing an additional \$67,396.15 for work done on the vehicle. *Id.* The dispute between the parties concerned what defendant was charging for labor per hour, a charge for markup by defendant on materials, and questions over whether the claimant approved work done "with periodic billings." *Id.* at 502-03.

The Court found defendant violated certain requirements under Iowa Code Chapter 537B relating to motor vehicle service practices. *Id.* at 516-17. Despite this finding, this Court held claimant did not have an ascertainable loss



because they expected to pay \$45,000.00 to defendant, did pay said amount for certain restoration services, and were not required to pay the additional amount the defendant sought for breach of contract. *Id.* at 523. In other words, the exact circumstances of this matter. The testimony was clear Graham expected to pay approximately \$140,000.00 for certain construction services on their home, did pay approximately \$140,000.00, received the services, and were not required to pay any additional amount to Bradshaw on its breach of contract claim based upon the Graham's expectation under the original contract.

Further, as noted above, despite the statutory violations committed by the defendant, this Court could not “conclude that the actions of [defendant] amount to willful and wanton disregard of the rights of their customers sufficient to support an amount of exemplary damages.” *Id.* at 524. In addition to the violations of chapter 537B of the Iowa Code, defendant therein was alleged to have committed billing errors regarding differences in hourly charges and a markup on work performed, exactly the allegations by Graham in this matter. The court of appeals decision here directly conflicts with the *Poller* decision from this Court.

Consumer fraud claims litigated under Iowa Code chapter 714H are common claims in construction disputes. The court of appeals ruling in this matter conflicts with what this Court previously held regarding what constitutes

an ascertainable loss and what conduct may meet the standard for treble damages under the statute. Following the court of appeals ruling in this matter there are now conflicting rulings on this important issue. Bradshaw respectfully submits this Court should grant further review to correct the conflicting rulings and provide guidance on the issue of first impression regarding required clear and convincing evidence to meet the high standard of willful and wanton disregard as required under the statute.

Respectfully Submitted,

**BERGKAMP, HEMPHILL & MCCLURE, P.C.**

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### **Certificate of Service**

Pursuant to Iowa Appellate Procedure 6.701, 6.702, and 6.901, the undersigned hereby certifies that on the 22nd day of October, 2024, this Application for Further Review was filed with the Supreme Court via EDMS and electronically served on all parties of record.

/S/ Matthew J. Hemphill  
Matthew J. Hemphill

### **Certificate of Compliance with Typeface Requirements, And Type-Volume Limitation**

This petition for further review complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.1103(4) because it is prepared in a proportionally spaced typeface using Microsoft Word in 14 point Garamond font and contains 3,107 words, excluding the parts of the petition exempted by Iowa R. App. P. 6.1103(5).

/S/ Matthew J. Hemphill  
Signature