

**IN THE IOWA SUPREME COURT  
NO. 23-1308  
(Polk County No. CVCV064749)**

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**JOHN DOSTART and DEENA DOSTART,**

**Plaintiffs-Appellees,**

**v.**

**COLUMBIA INSURANCE GROUP,**

**Defendant-Appellant.**

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**INTERLOCUTORY APPEAL FROM IOWA DISTRICT COURT FOR  
POLK COUNTY JUDGE COLEMAN MCALLISTER'S RULING DATED  
JULY 20, 2023 ON COLUMBIA INSURANCE GROUP'S MOTION FOR  
SUMMARY JUDGMENT**

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**APPELLANT COLUMBIA INSURANCE GROUP'S  
REPLY BRIEF**

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## TABLE OF CONTENTS

Table of Authorities .....	3
Statement of Issues Presented for Review .....	3
Argument.....	4
I.    Coverage Should Be Determined as a Matter of Law .....	4
A. The Fraud of Mr. Harmeyer and Tyler Custom Homes, Ltd. Is Not an “Occurrence” .....	4
B. The Jury Damages Award Against Mr. Harmeyer and Tyler Custom Homes, Ltd. Is Not for Covered Damages .....	6
C. Mr. Harmeyer’s and Tyler Custom Homes, Ltd.’s Fraud Is an Intentional Act Excluded from Coverage .....	8
Conclusion .....	9
Certificates of Cost, Filing & Service & Compliance .....	10

**TABLE OF AUTHORITIES**

**Statutes and Rules**

Iowa Code § 714H.3 .....4

**Cases**

*Thorn v. Am. States Ins. Co.*, 266 F. Supp. 2d. 1346 (M.D. Ala.) (2022) .....6

*Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995).....5, 7

**STATEMENT OF ISSUES PRESENTED FOR REVIEW**

Is Columbia Insurance Group obligated to pay the judgment that John Dostart and Deena Dostart obtained against Tyler Homes, Ltd. and James Harmeyer?

**Subissue 1: Is Mr. Harmeyer’s and Tyler Custom Homes, Ltd.’s Consumer Fraud An “Occurrence”?**

*Thorn v. Am. States Ins. Co.*, 266 F. Supp. 2d. 1346 (M.D. Ala.) (2022) .....6

*Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995).....5

**Subissue 2: Is the Jury Award Against Mr. Harmeyer and Tyler Custom Homes, Ltd. for “Property Damage” or Other Types of Covered Damages?**

*Yegge v. Integrity Mut. Ins. Co.*, 534 N.W.2d 100 (Iowa 1995).....7

*Smith v. All Stor Fort Knox, LLC*, 2018 Iowa App. LEXIS 749 (Iowa Ct. App. 2018) (citing *Bank of Am., N.A. v. Schulte*, 843 N.W.2d, 876, 883 (Iowa 2014)) ..7, 8

## ARGUMENT

### I. Coverage Should Be Determined as a Matter of Law.

The Dostarts claim that coverage cannot be determined as a matter of law. Yet, the Dostarts do not cite a single fact requiring jury determination. This reflects that the dispute between the parties is fundamentally legal in nature. It was error for the district court to determine that there are issues of fact precluding judgment in Columbia's favor.

#### A. The Fraud of Mr. Harmeyer and Tyler Custom Homes, Ltd. Is Not a Covered "Occurrence."

The Dostarts' Brief misrepresents Columbia's position as: "the Policy does not cover the judgment because consumer fraud "can never be an occurrence under the policy." (Dostarts' Brief, P. 8) (emphasis added). This is not Columbia's position. Columbia's position is that, under the specific circumstances of this case, Mr. Harmeyer's and Tyler Custom Homes, Ltd.'s consumer fraud is not an "occurrence" covered by Columbia's policy. The Court does not need to decide whether, hypothetically, consumer fraud can ever be an "occurrence" under insurance policy language.

As previously set forth in Columbia's Brief (P. 15), this case involves a judgment against Mr. Harmeyer and Tyler Custom Homes, Ltd. for consumer fraud in violation of Iowa Code section 714H.3. (Verdict, App. 37-38). The jury found fraud was willful and wanton, thus awarding punitive damages. (Verdict,

App. 38-39). Therefore, it is clear that the jury did not consider consumer fraud, in this particular case, to be merely accidental.

The Dostarts make no attempt to resist or otherwise respond to Columbia's argument that consumer fraud, where punitive damages are awarded, is not accidental and thus not a covered "occurrence." The Court should accordingly dispose of this appeal on the grounds that, given the jury's award of punitive damages for Mr. Harmeyer's and Tyler Custom Homes, Ltd.'s consumer fraud, their consumer fraud was non-accidental and thus not an "occurrence" as defined by Columbia's policy. Consequently, Columbia has no coverage obligation, as a matter of law.

The Dostarts argue that *Yegge v. Integrity Mutual* is distinguishable. 534 N.W.2d 100 (Iowa 1995). *Yegge* involves common law fraud rather than violation of Iowa's consumer fraud statute, Iowa Code section 714H.3. This difference does not matter. In both *Yegge* and this case, the fraud was clearly intentional and non-accidental. Both cases involve the award of punitive damages, reflecting that both cases involved willful, wanton conduct. *Yegge*, N.W.2d at 101-02; (Verdict, App. 38-39).

Also, to be found liable for statutory consumer fraud, Mr. Harmeyer and Tyler Custom Homes, Ltd. had to engage in a practice or perform an act they should have known was deceptive, with the intent that the practice or act would be

relied upon. (Jury Instruction, App. 212). Statutory consumer fraud consequently involves an inference that a party has deceptive intent. Whether intent to defraud has to be specifically proven (in the case of common law fraud) or is statutorily inferred (in the case of consumer law fraud), both common law fraud and statutory fraud involve conduct that is ultimately non-accidental in nature.

The portions of *Thorn v. Am. States Ins. Co.* that the Dostarts cite have no apparent relevance to this case. 266 F. Supp. 2d. 1346 (M.D. Ala. 2022); *see* Dostarts' Brief, PP. 11-12. *Thorn* involved an argument that claims of negligent misrepresentation were covered by an insurance policy. *Id.* at 1352-53. In the case against Mr. Harmeyer and Tyler Custom Homes, Ltd., negligent misrepresentation was undisputedly neither pled nor proven. (Petition, App. 20-27; Verdict, App. 35-39). In short, this case has nothing to do with negligent misrepresentation.

**B. The Jury Damages Award Against Mr. Harmeyer and Tyler Custom Homes, Ltd. Is Not for Covered Damages.**

The Dostarts incorrectly say they are resisting Columbia's position that "the only damages sought by the Dostarts in the underlying action . . . 'consist[ ] of the cost of completing their unfinished home.'" (Dostarts' Brief, P. 12). That is not Columbia's position.

Columbia's position is that regardless of what damages the Dostarts asked for at trial, and regardless of what damages their expert may have testified to, the jury only awarded costs of completing the unfinished home against Tyler

Custom Homes, Ltd. No other damages were awarded against Tyler Custom Homes, Ltd. This is obvious from the jury verdict form, which specifically states that \$118,808.30, “the reasonable cost of completing the home,” is awarded for consumer fraud against Tyler Custom Homes, Ltd. (Verdict, App. 38). *Yegge* leaves no doubt that costs of home completion are not “property damage” under a commercial general liability policy. *Yegge*, 534 N.W.2d at 101-02.

The Dostarts now claim the underlying case involved damages for not only costs of completion, but also loss of use of their home. (Dostarts’ Brief, P. 13). In fact, the jury verdict form shows no damages awarded for loss of use. (Verdict, App. 37-38). Because loss of use damages were not awarded by the jury, there is no genuine dispute over coverage for such damages. Also, no issue relating to loss of use was argued or ruled upon in district court, so error was not preserved as to this issue. *Smith v. All Star Fort Knox, LLC*, 2018 Iowa App. LEXIS 749, at \*3-\*4 (Iowa Ct. App. 2018) (citing *Bank of Am., N.A. v. Schulte*, 843 N.W.2d. 876, 883 (Iowa 2014)).

The Dostarts additionally argue (without citation to the record) their home was technically not “unfinished” and in need of completion. (Dostarts’ Brief, P. 13). The Dostarts specifically say in their Petition, however, that Mr. Harmeyer and Tyler Custom Homes, Ltd. did not “complete[ ] the construction of the Residence.” (Petition ¶ 12, App. 21). Damages were awarded for costs of

completion, which implies the home remained unfinished. (Verdict, App. 38). At any rate, the Dostarts do not exactly explain why it would make a difference whether the home was finished or not. Error was also not preserved on this argument. *See Smith*, 2018 Iowa App. LEXIS 749, at \*3-\*4.

The Dostarts offer no argument in response or in resistance to Columbia's position that damages awarded against James Harmeyer, personally, are intangible economic losses rather than covered property damage. (Columbia Brief, PP. 17-18). These damages included expenses/costs of temporary living, moving expenses and the cost of a loan extension. (Verdict, App. 37). Thus, the Court should find the damages awarded against Mr. Harmeyer could not be considered "property damage" as a matter of law.

**C. Mr. Harmeyer's and Tyler Custom Homes, Ltd.'s Fraud Is an Intentional Act Excluded from Coverage.**

With regard to applicability of the intentional acts exclusion, the Dostarts repeat their argument that consumer fraud can, hypothetically, be accidental. Again, there is no response to Columbia's position that, under the circumstances of the case actually before the Court, consumer fraud was intentional. Under the circumstances of this case, which involve an award of punitive damages for consumer fraud, clearly the conduct at hand was not accidental in the eyes of the jury.



## CONCLUSION

Columbia Insurance Group has no obligation to provide coverage for the judgment obtained by the Dostarts in Case No. LACL145712. As such, Columbia Insurance Group has no obligation to indemnify Tyler Custom Homes, Ltd. or James Harmeyer with regard to the consumer fraud judgment against them. Put another way, Columbia Insurance Group has no obligation to tender payment to the Dostarts for the conduct of Tyler Custom Homes, Ltd. or James Harmeyer. Columbia Insurance Group requests that the Court find that the district court erred, and direct that summary judgment should be entered in favor of Columbia Insurance Group.

Respectfully Submitted,

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CERTIFICATE OF COST

Pursuant to Iowa Rule of Appellate Procedure 1.903(2)(j), I certify that the costs actually paid for printing briefs in final form is currently \$0.

By /s/ Allison J. Frederick

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on February 29, 2024, the foregoing Reply Brief was filed via the appellate e-filing system and additionally served on counsel for the Dostarts, as identified below, via the e-filing system.

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CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND  
TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:  
This brief has been prepared in a proportionally spaced typeface using Times New Roman in font size 14 and contains 1,291 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

By /s/ Allison J. Frederick