IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 23-1308

POLK COUNTY NO. CVCV064749

JOHN DOSTART and DEENA DOSTART,

Plaintiffs-Appellees,

AND

COLUMBIA INSURANCE GROUP,

Defendant-Appellant.

INTERLOCUTORY APPEAL FROM THE IOWA DISTRICT COURT

IN AND FOR POLK COUNTY, IOWA

HONORABLE COLEMAN MCALLISTER, DISTRICT COURT JUDGE

APPELLEES JOHN DOSTART AND DEENA DOSTART'S FINAL BRIEF

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ROUTING STATEMENT

The Supreme Court should retain this case as it presents substantial issues of first impression and/or substantial questions of enunciating or changing legal principles, namely the application of insurance policies to consumer fraud judgment.

STATEMENT OF THE CASE

Appellees agree with the statement of the case contained in Columbia Insurance Group's Proof Brief filed on December 12, 2023, with the exception that the Dostarts obtained a judgment in a construction defect and *consumer* fraud case rather than a construction defect and fraud case. (App. 020-027; Petition).

STATEMENT OF FACTS

On or about October 18, 2017, Plaintiffs, Deena and John Dostart ("The Dostarts") contracted with Tyler Custom Homes, LTD and James Harmeyer to construct a custom built, single-family residence at 8756 NE 50th Avenue Altoona, Iowa ("Residence"). (App. 020-027; Petition) Due to the actions of Tyler Custom Homes, LTD and James Harmeyer ("Policyholder") on September 17, 2019, the

Dostarts filed suit against Tyler Custom Homes, Ltd., and its Owner James Harmeyer. (App. 020-027; Petition)

After a three day jury trial, on April 7, 2022, the jury found the Dostarts had proven their Consumer Fraud Claim and a verdict was returned in favor of the Dostarts against Tyler Custom Homes, Ltd. And its Owner. (App. 035-041; Verdict). Judgment was against Tyler Custom Homes, Ltd. and James Harmeyer and On June 14, 2022, the Court entered (App. 042-049; Judgment). That judgment was not appealed and general execution was issued. (App. 020-027; Petition) The execution was retuned unsatisfied and the judgment remains unsatisfied. (App. 020-027; Petition).

In this case, the Dostarts seek to establish Columbia Insurance Policy No. CMPIA0000002593 covers the damages awarded by the June 14, 2022 Judgment.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY DETERMINED THAT IT COULD NOT DETERMINE AS A MATTTER OF LAW THAT NO COVEREAGE EXISTED ON THE JUDGMENT

Preservation for Review.

The Dostarts agree that error has been preserved.

Scope and Standard of Review.

The Dostarts agree the summary judgment rulings are reviewed for corrections of errors at law as stated in Columbia Insurance Group's Proof Brief filed on December 12, 2023.

The standards of review for summary judgment are well established and correctly set forth by the District Court. (App. 302-303; Ruling p.1-2)

A. THE DISTRICT COURT CORRECTLY DETERMINED THAT CONSUMER FRAUD MAY BE AN "OCCURRENCE" COVERED BY THE POLICY

Columbia's asserts the Policy does not cover the judgment because consumer fraud can never be an occurrence under the policy. The Columbia Policy provides that the term "occurrence" is:

> 13. "Occurrence" means an accident, including continuous or repeated exposure to substantially the same general harmful conditions."

(See APP 113; Exhibit 7, pg. 60.)

In support of this assertion Columbia relied on *Yegge*. Proof Brief, p. 13. However, Columbias reliance on *Yegge* is misplaced. *Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995). In *Yegge,* the judgment against the insured was for Iowa's general fraud statute instead of the Consumer Fraud statute at issue in this case. *Id.*

Iowa's Consumer Fraud Statute is not the same as Common Law Fraud nor do they require proving the same elements. Compare Iowa Code § 714H and Iowa Code § 714. Consumer fraud is defined by the following prohibited practices:

> 1. A person shall not engage in a practice or act the 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.

Importantly, Iowa's consumer fraud "does not require knowledge with respect to the omission or concealment of a material fact." State ex rel. Miller v. Pace, 677 N.W.2d 761, 771 (Iowa 2004) (citing See Miller, 260 Ill. Dec. 735, 762 N.E.2d at 12) (holding "innocent misrepresentations or material omissions" are actionable under consumer fraud law that included "the concealment, suppression or omission of any material fact" within definition of unlawful practice)(citations omitted).

A claim of consumer fraud can occur without an intentional misrepresentation and no intent to deceive must be shown. Rather it is only based upon the intent to rely. Specifically in analyzing Iowa Consumer Fraud Statutes, the Iowa Supreme Court Held in *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004):

> we point out that it is not necessary for the State to prove that the violator acted with an intent to deceive, as is required for common law fraud. *See Miller v. William Chevrolet/GEO, Inc.*, 326 Ill.App.3d 642, 260 Ill.Dec. 735, 762 N.E.2d 1, 12 (2001) (interpreting identical statutory language and stating, "Nor need

> the defendant have intended to deceive the [investor]."); *Gennari v. Weichert Co. Realtors,* 148 N.J. 582, 691 A.2d 350, 365 (1997) (interpreting nearly identical statutory language and stating, "[a]n intent to deceive is not a prerequisite to the imposition of liability"). As we noted above, the only intent required by the statute is that the defendant act "with the intent *that others rely* " upon his omissions. Iowa Code § 714.16(2)(*a*) (emphasis added).

State ex rel. Miller v. Pace, 677 N.W.2d 761, 771 (Iowa 2004)

Columbia argues that other jurisdictions hold that misconduct associated with consumer transactions are not covered as occurrences. Columbia Proof Brief, p. 16.

> Moreover, the facts contained in both counts describe intentional behavior, stating that the defendants misrepresented material facts, that the plaintiff reasonably relied on those facts, and that the defendants intended to deceive the plaintiff and induce him to contract with and pay the defendants. While the claims do include

> the words "negligently or mistakenly," they advance no facts or legal theory to support negligent or mistaken fraud.

Thorn v. Am. States Ins. Co., 266 F. Supp. 2d 1346, 1351 (M.D. Ala. 2002), *aff'd*, 66 F. App'x 846 (11th Cir. 2003).

In fact, the *Thorn* case specifically finds that "[a]llegations of negligent or innocent misrepresentation could be covered if the conduct was an "occurrence" that caused either "bodily injury" or "property damage" and the conduct occurred during the policy period." *Id.*

Based on the foregoing, the District Court correctly determined that at the summary judgment stage and it could determine as a matter of law "that the insured's actions in this case did not fit within the definition of an "occurrence" such that coverage is not available." (APP 306; Ruling p. 5).

B. THE DISTRICT COURT CORRECTLY DETERMINED THE JUDGMENT MAY INCLUDE PROPERTY DAMAGE COVERED BY THE POLICY

Columbia assets that the only damages sought by the Dostarts in the underlying action simply "consist[] of the cost of completing their unfinished home." Proof Brief p. 17. This is not true. As the Court recognized "the Dostarts have provided an expert witness report that, when taken in the light most favorable to the Plaintiffs, supports a conclusion that property damage did result from the actions of Columbia's insured. (APP. 307; Ruling, p. 6). In determining if the insurer owes coverage, Courts construe the policy and look to the pleadings of third party actions and all other admissible and relevant facts in the record to ascertain whether there is coverage under the policy for the claims. *Kartridg Pak Co. v. Travelers Indem. Co.*, 425 N.W.2d 687, 689 (Iowa Ct. App. 1988).

More importantly, the Columbia policy does not limited Property damage to physical injury to tangible property. Rather, "Property damage means:

> 17. "Property damage" means:
>
> a. Physical injury to tangible property, including all resulting loss of use of that property. All such loss of use shall be deemed to occur at the time of the physical injury that cause it; or

> b. Loss of use of tangible property that is not physically injured. All such loss of use shall be deemed to occur at the time of the "occurrence" that caused it.

Columbia MSJ Ex. 7, p. 61.

Unlike *Yegge*, the Dostarts did not have an "unfinished home" but rather had a home with significant damage that needed to be completed. The record before the district Court established there was actual property damage to the Dostarts' home and loss of use that resulted therefrom.

Based on the foregoing, the District Court correctly determined that under the summary judgment standard at the summary judgment stage and it could not determine as a matter of law there was no property damage as defined under the policy. (APP 306; Ruling p. 5).

C. THE DISTRICT COURT CORRECTLY DETERMINED THE INTERNTIONAL ACT EXCLUSION MAY NOT APPLY.

Columbia asserts that they do not have coverage for loss "which results from an act committed by or at the direction of an insured with the intent to cause loss." (Proof Brief, p. 21) The Dostarts agree

that Iowa law has long recognized the intentional act exclusion to insurance coverage. However, as set forth above, a claim of consumer fraud can occur without an intentional misrepresentation and no intent to deceive must be shown. Rather it is only based upon the intent to rely. Again, in analyzing Iowa Consumer Fraud Statutes, the Iowa Supreme Court Held in *State ex rel. Miller v. Pace*, 677 N.W.2d 761, 771 (Iowa 2004):

> we point out that it is not necessary for the State to prove that the violator acted with an intent to deceive, as is required for common law fraud. *See Miller v. William Chevrolet/GEO, Inc.*, 326 Ill.App.3d 642, 260 Ill.Dec. 735, 762 N.E.2d 1, 12 (2001) (interpreting identical statutory language and stating, "Nor need the defendant have intended to deceive the [investor]."); *Gennari v. Weichert Co. Realtors*, 148 N.J. 582, 691 A.2d 350, 365 (1997) (interpreting nearly identical statutory language and stating, "[a]n intent to deceive is not a prerequisite to the imposition of liability"). As we noted above, the only intent required by the statute is that the

> defendant act "with the intent *that others rely* " upon his omissions. Iowa Code § 714.16(2)(*a*) (emphasis added).

State ex rel. Miller v. Pace, 677 N.W.2d 761, 771 (Iowa 2004) :

Based on the foregoing, the District Court correctly determined that at the summary judgment stage and it not could determine as a matter of law the Intentional Act Exclusion precludes recovery. (APP 306; Ruling p. 5).

CONCLUSION

Iowa courts prefer to decide cases on their merits. *Rucker v. Taylor*, 828 N.W.2d 595, 603 (Iowa 2013). Yet Columbia seeks to limit the fact finding role of the District Court by seeking to have the Court render a decision based on only one piece of evidence without the context of underlying evidence presented in the underlying case.

For the reasons stated herein, this Court should affirm the District Court's denial of Columbia's Motion for Summary Judgment and remand this matter for further proceedings.

STATEMENT REGARDING ORAL ARGUMENT

Appellees, John and Deena Dostart ask for this matter be set for oral argument.

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CERTIFICATE OF ELECTRONIC FILING

I certify that I have filed this Final Brief was filed with the Clerk of the Iowa Supreme Court through the electronic document management system on February 29, 2024.

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CERTIFICATE OF SERVICE

I certify that February 29, 2024, I served this Final Brief through the electronic document management system upon these attorneys:

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CERTIFICATE OF COMPLIANCE

1. This Brief follows the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1), because this Brief has 1,803 words, excluding the parts exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This Brief follows 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 the Brief has been prepared in a proportionally spaced typeface using Bookman Old Style font and using the 2018 edition of Microsoft Word in 14-point font plain style.

/s/ Billy J. Mallory
Billy J. Mallory

CERTIFICATE OF ATTORNEY'S COSTS

I certify that the cost of printing the foregoing Appellees' Final Brief was $0.00 (exclusive of sales tax, postage and delivery).

/s/ Billy J. Mallory
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