STATE JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

1. State your full name.

Patrick Andrew McElyea

2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)

District Court Judge, District 7

3. State your date of birth (to determine statutory eligibility).

02/26/1982

4. State your current city and county of residence.

Davenport, Scott County

PROFESSIONAL AND EDUCATIONAL HISTORY

5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.

2006-2008: Drake University Law School, Des Moines, Iowa. Awarded a Juris Doctorate degree with Honors.

2005-2006: University of Detroit Mercy Law School, Detroit, Michigan. I transferred to Drake University Law School because I wanted to continue my legal education in Iowa and become an Iowa lawyer.

2001-2004: Central College, Pella, Iowa. Awarded a Bachelor of Arts degree with majors in History and Political Science.

2000-2001: Coe College, Cedar Rapids, Iowa. I transferred to Central College because I felt more connected to the college and the community of Pella. I also had the opportunity to fulfill my athletic goals by playing on a nationally ranked golf team.

6. Describe in reverse chronological order all of your work experience since graduating from college, including:

a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.

1/2018-Present: District Court Judge, State of Iowa, 7th Judicial District, 400 W. 4th Street, Davenport, Iowa 52801, Hon. Henry Latham.

11/2016-12/2017: Special Assistant United States Attorney, State of Iowa, United States Attorney's Office, 131 E. 4th Street, Davenport, Iowa 52801, Acting U.S. Attorney Rich Westphal.

12/2012-11/2016: Assistant Scott County Attorney, Scott County, Iowa, Scott County Attorney's Office, 400 W. 4th Street, Davenport, Iowa 52801, Scott County Attorney Mike Walton.

1/2011-11/2012: Assistant Wapello County Attorney and Prosecutor for the Southeast Iowa Drug Task Force, Wapello County Attorney's Office, 219 N. Court Street, Ottumwa, Iowa 52501, Former Wapello County Attorney Lisa Holl.

8/2010-12/2010: Research Attorney, Special Counsel-Bloomberg Law, 504 Lavaca Street Suite 1004, Austin, Texas 78701, Libby Gagne, Supervisor.

9/2008-5/2010: Associate Attorney and Assistant Iowa County Attorney, Law Offices of Harned & McMeen and Iowa County Attorney's Office, 888 Court Avenue, Marengo, Iowa 52301, Iowa County Attorney Tim McMeen.

5/2007-8/2007: Summer Associate, Bradshaw, Fowler, Proctor & Fairgrave, 801 Grand #3700, Des Moines, Iowa 50309, Greg Kenyon.

5/2006-8/2006: Summer Extern for Hon. Thomas E. Jackson (Ret.), Frank Murphy Hall of Justice, 2 Woodward Avenue, Detroit, Michigan 48226, no supervisor or colleague to name.

3/2005-8/2005: Bartender, Olive Garden, 367 Collins Road NE, Cedar Rapids, Iowa 52402, no supervisor or colleague to name.

3/2005-8/2005: Golf Course Maintenance Crew Member, Indian Creek Country Club, 2401 Indian Creek Road, Marion, Iowa 52302, no supervisor or colleague to name.

9/2004-3/2005: Sales Associate, Midamerican Aerospace, 2727 16th Avenue SW, Cedar Rapids, Iowa 52404, Shawn Abdoney.

b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.

No prior service.

7. List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.

Admitted to the Iowa Bar in September 2008 and have maintained an active membership throughout my career.

8. Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:

a. A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.

2008-2010: I worked at Harned & McMeen, a small general practice firm in Marengo, Iowa and the office of the Iowa County Attorney. I worked both as an associate of the firm and as an Assistant County Attorney. As an associate, I represented private clients in family law matters, real estate transactions, estate planning, and income tax. My typical clients were individuals in the surrounding rural communities. As Assistant County Attorney, I represented the State of Iowa in felony and misdemeanor offenses in District Court, simple misdemeanors, and covered the majority of the juvenile docket. In this position, I gained experience in the private practice of law in a small community and

represented the State of Iowa in court proceedings. My time was equally divided (33% each) between juvenile court, criminal district court, and private practice clients.

2010-2011: My wife and I moved to Austin, Texas where she finished the final year of her doctorate in counseling psychology. As a contract attorney, I conducted legal research that helped build a legal research database called Bloomberg Law. I developed research products related to government affairs, including analysis of recent case law, legislation, and agency rulemaking. I spent 100% of my time reviewing recent case law developments in civil and business litigation.

2011-2012: As an Assistant County Attorney in Wapello County, I represented the State of Iowa in two very distinct roles. I began with Wapello County as the Violence Against Women Act prosecutor and handled primarily sex abuse and domestic abuse offenses. I then transitioned within the office to become the prosecutor for the Southeast Iowa Inter-Agency Drug Task Force where I prosecuted all felony drug offenses in four rural counties (Davis, Keokuk, Wapello, and Van Buren) in Southeast Iowa. 100% of my work was in criminal district or district associate court.

2012-2016: As an Assistant County Attorney in Scott County, I represented the State of Iowa at every level of our court system. When I began in the office, I prosecuted simple misdemeanors through felonies and covered juvenile court hearings. The juvenile hearings involved representing the State in juvenile delinquencies and in cases where the Department of Human Services alleged children were in need of assistance. Later in my tenure, I was promoted to Major Case Prosecutor tasked with prosecuting the more serious felony offenses. In this role, 25% of my time was spent in juvenile court with the remaining 75% of my time spent in criminal district and associate court.

2016-2017: I served as a Special Assistant United States Attorney with the Southern District of Iowa. The office covered nine counties in southeast Iowa. I represented the United States of America in federal narcotics and weapons cases originating out of those counties. 100% of my time was spent in the United States District Court for the Southern District of Iowa.

2018-Present: I currently serve as District Court Judge for the Judicial District. Our district encompasses Cedar, Clinton, Jackson, Muscatine, and Scott counties. As a District Court Judge, I preside over nearly every type of case within the Iowa court system, including criminal, civil, family, and probate areas of the law. I assist with our juvenile docket when needed, and I am currently the presiding judge for the Seventh Judicial Mental Health Court. 70% of my work is divided between criminal and family law cases. The remaining 30% is divided between the civil, probate, and juvenile areas of the law.

b. The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.

I have always practiced in Iowa District Court or the Southern District of Iowa federal courts. My non-litigation experience involves real estate and income tax. I have not appeared before any other tribunals outside of the Iowa District Court and the Southern District of Iowa federal courts.

c. The approximate percentage of your practice that involved litigation in court or other tribunals.

Nearly 100% of my practice has involved litigation in court. Throughout my career I have appeared in court on a daily or weekly basis. I have courtroom experience at all of the trial court levels in Iowa. I have appeared in front of magistrates, district associate judges, and district court judges.

d. The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.

As an attorney, approximately 95% of my litigation was criminal and about 5% was civil. As a trial court judge, about 60% of my experience is criminal and the remaining 40% is civil.

e. The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.

From 2012 until being appointed to the bench in December 2017, I tried approximately forty trials to conclusion. Nearly all of my trial experience was as sole counsel with one or two trials as chief counsel and one trial as associate counsel.

f. The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.

I participated in one appeal in the last 10 years, as an attorney. It was an appeal in federal district court to the Eighth Circuit Court of Appeals. I was sole counsel.

9. Describe your pro bono work over at least the past 10 years, including:

a. Approximate number of pro bono cases you've handled.

b. Average number of hours of pro bono service per year.

c. Types of pro bono cases.

Nearly my entire career has been as an attorney for the government. The ethical rules prohibited me from performing any pro bono work while serving as an attorney for a governmental agency.

10. If you have ever held judicial office or served in a quasi-judicial position:

a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.

I have held the position of District Court Judge in the 7th Judicial District since January 5, 2018. I was appointed by Gov. Reynolds on December 1, 2017 after being selected by the local judicial nominating commission to interview with the Governor.

The Iowa District Court is a court of general jurisdiction. I hear cases involving civil, criminal, family, juvenile, and probate matters.

b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.

Beverage v. Alcoa; Scott County Case LACE129455; Iowa Supreme Court Citation 975 N.W.2d 670 (Iowa 2022).

In re Marriage of Nygren; Scott County Case CDCD061372; Iowa Court of Appeals Citation 975 N.W.2d 48 (Iowa App. 2022).

In re Marriage of Mau; Scott County Case CDCD062469; Iowa Court of Appeals Citation 964 N.W.2d 358 (Iowa App. 2021).

State v. Parrow; Scott County Case OWCR395411; Iowa Court of Appeals Citation 966 N.W.2d 147 (Iowa App. 2021).

c. List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.

State v. Cahill; Muscatine County Case FECR059164; Iowa Supreme Court Citation 972 N.W.2d 19 (Iowa 2022).

11. If you have been subject to the reporting requirements of Court Rule 22.10:

a. State the number of times you have failed to file timely rule 22.10 reports.

I have timely filed all of my 22.10 reports with the exception of December 2020, which was 3 days overdue.

b. State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:

i. 120 days.

None.

ii. 180 days.

None.

iii. 240 days.

None.

iv. One year.

None.

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

a. Title of the case and venue,
b. A brief summary of the substance of each matter,
c. A succinct statement of what you believe to be the significance of it,
d. The name of the party you represented, if applicable,
e. The nature of your participation in the case,
f. Dates of your involvement,
g. The outcome of the case,
h. Name(s) and address(es) [city, state] of co-counsel (if any),
i. Name(s) of counsel for opposing parties in the case, and
j. Name of the judge before whom you tried the case, if applicable.

State of Iowa v. Annette Cahill Muscatine County District Court

This was a criminal case involving a murder that happened in 1992. The defendant was charged with first degree murder in 2018 due to newly discovered evidence. In 2017, a cold case detective with the Division of Criminal Investigations interviewed a nurse who would later testify that she heard the defendant (Cahill) confess to the murder a few weeks after it happened.

I presided over this case as a District Court Judge from June 2018 through November 2019. The defendant was found guilty of second-degree murder after the second jury trial. The attorneys representing the State were Alan Ostergren and Coleman McCallister (first trial only). The attorneys representing the defendant were Elizabeth Araguas and Clemens Erhdahl (deceased).

This case was significant for me as it presented challenging legal and logistical issues. This was the first Class A felony trial I presided over as a judge, and because it was a "cold case" there was a very specific legal issue related to delayed prosecution. The Defendant filed a motion to dismiss the case alleging the State failed to prosecute her in a timely fashion. I have included this ruling as part of my application. In addition to the legal issues, this case presented multiple logistical challenges that required thoughtful consideration and collaborative problem-solving with courthouse staff. The entire trial had significant media coverage, and it was featured on Dateline after it concluded. The first jury trial had to be conducted in an offsite location due to courthouse construction and resulted in a hung jury mistrial. The second jury trial included a previously undisclosed lab report from the state crime lab. The lab report issue required a ruling during the trial followed by a ruling on an in-depth post-trial motion challenging the guilty verdict. The Iowa Supreme Court affirmed Cahill's conviction in 2022.

Cueno v. Healthcare of Iowa, Inc. Jackson County District Court

This case involved the death of an elderly woman at a nursing home in Bellevue, Iowa. She passed away after being injured in a fall at the nursing home. As a result of her death, her family filed a civil suit against the nursing home for wrongful death. As a District Court Judge, I presided over the two-week jury trial in December 2019. The jury awarded the plaintiff's $800,000 in compensatory damages and $1,370,000 punitive damages. The attorneys for the plaintiff were Presley Henningsen and Benjamin Long. The attorneys for the defendant were Patrick Sullivan and Holly Logan.

This case is significant because it presented several unique legal issues. The first was an important pre-trial motion related to other falls at the nursing home, which asked me to decide whether the jury would be able to hear evidence about these falls. This motion was argued on the eve of trial and required a timely ruling. Next, there was a case-specific legal issue related to the jury instructions. The Plaintiffs requested the jury be instructed that any violation of a nursing home regulation be deemed negligence automatically. Finally, this case involved the issue of punitive damages against the nursing home and whether or not there was a legal basis for those punitive damages. On a post-trial motion, I decided to vacate the award of punitive damages based on the legal standard that needed to be applied. The decisions I made in this case were affirmed by the Court of Appeals on June 16, 2021.

In Re: John Maxwell, Scott County Supervisor, Scott County District Court

This matter came before the district court as an appeal from a vacancy decision by the Scott County Vacancy Panel. A panel made up of the auditor, recorder, and treasurer determined that John Maxwell had vacated his position as a member of the Scott County Board of Supervisors by his election to the North Scott Community School Board. The challenge to Maxwell's status as an elected official centered around his participation on the city conference board. By holding the offices of supervisor and school board member, he was part of two voting units on the city conference board.

I presided over this case as a District Court Judge in March 2021. On March 8, 2021, the legislature passed a law permitting persons to serve as elected officials in multiple voting units as long as they waived their participation such that they were only representing one voting unit on the conference board. The hearing I presided over happened on March 26, 2021. My decision in the case was to reverse the decision of the vacancy panel and reinstate John Maxwell as a supervisor. John Maxwell was represented by attorney Alan Ostergren and the Petitioners were represented by attorney James Larew. The decision was not appealed.

This appeal gave me the opportunity to serve as an appellate judge and review persuasive authority along with a newly enacted law to determine the right decision. The facts and the law of the case were a matter of first impression, meaning they had never been addressed by another court. Further, this was a rare opportunity for me as a District Court Judge to review the record of a previous decision and determine whether it was in accordance with the law. I believe my decision in this case demonstrates my ability to serve as an appellate judge.

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

Two non-litigation experiences have enhanced my ability to serve as a judge. The first was my time spent as a private practitioner with Harned & McMeen in Marengo, Iowa. This experience helped me understand the professional life of a small law firm business owner as part of a small-town general practice firm located in the county seat. That experience has enhanced my judicial career because I value the time I spend in some of our smaller communities. I feel as though I have an understanding of the lawyers who practice there, the courthouse staff, and the litigants. Without my experience in Marengo, I do not think I would have the same appreciation for the more rural communities that make up our district and our state.

The second non-litigation experience that has enhanced my judicial career would be my work with Bloomberg Law in Austin, Texas. I have always enjoyed legal research, but my work with Bloomberg provided me with legal research skills from the standpoint of a practitioner. These skills have been very useful as a judge. I am comfortable doing

my own research for rulings and I am able to quickly research issues that arise during a trial or hearing.

14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.

I have never held or sought public office.

15. If you are currently an officer, director, pa rtner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

a. Name of business / organization.
Vera French Housing Corporation

b. Your title.
Director and current President of the Board of Directors

c. Your duties.
Manage board meetings and provide oversight of the operations of the corporation.

d. Dates of involvement.
I have been on the board since 2013, and I have been President since Spring of 2021.

a. Name of business / organization.
Quad Cities Bike Club

b. Your title.
Awards Director

c. Your duties.
Coordinate the purchasing and distribution of various awards for members of the bike club throughout the year.

d. Dates of involvement.
I began volunteering in 2021 and officially joined the Board in July 2022.

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

2008-2010: Member of the Iowa County Bar Association, served as President in 2009.

2011-2012: Member of the Wapello County Bar Association.

2012-Present: Member of the Scott County Bar Association. I served on the Executive Council from 2015-2017.

2008-Present: Member of the Iowa Bar Association, serving on the Executive Council of the Young Lawyers Division from 2012 through 2016. I was a member of the Ethics Opinion Committee from 2013 through 2016.

2018-Present: Member of the Iowa Judges Association. I currently serve on the Board as the District 7 Representative.

2018-Present: Member of the Dillon Inn of Court.

2019-Present: 7th Judicial Problem-Solving Court Task Force member as a result of my service as the Seventh Judicial Mental Health Court presiding judge.

May 2022 - Present: Member of the Drake Law School Recent Alumni Engagement Board.

In addition to these memberships, I have served on numerous committees as a District Court Judge to assist Court Administration and the Judicial Branch with various initiatives. Those committee assignments range from administrative policy changes, implementing new procedures to conform with statutory changes, and serving as a liaison with other governmental agencies such as the Department of Corrections. Specific committee assignments through the Judicial Branch have included Reasonable Ability to Pay Committee, Expungement Committee, and Empowering Justice Committee.

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. "Participation" means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

Throughout my life, I have been committed to active community service through a wide variety of civic and community organizations. I believe community engagement is very important, and my community service activities reflect a deep commitment to improving issues of education, mental illness, and interpersonal violence. Since completing law school, I have volunteered with the following:

Marengo Rotary Club, Member, 2008 through 2010. I was an active member of the Marengo Rotary Club when my legal career began. Membership in Rotary helped instill the importance of community involvement.

FRIENDS of the Davenport Library, President and Director, 2013 to 2017. I served as a director for two years and as the President for three years. The FRIENDS are the fundraising group for the Davenport Public Library providing funding for various programs provided by the library.

Reading for Tomorrow, Volunteer, 2016 through 2017. This is a program coordinated by United Way, and I read to a fifthgrade child weekly at Jefferson Elementary School in Davenport, Iowa.

Elephant Club of the Quad Cities, Volunteer, 2013 to Present. The Elephant Club of the Quad Cities is a group of men devoted to fighting domestic and sexual abuse in the Quad Cities. I volunteer on a monthly basis and have assisted with our signature event, Flowers on the River, which remembers victims of domestic abuse in the Quad Cities.

Davenport Central High School, Mock Trial Coach, 2013 to Present. With another attorney, I have coached Davenport Central Mock Trial teams for the last 8 years, twice making it to the state tournament.

Contemporary Club, Member, 2019 to Present. The Contemporary Club is an organization made up of professionals from the community. During our monthly meetings members gather to listen to an essay presentation by another member followed by dinner and fellowship.

Vera French Housing Corporation, Director, 2013 to 2021. Vera French Housing Corporation provides housing to people with chronic mental illness throughout Davenport and Bettendorf.

Central College National Advisory Council, Member, 2014 to 2019. The National Advisory Council is a group of primarily Central College alumni who meet with the administration annually to provide insight and feedback on new initiatives.

18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.

Jones v. Garrelts Clinton County District Court CDCV045591

I selected this opinion as a sample of a family law decision. Because almost all family law appeals are decided by the Court of Appeals, I thought it was important to give the Commission a sample ruling. In addition to the subject matter, this is a good example of the organization of my rulings using headings in an effort to provide clarity to the litigants. Writing a ruling that is easy to understand is important to me, particularly in

family law cases, because the litigants are the ones who have to live with the ruling and follow its provisions for sometimes many years.

Ross v. Hayes Scott County District Court LACE131213

I selected this opinion because it demonstrates my judicial philosophy of following the law despite a somewhat harsh outcome. Our courts prefer to address cases on their merits rather than dismissing them for procedural errors. However, when the law supports dismissing the claim based on a procedural error, trial courts have a duty to ensure the exceptions do not swallow the rule. Additionally, I think this is a good example of writing a ruling that addresses the issue before the court in a thorough yet concise manner.

Kim Cueno v. Mill Valley Care Center Jackson County District Court LACV028302

This opinion reflects my in-depth analysis of legal and factual issues presented following a two-week jury trial. This opinion applied complex facts to the appropriate legal standard to reverse a jury's award of punitive damages. This decision tested my judicial philosophy of adherence to the law, in that I believe strongly in honoring the verdicts our juries render, but only when the law and the facts support their verdict. This decision was affirmed by the Iowa Court of Appeals. *Cueno v. Healthcare of Iowa, Inc*., 965 N.W.2d 195 (Iowa App. 2021).

State v. Ahlgren Scott County District Court FECR374757

This is a ruling on a motion to suppress. I chose to include this case for two reasons. First, the Court of Appeals is often asked to review suppression rulings by the District Court, and this provides an example of one of my rulings. Second, it is an example of a decision where I felt law enforcement made every effort to follow the right procedures, but the case law dictated a different result. In the end following the law was not the easy choice, but it was the correct one.

19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.

OTHER INFORMATION

20. If any member of the State Judicial Nominating Commission is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.

Not applicable.

21. If any member of the State Judicial Nominating Commission is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.

Not applicable.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

Not applicable.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

About the Seventh Judicial Mental Health Court - This was a presentation describing the work of our mental health court. It was presented to the Summit on Iowa Courts' Response to Mental Illness which included representatives from the Judicial Branch, Health and Human Services, Department of Corrections, local law enforcement, and mental health providers. The presentation was given in June 2022.

A Day in the Life Podcast - This was a podcast interview I did for the Judicial Branch "In the Balance" podcast series. The topic of the podcast was a day in the life of a District Court Judge. The podcast aired in April 2022.

Eyewitness Testimony and False Memories - This was a presentation discussing the issues around eyewitness testimony and the reliability of memory in the courtroom setting. This was a continuing legal education presentation as part of the Dillon Inn of Court. In conjunction with the attorneys in the group, we invited a local middle school student to present her middle school science fair project on these issues. Dillon Inn of Court is a group of lawyers and judges who meet monthly for a continuing legal education presentation and dinner. This presentation was given in March 2022.

Last Chance Ethics - This was an ethics presentation with insights from the bench to provide insights and practice pointers for attorneys. This was a continuing legal education presentation given as part of the Scott County Bar Association's Last Chance CLE in December 2019.

Jury Selection - This presentation outlined rules, laws, and case law involved in the jury selection process for both criminal and civil cases. It also provided practice tips for attorneys. This was a continuing legal education presentation as part of the Dillon Inn of Court in November 2018.

Federal vs. State: A Criminal Law Overview - This was a presentation outlining the differences between criminal law practice in federal court and state courts in Iowa. This was a continuing legal education presentation as part of the Dillon Inn of Court in March 2018.

In addition to the presentations outlined above I have participated in a number of "Lunch and Learn" continuing legal education presentations given by the Scott County Bar and the Seventh Judicial District. These presentations vary in topics with the central goal to provide practical insight from judges and lawyers on relevant legal issues facing the bar.

In November 2021 I served as a panelist for a discussion about our mental health system in Iowa. This was part of the annual NAMI Iowa conference. My role was to discuss what the courts are doing to address issues related to mental illness.

24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.

LinkedIn account name: Patrick McElyea
Twitter account name: za773
Snapchat account name: p_mack68
Facebook account name: Pa Trick Mackelyay

25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.

I was a two-time Academic All-American golfer in 2003and 2004, and an All-American golfer in 2004 at Central College. In addition, I was awarded the team MVP and leadership awards in 2004.

I graduated from Drake Law School with Honors. During my first year, I was a semifinalist in our moot court appellate advocacy competition and I competed in the national mock trial tournament my third year.

I received the Achievement Award from the Quad Cities Elephant Club in 2018.

26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.

Justice Tom Waterman, Iowa Supreme Court Justice - 563-326-8725/515-348-4962

Justice Waterman and I are office neighbors in the Scott County Courthouse. We recently began working together to interview and select students from the University of Iowa Law School for summer judicial externships.

Honorable Tom Reidel, District Court Judge Seventh Judicial District - 563-326-8783

Judge Reidel has been a mentor to me both as an attorney and a District Court Judge.

Honorable Mark Fowler, District Court Judge Seventh Judicial District - 563-326-8783

Judge Fowler has been a mentor to me both as an attorney and a District Court Judge.

Honorable Tamra Roberts, District Court Judge Seventh Judicial District - 563-326-8783

Judge Roberts and I attended Central College together, she was on the nominating commission when I applied to be a District Court Judge, and she is now a colleague on the bench.

Heidi McDonough, Clerk of Court for Muscatine and Cedar Counties - 563-263-6634

Heidi and I have worked together since I became a District Court Judge in 2018. I have worked with Heidi in her roles as a Judicial Specialist, Interim Assistant District Court Administrator, and Clerk of Court.

27. Explain why you are seeking this judicial position.

I am seeking a position on the Court of Appeals because I have a deep commitment to public service and a desire to be challenged by a different role within the justice system.

Throughout my career, I have found it very important to remember why I am doing the work. From my time as a prosecutor to my work now as a trial judge, the why for me has always been about serving my community. I am thoroughly invested in my work as a judge and passionate about serving the people involved with the legal system. I applied to be a judge because of a strong belief in the role of our legal system and the judiciary to provide the public with an opportunity to be heard, provide resolution to their dispute, and offer community protection. Now as a trial court judge, those beliefs have become more deeply embodied through my experiences in the courtroom. Almost daily, I see the importance of allowing litigants to be heard, feel the emotions at a sentencing, and experience the satisfaction of resolving a dispute. These experiences serve as a constant reminder that each case I hear is likely the most important thing in that person's life at that moment. This is perhaps even more true for the cases on appeal, where at least one party is dissatisfied with the result at the trial court. The public need for a timely final resolution to their issue underscores the vitally important work of the Court of Appeals.

My work is grounded in a sound judicial philosophy, the foundation of which is the Judicial Oath of Office. As a District Court Judge I swore to "administer justice according to the law, equally to the rich and the poor." For me, this means deciding the difficult cases in accordance with the law and not based on sympathies or bias. I am

deeply committed to being consistent and well-reasoned no matter who is in front of me. In my role, I must often make difficult decisions. I take my duty to make these decisions and make them in accordance with the law, regardless of how difficult that is, incredibly seriously. That is my responsibility to the people of the Seventh District. As a judge on the Court of Appeals, I look forward to the opportunity to deepen my service by addressing some of the most unique issues in our courts and to broaden my service by deciding cases across the state to provide litigants and trial judges clear and well thought out opinions.

As a deeply intellectually curious person, I am drawn to the myriad of challenges concerning application of the law that comes with sitting on an appellate court. One of the most attractive aspects to the Court of Appeals is handling some of the most difficult and nuanced issues in our legal system. While my extensive legal and courtroom experience provides me with a strong foundation for reviewing the trial court, I look forward to the opportunity to further develop my judicial opinion writing skills. It truly is a craft to write an opinion that builds consensus among the panel while also providing clarity to litigants and trial courts. Having looked to the Court of Appeals for guidance on application of the law as an attorney and a trial judge, I am excited at the prospect of joining this team of appellate judges to continue this valuable service. It is called the "practice of law" for a reason. There is always room for improvement, and learning opportunities abound when it comes to the law. I am eager to embrace this challenge while learning from strong, supportive colleagues already serving on the Court of Appeals. I thrive in a demanding work environment, and I believe in the essential work done by the Court of Appeals to render timely, thoughtful decisions in a high-volume docket.

I became a District Court Judge to be an impactful member of my community and the legal profession. I am hopeful that people in my district would say that I have done that in part through a consistent judicial philosophy and a good judicial temperament. In applying to the Court of Appeals, I seek to have an impact not just in my local community but statewide. While I want to continue to be a presence in the Seventh Judicial District by participating in local bar events, giving CLE presentations, and engaging with people at the local courthouses, I also look forward to the opportunities that may be available to assist people across the state. I hope to continue to help our courts navigate the ever changing legal landscape as an appellate judge by providing litigants and trial court judges with clear, well-reasoned opinions that provide insight on the proper application of the law.

28. Explain how your appointment would enhance the court.

In my District Court application, I wrote that I appreciated the use of the word "enhance" as it acknowledged the trial court bench was already very strong, and I feel the same way as I answer this question for the Court of Appeals. Having spoken to every member of the current court prior to applying, I know it is already a very strong group of judges that work hard and work well together. My appointment to the court may enhance the court by providing diversity of professional experience, a unique insight into the interaction

between our mental health system and our justice system, and the necessary judicial temperament and work ethic that is vital to the success of the Court of Appeals.

My work as a career prosecutor throughout the state as well as a judge in eastern Iowa will bring diversity to the court through both professional experience and geographic location. As a prosecutor, I practiced in rural and urban areas within our state, and I served in both state and federal court. During my career I prosecuted all manner of cases, including all levels of criminal offenses. I have juvenile court experience involving both Child In Need of Assistance (CINA) and delinquency dockets. Moreover, I served as a specialized prosecutor for domestic abuse crimes and drug crimes, providing in-depth knowledge of nuanced legal issues involved in these matters. My prosecutorial experiences taught me the importance of adherence to the law, how to be an effective trial attorney, and the value of dedicated public service. As a former prosecutor and now District Court Judge, I see legal issues impacting our communities up close and I understand both the humanity of this work and the deep importance to uphold the law. The primary duty of a prosecutor is to seek justice within the bounds of the law, not merely to convict. This ethos aptly summarizes the perspective I would bring to the Court of Appeals as a former prosecutor−a judge who is seeking to provide justice within the bounds of the law rather than achieve a desired result.

I am proud to serve in the Seventh Judicial District. Our district borders another state and a major river, which creates its own unique set of issues. Additionally, our district is very representative of the state as a whole. We serve the people of Scott County which is the third most populous county in the state, the people of Cedar County which is the 38th most populous county, and everyone in between. There are very different issues facing litigants, lawyers, and courthouse staff in each of our five counties. As a District Court Judge, I work hard to spend time with the people in the communities I serve and understand specific issues impacting their daily lives both inside and outside the courthouse. My experience working in each of our five counties and understanding the issues facing them will better equip me to understand the matters presented to the Court of Appeals from all 99 counties. Moreover, there has never been a member of the Court of Appeals from the Seventh District.

I hope to further contribute to the Court of Appeals through my work as the presiding judge on the Seventh Judicial Mental Health Court. Mental Health Court is a diversionary court aimed at helping people who are involved with the justice system as a result of their mental illness. This position has given me the opportunity to gain valuable insight into the impact that mental health and mental illness have on our justice system. As a judge and an engaged member of my community, this work is incredibly important to me because it allows me to understand and appreciate some of the challenges our litigants face. These insights help me treat the people in my courtroom with compassion, courtesy, and dignity all while giving them a decision that follows the law. This is the judicial philosophy I would bring to the Court of Appeals. As I write my opinions, I will remain mindful of the challenges our litigants face and seek to provide valuable feedback to my colleagues on those same issues.

Lastly, I believe my judicial temperament and work ethic complement the existing make-up of the Court of Appeals. The American Bar Association defines judicial temperament as compassion, decisiveness, open mindedness, courtesy, patience, freedom from bias, and commitment to equal justice under the law. I seek to live out these qualities in my daily work and would strive to bring a commitment to service and a good judicial temperament to the Court of Appeals. Anyone who knows anything about the Court of Appeals knows they are a very collegial group of hardworking judges. Being on the appellate court requires the ability to be a team player by writing consensus building opinions, staying on top of the work, and maintaining positive working relationships despite disagreements. I have always enjoyed being part of a team, whether it was as an athlete or in my professional career.

A position on the Court of Appeals would be a great honor, and I know that I can bring a thoughtful judicial philosophy, a strong work ethic, and diverse professional experience to the court.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

As you can tell from my application, public service is something I value a great deal. I want to take this opportunity to express my appreciation to the Commission and the Governor's office for their work in reviewing the applications and meeting with the applicants. Iowa's merit selection process depends on the willingness of lawyers and non-lawyers to give their time to participate in this process. Thank you for your consideration.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed: _____ Date: September 6, 2022

Printed name: Patrick A. McElyea

Attachments:

Pages 20-68 are responsive to question 10(b)

Pages 69-83 are responsive to question 10(c)

IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

LARRY C. BEVERAGE, Individually and as Personal Representative of the Estate of CHARLES E. BEVERAGE, Deceased, and LINDA K. ANDERSON, and BONNIE K. VAL,	)	**Case No. LACE129455**
Plaintiffs,	)	**RULING AND ORDER ON: DEFENDANT ARCONIC, INC.'S MOTION FOR SUMMARY JUDGMENT**
v.	)	**&**
ALCOA, INC., a Pennsylvania Corporation, et al.	)	**DEFENDANT IOWA-ILLINOIS TAYLOR INSULATION, INC.'S MOTION FOR SUMMARY JUDGMENT**
Defendants.	)	

On September 17, 2019, the above-captioned motions came before the Court for oral argument. The Plaintiffs were represented by Attorneys Kevin Paul, Ethan Horn, and Erich Priebe. The Defendants were represented by Attorneys Donna Miller (Alcoa) and Kevin Horan (Iowa-Illinois Taylor Insulation). After having considered the pleadings, the written and oral arguments of counsel, and the applicable law, the Court enters the following ruling on the pending motions.

FACTUAL AND PROCEDURAL BACKGROUND

Decedent Charles Beverage owned Beverage Construction from approximately 1955 to 1975. Decedent and his construction company performed construction projects exclusively at the

Alcoa plant in Bettendorf, Iowa.[1] Decedent continued to work in and around the Alcoa plant as an employee of Priester Construction until 1979.

Defendant Iowa-Illinois Taylor Insulation, Inc. (IITI) installed insulation throughout the Alcoa plant while the Decedent worked there. In addition, IITI mixed and applied insulating cement at the Alcoa plant and served as an insulation distributor to Alcoa. IITI was the only insulation contractor at Alcoa during the relevant timeframe.

During his work at the Alcoa plant, Decedent was allegedly exposed to asbestos. In September 2015, Decedent was diagnosed with malignant mesothelioma, a disease caused by asbestos exposure, and he died from the disease on October 7, 2015.

On September 27, 2017, Plaintiffs filed the present action asserting claims for negligence, premises liability, strict liability for manufacture and/or sale of defective products, breach of express and implied warranties of merchantability and fitness for intended purposes, and loss of consortium.

The parties have raised numerous issues in their summary judgement motions which the Court will not address in this ruling. The Court has limited this ruling to the single issue of the applicability of Iowa Code Section 686B.7(5). The Court finds that this code section creates immunity for the Defendants in this action and is therefore dispositive.

ANALYSIS

I. Summary Judgment Standard

A motion for summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a

[1] Defendant Arconic Inc. (Arconic) is a successor of Alcoa.

matter of law." Iowa R. Civ. P. 1.981(3). The moving party carries the burden of proving the absence of an issue of material fact. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). A fact is "material" when it could affect the outcome of the case. *DuTrac Cmty. Credit Union v. Radiology Grp. Real Estate, L.C.*, 891 N.W.2d 210, 215 (Iowa 2017). "If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists." *McIlravy*, 653 N.W.2d at 328. In ruling on a motion for summary judgment, the facts must be viewed in the light most favorable to the non-moving party. *Hlubek v. Pelecky*, 701 N.W.2d 93, 95 (Iowa 2005). Thus, the Court "consider[s] on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record." *Phillips v. Covenant Clinic*, 625 N.W.2d 714, 717–18 (Iowa 2001). "An inference is legitimate if it is 'rational, reasonable, and otherwise permissible under the governing substantive law.'" *Id.* (quoting *Butler v. Hoover Nature Trail, Inc.*, 530 N.W.2d 85, 88 (Iowa Ct. App. 1994)). "However, the nonmoving party may not rest upon the mere allegations of his pleading but must set forth specific facts showing the existence of a genuine issue for trial. Speculation is not sufficient to generate a genuine issue of fact." *Hlubek*, 701 N.W.2d at 95–96.

II. Iowa Code Section 686B.7(5)

In 2017, the Iowa General Assembly adopted and the Governor signed into law Iowa Code Chapters 686A and 686B. Relevant to the present action is Iowa Code Section 686B.7(5):

> A defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party.

Iowa Code § 686B.7(5) (2017).

No Iowa appellate court has interpreted Iowa Code Section 686B.7(5). Furthermore, no valuable legislative history is available. Only one other district court has interpreted the statute, and this Court finds that opinion highly persuasive. *See Fankhauser et al. v. Borg-Warner Morse Tec, Inc. et al.*, No LACL140972 (Polk County, Aug. 14, 2019).

The Court begins its analysis of Iowa Code Section 686B.7(5) with an overview of the principles of statutory interpretation:

> When interpreting statutes, our primary objective is to ascertain the legislature's intent. *Branstad v. State ex rel. Nat. Res. Comm'n*, 871 N.W.2d 291, 295 (Iowa 2015). We begin with the statute's language. *Des Moines Flying Serv., Inc. v. Aerial Servs. Inc.*, 880 N.W.2d 212, 220 (Iowa 2016). If a word is not defined by the statute, however, we assign the word its common, ordinary meaning, interpreted within the context of the statute and its history. *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 880 (Iowa 2014). We do not extend, expand, or change the meaning of a statute under the guise of construction, even if we believe doing so would mitigate the hardship of a consequence or if we question the statute's wisdom. *Reg'l Util. Serv. Sys. v. City of Mount Union*, 874 N.W.2d 120, 124 (Iowa 2016). We construe statutes "in light of the legislative purpose," *In re A.J.M.*, 847 N.W.2d 601, 605 (Iowa 2014) (quoting *State v. Erbe*, 519 N.W.2d 812, 815 (Iowa 1994)), and "give weight to explanations attached to bills as indications of legislative intent," *Homan v. Branstad*, 887 N.W.2d 153, 166 (Iowa 2016).

Myria Holdings Inc. v. Iowa Dep't of Revenue, 892 N.W.2d 343, 348 (Iowa 2017).

The Court also looks to Iowa Code Chapter 4 in construing statutes. The Court presumes that the state legislature intended "[a] just and reasonable result," as well as "[a] result feasible of execution." *See* Iowa Code § 4.4(3), (4) (2019). "When the text of a statute is plain and its meaning clear, the court should not search for meaning beyond the express terms of the statute." *Cox v. Iowa Dep't of Human Servs*., 920 N.W.2d 545, 553 (Iowa 2018). Regarding the potential ambiguity within the statute, "where the language chosen by the legislature is unambiguous, [the

courts] enforce a statute as written." *State v. Iowa Dist. Court for Scott Cty*., 889 N.W.2d 467, 471 (Iowa 2017).

The Court uses this guidance from the Iowa Supreme Court and the legislature to interpret the terms in Iowa Code Section 686B.7(5). The Court begins with the unambiguous term "defendant." The Court finds that Alcoa and IITI fit squarely within the definition of "defendant" for purposes of this code section.

The next term is "asbestos action," which is defined by statute. Iowa Code Section 686B.2(3) refers to Iowa Code Section 686A.2, which in turn provides:

> "Asbestos action" means a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on, or related to the health effects of exposure to asbestos, including loss of consortium, wrongful death, mental or emotional injury, risk or fear of disease or other injury, costs of medical monitoring or surveillance, and any other derivative claim made by or on behalf of a person exposed to asbestos or a representative, spouse, parent, child, or other relative of that person.

Id. § 686A.2(2). Based on this definition, the present action is an "asbestos action" within the meaning of the statute. All of Plaintiffs' asserted causes of action, including their premises liability claim, are "arising out of, based on, or related to the health effects of exposure to asbestos."

The next phrase, "shall not be liable," is intended to create an immunity from suit. *See Liability*, Black's Law Dictionary (11th ed. 2019) (defining "liable" as "The quality, state, or condition of being legally obligated or accountable; legal responsibility to another or to society, enforceable by civil remedy or criminal punishment."). The plain meaning of this term is unambiguous and leaves no room for further interpretation.

The terms addressed above are well-defined and unambiguous. The next set of terms that the Court must define are where the Plaintiff takes issue with the wording of the statute. For purposes of this ruling the Court will break them down into two pockets. The first is an examination of "product or component part" and the second is "made or sold by a third party."

A. Product or Component Part

When the legislature has not defined a term the courts look "to the common law and dictionary definitions." *State v. Steenhoek*, 182 N.W.2d 377, 379 (Iowa 1970). In interpreting these undefined words courts must do so in a manner designed "to prevent absurdities and incongruities that may prevent justice." *Id.* Employing these principles the Iowa Supreme Court has defined the word "product" as "anything produced." *Id.* "Produce" in its verb form is defined in several ways by Webster's Dictionary. The definitions that are applicable to this matter are "to cause to have existence or to happen," "to give being, form, or shape to," "to compose, create, or bring about by intellectual or physical effort." *Produce*, Merriam–Webster's Collegiate Dictionary 991 (11th ed. 2003).

Next the Court considers the term "component part." The legislature did not define this term either; however, there is some guidance from the Iowa Court of Appeals in *United Properties, Inc. v. Home Ins. Co.*, 311 N.W.2d 689, 691 (Iowa Ct. App. 1981), where the court adopted the plain meaning definition of "component" as a "constituent part." *See also Schreiber v. Bastemeyer*, 644 N.W.2d 296 (Iowa 2002). A "constituent" is "an essential part." *Constituent*, Merriam–Webster's Collegiate Dictionary 402.

The products and component parts at issue in this case involve asbestos insulation used at the Alcoa plant. Almost all of this insulation was either purchased by or installed by IITI. There

is no factual dispute that this action concerns alleged exposures from these products or component parts. The central issue before the Court is whether or not these products and component parts were made or sold by a third party.

B. Made or Sold by a Third Party

The terms "made," "sold," and "third party" are also not defined within the Code. These terms are fairly easy for the Court to define. "Made" is defined as "artificially produced," or "put together of various ingredients." *Made*, Merriam–Webster's Collegiate Dictionary 746. "Sold" is the past tense of "sell" which is defined as "to offer for sale." *Sell*, Merriam–Webster's Collegiate Dictionary 1129. And "third party" is defined as "a person other than the principals." *Third party*, Merriam–Webster's New Collegiate Dictionary 1213 (5th ed. 1977).

Regarding Alcoa, there are no allegations that they manufactured or produced an asbestos containing product or component part. The record is completely devoid of any evidence that Alcoa was responsible for manufacturing, creating, or selling asbestos or an asbestos containing product. In viewing the evidence in the light most favorable to the Plaintiff the record simply shows that Alcoa was a consumer of asbestos insulation provided by a third party, IITI.

When it comes to IITI, the analysis is slightly different. The record is quite clear that their company sold products containing asbestos.[2] The record is also clear that IITI purchased these asbestos products from other sources, specifically, Johns Manville and Eagle-Pitcher.[3] When viewing the evidence in the light most favorable to the Plaintiff, any asbestos containing

[2] Plaintiff's Undisputed Facts Paragraphs 15–18, 33, 39–45.
[3] Plaintiff's Undisputed Facts Paragraphs 40–41.

products that IITI installed at Alcoa or sold to Alcoa were products or component parts made or sold by third parties such as Johns Manville and Eagle-Pitcher.

The Plaintiff argues this statute creates an unfair and an unreasonable result if it grants immunity to a defendant who has purchased a product from a third party. They argue that Alcoa, as a large corporation, who used asbestos products throughout their facility despite their knowledge of its risks, should not be immune simply because they didn't make the asbestos. The Plaintiff argues that IITI as an asbestos installer for decades, should not avoid liability merely because they purchase asbestos from the manufacturer. This argument centers on what the Defendant's knew about asbestos and its hazards and the extent to which they used products that contained asbestos.

The Plaintiff further argues that the statute is unclear as to how far back in the chain of commerce the immunity provision extends. The Plaintiff asserts that this ambiguity or lack of clarity allows the Court some latitude in interpreting the statute. While the Court is sympathetic to the argument, the Court also sees a valid rationale that the legislature may have intended litigation with the actual producers of products containing asbestos rather than entities who purchase it.

These arguments fail because they require the Court to "search for meaning beyond the express terms of the statute." *Cox*, 920 N.W.2d at 553. Iowa Code Section 686B.7(5) of the Code is concise and unambiguous, and therefore must be given its plain meaning as the legislature intended. Neither Alcoa nor IITI are the original manufacturer or seller of any asbestos product or component part. As such, the Court concludes that these products or component parts were

"made or sold by a third party," and Iowa Code Section 686B.7(5) makes these Defendants not liable in the instant matter.

RULING

For all of the above-stated reasons, it is the ruling of the Court that Defendant Alcoa, Inc.'s Motion for Summary Judgment is GRANTED.

For all of the above-stated reasons, it is the ruling of the Court that Defendant IITI's Motion for Summary Judgment is GRANTED.

Any remaining costs associated with this action shall be assessed to the Plaintiff.

ALL OF THE ABOVE IS ORDERED.

975 N.W.2d 670
Supreme Court of Iowa.

Larry C. BEVERAGE, Individually and as Personal Representative of the Estate of Charles E. Beverage, Deceased, and Linda K. Anderson, and Bonnie K. Valentine, Appellants,
v.
ALCOA, INC., a Pennsylvania Corporation, Iowa-Illinois Taylor Insulation, Inc., a successor in interest to Iowa Illinois Thermal Insulation, Inc., an Iowa Corporation, Appellees.

No. 19–1852
|
Submitted January 19, 2022
|
Filed June 17, 2022

Synopsis

Background: Children and executor of estate of deceased worker who died from malignant mesothelioma arising from exposure to asbestos-containing insulation and other asbestos-containing products when he worked as an independent construction contractor inside aluminum plant brought action against plant owner and supplier of plant's asbestos-containing insulation, alleging products liability claims for negligence and strict liability, and claims for premises liability, breach of express and implied warranties, and loss of consortium. The District Court, Scott County, Patrick McElyea, J., granted defendants' summary judgment. Plaintiffs appealed. The Court of Appeals, May, J., 958 N.W.2d 611, affirmed. Plaintiffs' application for further review was granted.

Holdings: The Supreme Court, Oxley, J., held that:

as a matter of first impression, statutory exclusion from liability in asbestos litigation protects asbestos manufacturers or sellers from products liability claims premised on products or component parts made or sold by others;

as a matter of first impression, statutory limitation of liability that protects asbestos manufacturers or sellers from products liability claims premised on products or component parts made or sold by others did not extend to premises liability claims against owner; and

as a matter of first impression, statutory limitation of liability did not extend to products liability claims against supplier who sold insulation to owner.

Court of Appeals decision vacated, and district court judgment reversed.

Waterman, J., filed a dissenting opinion in which Mansfield and McDermott, JJ., joined.

Procedural Posture(s): On Appeal; Motion for Summary Judgment.

***672** On review from the Iowa Court of Appeals.

Appeal from the Iowa District Court for Scott County, Patrick A. McElyea, Judge.

Plaintiffs appeal from district court's grant of summary judgment in favor of defendants in asbestos litigation under statutory limitation of liability. COURT OF APPEALS DECISION VACATED; DISTRICT COURT JUDGMENT REVERSED.

Attorneys and Law Firms

Lisa W. Shirley (argued) of Dean Omar Branham Shirley, LLP, Dallas, Texas, and James H. Cook of Dutton, Daniels, Hines, Kalkhoff, Cook & Swanson, PLC, Waterloo, for appellants.

Kevin P. Horan (argued), Douglas M. Sinars, and Owen Blood of Sinars Slowikowski Tomaska, LLC, Chicago, Illinois, for appellee Iowa-Illinois Taylor Insulation, Inc.

Robert M. Livingston (argued) and William R. Hughes, Jr., of Stuart Tinley Law Firm, LLP, Council Bluffs, for appellee Arconic, Inc., f/k/a ALCOA, Inc.

Matthew McKinney and Thomas Story of Brown, Winick, Graves, Gross & Baskerville, P.L.C., Des Moines, and Mark Behrens of Shook, Hardy & Bacon L.L.P., Washington, D.C., for amici curiae Iowa Association of Business and Industry, Iowa Insurance Institute, NFIB Small Business Legal Center, and Coalition for Litigation Justice, Inc.

Oxley, J., delivered the opinion of the court in which Christensen, C.J., and Appel and McDonald, JJ., joined.

Waterman, J., filed a dissenting opinion, in which Mansfield and McDermott, JJ., joined.

Opinion

OXLEY, Justice.

In 2017, the Iowa General Assembly followed the lead of several other states in enacting detailed tort reform related to asbestos litigation, codified in three new chapters of the Iowa Code: chapters 686A, 686B, and 686C. As a general matter, the legislation requires plaintiffs bringing asbestos lawsuits to identify actual or potential claims they may have ***673** against an asbestos manufacturer's section 524(g) bankruptcy trust. This alerts defendants in the asbestos litigation to other possible sources of recovery for the plaintiff that can be used as a setoff against any recovery ordered in the litigation. The legislation also requires a plaintiff to file detailed medical and background information with their initial pleading to prioritize asbestos claims by plaintiffs with current physical conditions over those by plaintiffs who are not yet sick.

Iowa also added a provision not found in any other state's legislation: "A defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." Iowa Code § 686B.7(5) (2018). In this asbestos case, the district court read section 686B.7(5) to limit liability to manufacturers of the offending asbestos-containing product and granted summary judgment on plaintiffs' premises liability claims against Alcoa and on their products liability claims against Iowa-Illinois Taylor Insulation for supplying, but not manufacturing, the asbestos-containing insulation in the Alcoa plant.

On our review of the statute, we conclude the district court failed to appreciate the legal significance of the legislature's use of the phrase "product or component part made or sold by a third party" to reference a products liability defense known as the "component parts defense," or "bare metal defense" as described in the specific context of asbestos litigation. Properly considering the context of the provision, we conclude section 686B.7(5) does not apply to the claims against Alcoa or Iowa Illinois-Taylor Insulation, and we reverse the district court's grant of summary judgment.

I. Background Facts and Proceedings.

Charles Beverage was diagnosed with malignant mesothelioma in September 2015 and passed away from the disease on October 7, 2015. His children, Larry Beverage, Linda K. Anderson, and Bonnie K. Valentine, and the executor of his estate, Larry Beverage, (collectively referred to as "Beverage") filed this action against two defendants, Alcoa, Inc. [1] and Iowa-Illinois Taylor Insulation, Inc. (IITI), on September 27, 2017. [2] In an amended petition, Beverage alleged claims for negligence, premises liability, strict liability, breach of express and implied warranties, and loss of consortium.

The claims stem from Charles's exposure to asbestos-containing insulation and other asbestos-containing products when he worked as an independent construction contractor inside Alcoa's aluminum plant in Bettendorf from the 1950s through the mid-1970s. IITI, a supplier and distributor of insulation products, supplied and installed much of the asbestos-containing insulation used in the Alcoa plant. IITI did not manufacture insulation, but it did, at Alcoa's direction, supply asbestos-containing insulation and install it at Alcoa's plant. There are no allegations that Alcoa manufactured or produced asbestos-containing products.

Both defendants moved for summary judgment based on recently-enacted Iowa Code section 686B.7(5), arguing the provision's ***674** protection against liability "for exposures from a product or component part made or sold by a third party" applied to each of them. Alcoa faced premises-type liability for failing to provide Charles with a safe environment and failing to warn him of the dangers of the asbestos dust he worked around inside its plant. IITI faced products liability claims of negligence and strict liability for its role in supplying and installing the insulation that was present in the Alcoa plant. The district court parsed the twenty-eight-word provision to conclude that the statute unambiguously granted immunity to any defendant who did not manufacture the offending asbestos-containing products. The district court traced the insulation at issue to manufacturers Johns Manville and Eagle-Pitcher, not Alcoa or IITI, and dismissed all claims against both defendants.

The court of appeals affirmed the district court's grant of summary judgment, agreeing with its interpretation of section 686B.7(5) as unambiguously granting immunity to Alcoa and IITI since the asbestos-containing insulation was manufactured by third parties. We granted Beverage's application for further review to address the meaning of the newly enacted statute.

II. Analysis.

Beverage does not dispute the factual basis for the district court's ruling, challenging only its legal interpretation of section 686B.7(5). We review both the grant of summary judgment and the interpretation of a statute for correction of legal error.[3] *Albaugh v. The Reserve*, 930 N.W.2d 676, 682 (Iowa 2019). "Summary judgment is appropriate 'if the record reveals only a conflict concerning the legal consequences of undisputed facts.' " *EMC Ins. Grp. v. Shepard*, 960 N.W.2d 661, 668 (Iowa 2021) (quoting *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 882 (Iowa 2020)).

A. Background of Asbestos Litigation. Iowa Code section 686B.7 was passed as part of a comprehensive bill enacting tort reform in asbestos litigation, so we start with an understanding of what was going on in asbestos litigation at the time. Asbestos was once considered a "magic mineral" due to its diverse uses. Timothy B. Mueller, Comment, *Tomorrow's Causation Standards for Yesterday's Wonder Material:* Reiter v. ACandS, Inc. *and Maryland's Changing Asbestos Litigation*, 25 J. Contemp. Health L. & Pol'y 437, 440 & n.24 (2009) [hereinafter Mueller]. In the early twentieth century, it became the material of choice for industries manufacturing products that needed the heat resistance, low electrical conductivity, flexibility, and high tensile strength that asbestos provided. *Id.* at 440–41. Asbestos has been used in thousands of products ranging from thermal insulation to roofing shingles, acoustic ceiling tiles, floor tiles, air conditioning systems, fireproofing, cigarette filters, and automobile brake parts.[4] *Id.* It ***675** can be found in houses, schools, courthouses, factories, and industrial facilities throughout the United States.

But that miracle mineral is now considered "yesterday's mistake" given what is known about the harms of asbestos. *Id.* at 441. When asbestos fibers are released into the air, microscopic fibrous particles are ingested or inhaled by those in the vicinity. The fibers get stuck in the lungs, causing inflammation and irritability of the lung tissues. *Id.* at 442. Repeated exposure to high concentrations of asbestos in the ambient air over an extended period of time can result in lung scarring, pleural thickening, and tumors. *Id.* at 442 & n.36. Mesothelioma, "a rare tumor that affects the tissues lining the thoracic and abdominal cavities," was connected to asbestos exposure in the early 1960s. *Id.* at 442–43. Mesothelioma has a latency period that is measured in decades, so it is not detected until years after the exposure. *See Ganske v. Spahn & Rose Lumber Co.*, 580 N.W.2d 812, 813 n.1 (Iowa 1998) (describing mesothelioma's latency period between twenty and forty years). There is no cure for mesothelioma, and once its symptoms appear, it is a quick but painful way to die.

American "courts first began recognizing claims against asbestos manufacturers in the early 1970s." Michael D. Kelley, Boley v. Goodyear Tire & Rubber Co., 37 Ohio N.U. L. Rev. 901, 912 (2011) [hereinafter Kelley]. Asbestos litigation gained significant traction in 1973 when the United States Court of Appeals for the Fifth Circuit affirmed a judgment holding asbestos manufacturers jointly and severally liable under a theory of strict liability to an insulation worker. *See* *Borel v. Fibreboard Paper Prods. Corp.*, 493 F.2d 1076, 1096 (5th Cir. 1973). Asbestos litigation in the United States exploded, and by 2002—twenty years ago now—approximately 730,000 individuals had filed lawsuits related to asbestos exposure. *See* Kelley, 37 Ohio N.U. L. Rev. at 912.

B. Legislative Responses Bringing Tort Reform to Asbestos Litigation. Distinct issues related to asbestos litigation have led states to enact legislation regulating asbestos lawsuits. First is the increase in "unimpaired" claims —claims filed by plaintiffs exposed to asbestos products but who were not yet sick. The primary concern raised by this trend "was the reality that such mass filings would divert the limited resources away from the victims who were suffering from cancer or other serious asbestos-related illness and into the pockets of claimants who had some physical indication of exposure but were not sick." 3 Lawrence G. Cetrulo, *Toxic Torts Litigation Guide* § 33:33, Westlaw (database updated Dec. 2021) [hereinafter *Toxic Torts Litigation Guide*]. In 2004, Ohio led the way with asbestos tort reform by "adopt[ing] objective minimum medical criteria standards for plaintiffs filing asbestos exposure claims." Kelley, 37 Ohio N.U. L. Rev. at 914; *see also* Ohio Rev. Code Ann. §§ 2307.91–.98 (West, Westlaw through File 100, 2021–22 Gen. Assemb.). The basic premise of medical criteria legislation is to "provide for a physical impairment requirement, and necessary qualifications of the professional rendering the diagnosis, in order to file an active claim." *Toxic Torts Litigation Guide* § 33:33. The legislation precludes plaintiffs from bringing a claim unless and until they have medically documented physical impairments tied to asbestos exposure. The same legislation also tolls statutes of limitation and statutes of repose until the physical impairment has manifested so plaintiffs don't lose their claim before it begins. *Id.* Many states have followed with similar ***676** legislation.[5] Commentators describe these requirements as "significant because they prevent plaintiffs' attorneys from

recruiting and filing weak or unimpaired claims and settling them in the midst of claims with serious injuries, thereby protecting the resources to compensate the plaintiffs with the most serious injuries." *Id.* & n.8 (citing Hanlon and Anne Smetak, *Asbestos Changes*, 62 N.Y.U. Ann. Surv. Am. L. 525, 568–69 (2007)). The Ohio claim prioritization legislation has reportedly cut down ninety percent of asbestos filings. *See* Kelley, 37 Ohio N.U. L. Rev. at 914–16.

The second issue stems from the proliferation of asbestos manufacturers that have sought bankruptcy protection. Asbestos product manufacturers faced with thousands of claims by individuals exposed to their products started seeking relief in bankruptcy court. Johns Manville was the first, filing for bankruptcy protection in 1982 and ultimately creating a trust as part of those proceedings. The bankruptcy trust provided the only avenue for claimants to recover, and it limited recovery to claimants with specific medical and exposure criteria. *See Toxic Torts Litigation Guide* § 33:36. Other manufacturers quickly followed suit, and in 1994 Congress codified the Johns Manville model for bankruptcy at 11 U.S.C. § 524(g). *See id.*; *see also Construction and Application of Bankruptcy Code Asbestos Trusts, 11 U.S.C.A. § 524(g)*, 86 A.L.R. Fed. 2d 365 § 2 (2014). Section 524(g) "trusts answer for the tort liabilities of the great majority of the historically most-culpable large manufacturers that exited the tort system through bankruptcy over the past several decades." William P. Shelley et al., *The Need for Further Transparency Between the Tort System and Section 524(g) Asbestos Trusts*, 23 Widener L.J. 675, 675–76 (2014).

"As the 'main players' have exited the tort system through bankruptcy, asbestos plaintiffs have turned to targeting an ever-growing number of 'peripheral' defendants that have comparatively lower degrees of culpability for the claimant's injuries." *Id.* at 676. A common claim against "peripheral" defendants is a premises liability claim. "In a practical sense (and without excessive doctrinal scruple) premises claims are the non-product work-site claims that are left over after the claims barred by workers' compensation laws are taken away." Patrick M. Hanlon, Developments in Premises Liability Law 2005, ALI-ABA Course of Study: Asbestos Litigation in the 21st Century, SL041 ALI-ABA 665, 668 (Westlaw 2005) [hereinafter Hanlon]. "Typically those claims have been asserted by employees of independent contractors," *id.*, similar to the claim made by Beverage against Alcoa.

Without disclosure of bankruptcy trust claim materials, these peripheral defendants are often forced to pay more than their fair share of a plaintiff's damages, and plaintiffs could receive a double recovery—once from the manufacturers' 524(g) bankruptcy trusts and again from litigation with the peripheral defendants. *Toxic Torts Litigation Guide* § 33.37. Starting in Ohio in 2012, many states have passed legislation requiring plaintiffs in asbestos lawsuits to identify 524(g) trusts to which ***677** they may have a claim.[6] "The central purpose of these statutes is to provide transparency by requiring plaintiffs to disclose any trust claims in the early stages of litigation and to prevent plaintiffs from double-dipping." *Toxic Torts Litigation Guide* § 33:37. Notably, the bankruptcy trust transparency legislation does not limit a plaintiff to seeking recovery only from the manufacturers' trusts. Rather, it requires plaintiffs to disclose available funds from bankruptcy trusts to their litigation defendants to ensure plaintiffs are consistent in their claimed exposures and do not unfairly seek the same recovery from multiple sources. *See id.*

Finally, some states have enacted legislation to limit successor liability for entities acquiring the stock or assets of companies previously involved in manufacturing or selling products containing asbestos as long as the successor does not continue the asbestos-related activities of its predecessor.[7] Pennsylvania has one such statute, which was described as advancing a state's "basic governmental interest to make sure [its] corporate merger laws do not unfairly expose innocent companies to ruin solely because of a merger." *Markovsky v. Crown Cork & Seal Co.*, 107 A.3d 749, 768 (Pa. Super. Ct. 2014) (quoting Pa. S. Journal, 185th G.A., 2001 Reg. Sess., No. 63, at 1231–32 (Dec. 11, 2001)).

States have not been consistent in their asbestos litigation tort reform, enacting forms of some or all of these general areas of tort reform. Some states have expanded their legislation to cover other issues in asbestos litigation. For example, Ohio enacted legislation that limits premises liability for "take home" exposure, which often occurred when an employee who worked in a factory where asbestos dust was present brought the dust home and his or her spouse laundered the employee's dusty clothes, inhaling the dangerous asbestos particles as they flew into the air with each shake of the clothes before throwing them into the wash. *See* Kelley, 37 Ohio N.U. L. Rev. at 915–16 (questioning whether the Ohio legislature "acted overzealously" in enacting legislation to eliminate all take-home exposure liability). Only Ohio and Kansas have enacted legislation precluding liability for this take-home exposure. *See* Kan. Stat. Ann. § 60-4905(a) (2021); Ohio Rev.

Code Ann. § 2307.941(A)(1); *see also* Kelley, 37 Ohio N.U. L. Rev. at 915.

C. The Iowa General Assembly Enacts Senate File 376. With this background, we turn to the legislation passed by the Iowa General Assembly in 2017 to address asbestos litigation, adding chapters 686A, 686B, and 686C to the Iowa Code. *See* 2017 Iowa Acts ch. 11 (codified at Iowa Code chs. 686A–686C (2018)). The legislation is, to some extent, modeled after legislation enacted in other states described above. *See Toxic Torts Litigation Guide* § 33:37 (discussing Ohio legislation enacted in 2012, followed by legislation enacted or ***678** proposed in almost twenty additional states).

Chapter 686A is titled the "Asbestos Bankruptcy Trust Claims Transparency Act" and requires a plaintiff in an asbestos action to investigate and bring claims against asbestos bankruptcy trusts before bringing a claim against solvent defendants. Iowa Code § 686A.3(1)(*a*) (requiring plaintiffs to provide a sworn statement within ninety days of filing an asbestos lawsuit "indicating that an investigation of all asbestos trust claims has been conducted and that all asbestos trust claims that may be made by the plaintiff or any person on the plaintiff's behalf have been filed"). It also requires plaintiffs to disclose to defendants the existence of trusts against which they have made, or could make, a claim. *Id.* § 686A.3(1)(*b*). Chapter 686A does not limit a plaintiff to only seeking recovery from asbestos manufacturers' trusts, but it does provide a mechanism to ensure a plaintiff makes claims against any relevant trusts that can be offset against any recovery in an asbestos tort action. *See* Iowa Code §§ 686A.3, .7.

Chapter 686B is titled the "Asbestos and Silica Claims Priorities Act" and prioritizes claims in favor of plaintiffs who have experienced physical impairment from asbestos exposure. Plaintiffs in Iowa, like elsewhere, have filed lawsuits before experiencing physical symptoms, recovering high-dollar verdicts based on the fear of contracting asbestos-related cancer in the future. *See, e.g.*, *Beeman v. Manville Corp. Asbestos Disease Comp. Fund*, 496 N.W.2d 247, 254–55 (Iowa 1993) (en banc) (affirming verdict in excess of $500,000 based solely on plaintiff's fear of contracting asbestos-related cancer after being diagnosed with asbestosis). Presymptomatic claims were often the only way a plaintiff could recover damages given the long latency periods for related diseases, which meant their claims would be barred by the statute of repose if not brought until symptoms appeared. *See, e.g.*, *Tallman v. W.R. Grace & Co.—Conn.*, 558 N.W.2d 208, 211 (Iowa 1997) (holding manufacturer of asbestos spray insulation was protected by fifteen-year statute of repose in Iowa Code § 614.1(11) (1993) against claim brought by worker exposed to asbestos).

Chapter 686B largely follows the lead of other medical criteria legislation by "provid[ing] for a physical impairment requirement, and necessary qualifications of the professional rendering the diagnosis, in order to file an active claim." *Toxic Torts Litigation Guide* § 33:33. In Iowa, "[a]n asbestos action involving a nonmalignant condition shall not be brought or maintained in the absence of prima facie evidence that the exposed person has a physical impairment for which asbestos exposure was a substantial contributing factor." Iowa Code § 686B.4. "The prima facie showing shall be made as to each defendant and include a detailed narrative medical report and diagnosis signed under oath by a qualified physician." *Id.* At the same time, chapter 686B tolls an asbestos claim until the plaintiff has "received a medical diagnosis of an asbestos-related impairment" or discovers facts that would lead "a reasonable person to obtain a medical diagnosis." *Id.* § 686B.8(1).

Chapter 686B requires the plaintiff to include with the petition a sworn statement of the evidence that forms the basis of the claim against each defendant. *Id.* § 686B.3(2). The sworn statement must identify the worksites and employers of the exposed person; each asbestos-containing product exposed to, whether bankrupt or not; the location, manner, and duration of exposure to the identified products; and the identity of the manufacturer or seller of the specific asbestos product. *Id.* It also ***679** places limits on asbestos claims by prohibiting class action suits. *Id.* § 686B.3(5).

Titled "Procedures — limitation," Iowa Code section 686B.7 includes five separate subsections. These subsections limit use of the medical impairment evidence required to establish a prima facie claim to pretrial proceedings, *id.* § 686B.7(1)–(2); preclude discovery until a prima facie case is established, *id.* § 686B.7(3); preclude consolidation of claims for trial involving different plaintiffs absent consent of the parties, *id.* § 686B.7(4); and—the provision at issue here—protect defendants from liability for exposures to products or component parts made or sold by third parties. This specific provision, Iowa Code section 686B.7(5), is unique; no other state legislation includes a similar limitation on liability. [8]

Finally, while not at issue in this case, chapter 686C covers successor liability. Generally, it limits the liability of any

entity sued based on the actions of its predecessors to the fair market value of the assets it received in the transaction from which it became the successor, assuming the entity no longer engages in the asbestos-related activities of its predecessor. *See* Iowa Code § 686C.3. It follows legislation enacted in other states.

D. The District Court's and Court of Appeals' Analysis of Section 686B.7(5). This brings us to the specific issue involved in this case. Iowa Code section 686B.7(5) provides: "A defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." IITI most aptly describes the district court's methodology in interpreting the provision: it "painstakingly interpreted each term of the Statute on an almost granular level." Considering the provision word by word, the district court consulted Webster's Collegiate Dictionary to conclude this provision meant that all defendants in an asbestos case are immune from any liability caused by a product that was either made or sold by another party. Since the asbestos-containing insulation involved in this case was made by Johns Manville and Eagle-Pitcher, not by Alcoa or IITI, it was made by a third party, and Alcoa and IITI were each entitled to immunity. Under the district court's interpretation, only the manufacturer of the asbestos-containing product or component part could be civilly liable for any asbestos exposure.

The court of appeals addressed Beverage's arguments as discrete arguments, which led the court of appeals to first conclude that the word "defendant" broadly applied to every defendant in an asbestos action. Its focus on the broad application to any asbestos-action defendant led the court to discount Beverage's argument that, read as a whole, the liability-limiting provision applies to types of claims, not types of defendants. The court of appeals rejected Beverage's argument that the provision was a codification of the bare-metal defense, concluding that the legislature "could easily have so stated" if that was its intent.

The court of appeals also thought Beverage "overstate[d] the impact of section 686B.7(5). It only immunizes defendants against liability for exposure to asbestos or silica products that were 'made or sold by ***680** a third party.' It contains no general grant of immunity for 'premises owners' or 'asbestos product suppliers.' " The court's recognition that the provision did not expressly grant immunity for premises owners or asbestos product suppliers is well taken, but its conclusion misses the effect of its holding. To the contrary, the district court's analysis implicitly does just that by effectively limiting liability to the party who both manufactured and sold the offending asbestos-containing product. Unless the premises owner happens to also manufacture asbestos-containing products, the court of appeals' opinion effectively eliminates premises liability involving asbestos. By affirming summary judgment for IITI—who admittedly supplied and sold the offending product to Alcoa—the court of appeals also eliminated all product supplier liability beyond the original manufacturer.

E. Parties' Arguments. The defendants focus on the beginning language of Iowa Code section 686B.7(5) that applies to a "defendant in an asbestos action," arguing the plain language provides immunity to any defendant who is not a manufacturer of the asbestos-containing product or component part. Beverage focuses on the language at the end of the provision, "product or component part made or sold by a third party," arguing that the provision limits a manufacturer's or seller's liability to that stemming from their own products or component parts but immunizes them from liability stemming from a third parties' products or component parts. In other words, the statute is a codification of the component-parts defense, or in the nomenclature of asbestos litigation, the bare-metal defense. Considered in that context, Beverage argues that the provision applies only to products liability claims, as those are the only types of claims that would be subject to a component-parts, or bare-metal, defense.

F. Rules of Statutory Interpretation. Our analysis turns on the meaning of section 686B.7(5). As with all cases involving statutory interpretation, we start with the language of the statute to determine what the statute means. Our first step is determining whether the meaning of the provision is ambiguous; if it is not, we go no further and apply the unambiguous meaning of the language used in the provision. *See Com. Bank v. McGowen*, 956 N.W.2d 128, 133 (Iowa 2021) ("If the 'text of a statute is plain and its meaning clear, we will not search for a meaning beyond the express terms of the statute or resort to rules of construction.' " (quoting *In re Est. of Voss*, 553 N.W.2d 878, 880 (Iowa 1996))). If it is ambiguous, we apply canons of statutory construction to determine what the ambiguous language of the statute means. *See State v. Doe*, 903 N.W.2d 347, 351 (Iowa 2017) ("If there is no ambiguity, we apply that plain meaning. Otherwise, we may resort to other tools of statutory interpretation." (citation omitted)).

Ambiguity may arise in two ways: (1) from the specific language used in the statute or (2) when the provision is considered in the context of the entire statute or other related statutes. *Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 72 (Iowa 2015). "In other words, even if the meaning of words might seem clear on their face, their context can create ambiguity." *Id.* "[T]he determination of whether a statute is ambiguous does not necessarily rest on close analysis of a handful of words or a phrase utilized by the legislature, but involves consideration of the language in context." *State v. Richardson*, 890 N.W.2d 609, 616 (Iowa 2017) (alteration in original) (quoting *Rhoades v. State*, 880 N.W.2d 431, 446 (Iowa 2016), and considering whether a ***681** "sentence" under Iowa Code section 901.5(14) (2014) includes a restitution order by considering how "sentence" is used in related statutes and by examining section 901.5 as a whole).

The district court and court of appeals looked at each word or phrase with laser focus, starting with the meaning of the word "defendant" and working through each word of the statute in a similar fashion. But legislators do not legislate one word at a time, and statutes cannot be read with blinders, dissecting a provision one word at a time, setting that word aside, and then moving to the next to address its meaning outside the context of the other words used in the provision or how the provision fits into the greater statutory scheme. *See* Norman J. Singer & J.D. Shambie Singer, 2A Sutherland Statutory Construction § 46:5 (7th ed. rev. 2014) ("A statutory subsection may not be considered in a vacuum, but must be considered in reference to the statute as a whole ...."). Rather, context is critical, and context comes from "the language's relationship to other provisions of the same statute and other provisions of related statutes." *McGowen*, 956 N.W.2d at 133; *see also* Code § 4.1(38) ("Words and phrases shall be construed according to the context and the approved usage of the language....").

The district court focused on defining "the defendant" as any party named as a defendant in a civil action without considering the context in which the term was used. This led to an overly broad reading of the rest of the provision, which we have cautioned against in other cases. *See, e.g.*, *U.S. Bank Nat'l Ass'n v. Lamb*, 874 N.W.2d 112, 117 (Iowa 2016) ("We certainly understand the argument that all liens means all liens, yet the location of the phrase within a statute that appears to narrowly govern certain judgments imposes an obligation of further analysis to determine the objective meaning of the statute."); *Rolfe State Bank v. Gunderson*, 794 N.W.2d 561, 565 (Iowa 2011) ("While the language used by the legislature at first blush appears to be broad, we have in many cases stated that broad and even unqualified language must be evaluated in its context."); *see also* *Dole v. United Steelworkers*, 494 U.S. 26, 35, 110 S.Ct. 929, 108 L.Ed.2d 23 (1990) ("[I]n expounding a statute, we are not guided by a single sentence or member of a sentence, but look to the provisions of the whole law ....") (quoting *Massachusetts v. Morash*, 490 U.S. 107, 115, 109 S.Ct. 1668, 104 L.Ed.2d 98 (1989)). In the words of Judge Learned Hand, "Words are not pebbles in alien juxtaposition; they have only a communal existence; and not only does the meaning of each interpenetrate the other, but all in their aggregate take their purport from the setting in which they are used." *N.L.R.B. v. Federbush Co.*, 121 F.2d 954, 957 (2d Cir. 1941).

By focusing on the term "defendant," the district court and court of appeals also failed to recognize that the phrase "product or component part made or sold by a third party" has a specific meaning in the context of products liability law. The district court defined each word of the phrase separately using an ordinary dictionary definition. Had it consulted *Black's Law Dictionary*, it would have seen the phrase "component-parts doctrine" as a specific legal concept. *See* Component-Parts Doctrine, *Black's Law Dictionary* (11th ed. 2019) (defining the doctrine as "[a] rule that the seller of a component part is liable if the component is defective and causes harm, or if the seller participates substantially in integrating the component into the final product's design and the component causes the product to be defective").

***682** It is a "cardinal rule of statutory construction that when [the legislature] employs a term of art, it presumably knows and adopts the cluster of ideas that were attached to each borrowed word in the body of learning from which it is taken." *Air Wis. Airlines Corp. v. Hoeper*, 571 U.S. 237, 247–48, 134 S.Ct. 852, 187 L.Ed.2d 744 (2014) (quoting *F.A.A. v. Cooper*, 566 U.S. 284, 292, 132 S.Ct. 1441, 182 L.Ed.2d 497 (2012)) (concluding that "Congress meant to adopt the material falsity requirement when it incorporated the actual malice standard into the [Aviation and Transportation Security Act] immunity exception" in 49 U.S.C. § 44941(b)(2) even though the statute's use of the phrase "any disclosure made with reckless disregard as to the truth or falsity of that disclosure" could be construed to cover truthful statements made recklessly). Terms of art are not always easy to

recognize, sometimes appearing as everyday words. *See, e.g.*, *Cooper*, 566 U.S. at 291–93, 132 S.Ct. 1441 (rejecting party's attempt to define term "actual damages" by looking at ordinary dictionary definition of word "actual" and word "damages" because "actual damages" is a legal term of art); *Dix v. Casey's Gen. Stores, Inc.*, 961 N.W.2d 671, 687 (Iowa 2021) ("[W]e do not ignore, nor do we believe the general assembly ignored, the specialized meaning 'safety sensitive' has developed in the context of workplace drug testing in considering its meaning under Iowa law."); *Auen v. Alcoholic Beverages Div., Iowa Dep't of Com.*, 679 N.W.2d 586, 590 (Iowa 2004) (recognizing words in a statute are to be construed based on their "established meaning in the law"). "Courts as well as advocates have been known to overlook technical senses of ordinary words—senses that might bear directly on their decisions." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* 73–76 (2012) (describing cases construing the legal terms "person," "consideration," and "escape"). "[I]f a word is obviously transplanted from another legal source, whether the common law or other legislation, it brings the old soil with it." *Id.* at 73 (alteration in original) (quoting Felix Frankfurter, *Some Reflections on the Reading of Statutes*, 47 Colum. L. Rev. 527, 537 (1947)).

Beverage invoked the term of art doctrine when he argued to the district court that "product or component part" has a specific meaning in the context of products liability law. Beverage has further expounded that argument on appeal in describing the general assembly's use of the phrase "component part" as invoking the bare-metal defense.

The court of appeals concluded that if the legislature intended to codify the bare-metal defense, it could have easily done so. Beverage counters by arguing that if the legislature intended to limit all liability except that imposed on manufacturers and sellers, it could have simply said so without enacting the detailed requirements of Iowa Code chapter 686B. Looking beyond the words of the single provision in section 686B.7(5) and considering the entire statutory scheme created by Senate File 376, Beverage has a point. Had the general assembly intended to limit asbestos liability to the manufacturers and sellers of the offending products, it could have done so in a much more straightforward manner.

G. The Bare-Metal Defense. To understand Beverage's argument, we must first understand the bare-metal defense. The bare-metal defense is a specific application of the component-parts defense, which provides "that a manufacturer has no duty to warn about potential dangers from exposure to a part of its product if the manufacturer did not make or distribute the part." *Toxic Torts Litigation Guide* § 33:18. As applied in the context of asbestos litigation, "a company would not be ***683** held liable if a disease causing part was added to its 'bare metal' product," thus the name, bare-metal defense. *Id.* The bare-metal defense is controversial, and "[j]urisdictions remain split regarding the availability of the 'bare metal' defense to product manufacturers." *Id.*

> [Some] courts have adopted a bright-line rule, finding a manufacturer of a bare metal product can never be liable for injuries caused by asbestos containing materials which were not original to the product at issue. Conversely, a growing number of states have adopted a fact-specific approach, which looks to the foreseeability that asbestos containing materials would be added to a manufacturer's original bare product.

Id. (footnote omitted).

The United States Supreme Court recently addressed the defense under maritime law involving two Navy veterans who contracted cancer and ultimately died after they were exposed to asbestos on Navy ships. *See* *Air & Liquid Sys. Corp. v. DeVries*, —— U.S. ——, 139 S. Ct. 986, 991, 203 L.Ed.2d 373 (2019). The veterans brought failure-to-warn products liability claims against manufacturers of pumps, blowers, and turbines supplied to the Navy. *Id.* The parts manufacturers raised the bare-metal defense, arguing the Navy added asbestos insulation and asbestos parts to their "bare metal" pumps, blowers, and turbines to allow them to function aboard the Navy ships. *Id.* Recognizing "federal and state courts have not reached consensus on how to apply" the component-parts defense, the Court identified three approaches courts have taken. *Id.* at 993–94.

The "plaintiff friendly" approach adopted by the Third Circuit in the *DeVries* case used a foreseeability rule: "A manufacturer may be liable when it was foreseeable that the manufacturer's product would be used with another product or part, even if the manufacturer's product did not require use or incorporation of that other product or part." *Id.* The "defendant-friendly bare-metal defense" urged by the manufacturers provided complete protection from liability:

> If a manufacturer did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated product was likely to be dangerous for its intended uses.

Id. Then there is a middle approach.

> [Although] foreseeability that the product may be used with another product or part that is likely to be dangerous is not enough to trigger a duty to warn[,] ... a manufacturer does have a duty to warn when its product requires incorporation of a part and the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses.

Id. at 993–94. For maritime claims, the Court settled on the middle approach, concluding that

> [A] product manufacturer has a duty to warn when (i) its product requires incorporation of a part, (ii) the manufacturer knows or has reason to know that the integrated product is likely to be dangerous for its intended uses, and (iii) the manufacturer has no reason to believe that the product's users will realize that danger.

Id. at 995.

Justice Gorsuch dissented and would have applied the bare-metal defense urged by the manufacturers. He reasoned that "it is black-letter law that the supplier of a product generally must warn about only ***684** those risks associated with the product itself, not those associated with the 'products and systems into which [it later may be] integrated.' " *Id.* at 997 (Gorsuch, J., dissenting) (alteration in original) (quoting Restatement (Third) of Torts: Prods. Liab. § 5, cmt. *b* (Am. L. Inst. 1997)). Justice Gorsuch equated the bare-metal defense with section 5 of the Restatement (Third) of Torts: Products Liability, which addresses the component-parts doctrine. *Id.*; *see also* Marjorie A. Shields, Annotation, *Application of "Bare Metal" Defense in Asbestos Products Liability Cases*, 9 A.L.R.7th art. 2, Westlaw (2015) [hereinafter Shields] ("The 'bare metal' defense, an affirmative defense, provides that a manufacturer has no duty to warn about potential dangers from exposure to a part of its product if the manufacturer did not make or distribute the part.").

H. Interpretation of Iowa Code Section 686B.7(5). With this understanding of the bare-metal defense, we return to the provision at issue: "A defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." Iowa Code § 686B.7(5). The exclusion from liability provided by section 686B.7(5) encapsulates the bare-metal defense as urged by the manufacturers in *DeVries*. The broadest view of the defense precludes liability to a manufacturer or supplier for harm caused by an integrated product into its own product. If the defendant

> did not itself make, sell, or distribute the part or incorporate the part into the product, the manufacturer is not liable for harm caused by the integrated product—even if the product required incorporation of the part and the manufacturer knew that the integrated

> product was likely to be dangerous for its intended uses.

DeVries, 139 S. Ct. at 993 (majority opinion). This is precisely what section 686B.7(5) does. It protects a manufacturer or seller from liability for exposure to an asbestos-containing product or component part made by someone else, a "third party" in the words of the statute.

We had neither adopted nor rejected the bare-metal defense with respect to asbestos claims, so the general assembly was writing on a clean slate on the specific issue of whether and how to apply the defense to asbestos claims, and it chose to apply it broadly, the "defendant friendly" version under *DeVries*. *See id.* Whichever formulation is used, a critical element running through the component-part doctrine is that it provides a defense for manufacturers or sellers facing products liability claims. Its very focus is on the part produced or sold by the defendant as compared to a part made or sold by a third party, limiting or eliminating liability for the manufacturer or seller whose product was not the dangerous part. *See* David Judd, *Disentangling* DeVries*: A Manufacturer's Duty to Warn Against the Dangers of Third-Party Products*, 81 La. L. Rev. 217, 233–34 (2020) (describing the question of whether a manufacturer has a duty to warn about risks posed by third-party products involving a manufacturer of component parts as a "subset of products liability cases"); Shields, 9 A.L.R.7th Art. 2 ("collect[ing] and discuss[ing] those cases in which courts have applied the 'bare metal' defense in asbestos *products liability* cases") (emphasis added); *see also, e.g.*, *Morgan v. Bill Vann Co.*, 969 F. Supp. 2d 1358, 1367–70 (S.D. Ala. 2013) (applying the bare metal defense under Alabama products liability law and holding it barred plaintiff's claim). The defense simply has no application to other types of claims, such as a premises liability claim, where the basis of liability is something other than duties owed by manufacturers or sellers ***685** of products to warn others about risks associated with their products.

It may well be that the Iowa General Assembly's codification of the component-parts defense is broader than the defense described in the Restatement or at common law. And that is the general assembly's prerogative. But its use of the phrase "product or component part made or sold by a third party" is clearly a reference to the component-parts doctrine, and we cannot ignore the context in which that defense arises in determining the meaning of Iowa Code section 686B.7(5).

Our interpretation of section 686B.7(5) as codifying a type of component-parts defense to a products liability claim is confirmed by other rules of statutory construction. We first look at the rest of the statutory scheme to construe the reach of section 686B.7(5). *See Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 865 (Iowa 2003) ("[W]e consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole."). Chapter 686B lays out the detailed process a plaintiff must complete in bringing an asbestos claim. A plaintiff with a nonmalignant condition must file, with his initial pleading, "a sworn information form" containing specific information, including the employer and occupation of the exposed person, the specific location and manner of each alleged exposure, and the beginning and ending dates of the exposure. Iowa Code § 686B.3(2)(*a*)–(*d*). The sworn information form must also provide "[t]he identity of the manufacturer of the specific asbestos ... product for each exposure" and "[t]he identity of the defendant or defendants against whom the plaintiff asserts a claim." *Id.* § 686B.3(2)(*e*)–(*f*). If any of the required information is missing, "[t]he court shall dismiss the asbestos action ... without prejudice." *Id.* § 686B.3(5). These details, particularly those related to the exposed person's occupation, employer, and locations and manners of exposure, seem unnecessary and would serve no purpose if liability is limited to manufacturers. So too would be the requirement to identify both the manufacturers of the specific products for each exposure and to separately identify the defendants against whom the plaintiff is asserting his claim. Those are one and the same under the district court's interpretation. We generally read legislation in a manner to avoid rendering portions of a statute superfluous or meaningless. *See Little v. Davis*, 974 N.W.2d 70, 2022 WL 1434657, at *4 (Iowa May 6, 2022) (rejecting interpretation of the Iowa Trust Code in a way that would make other sections never operable and relying on the "general rule of statutory construction" under which "we avoid an interpretation or application of a statute that renders other portions of the statute superfluous or meaningless").

We also consider how Iowa Code chapter 686B relates to chapter 686A. Chapter 686A requires plaintiffs bringing asbestos claims to identify bankruptcy trusts in which they may have a claim, which essentially means identifying the asbestos product manufacturers such as the two identified in this case—Johns Manville and Eagle-Pitcher. While plaintiffs are required to identify any actual or potential trust claims,

importantly, they are not limited to only bringing their claims against those trusts. Rather, the purpose behind chapter 686A is to ensure trust claims are identified to prevent a plaintiff from receiving the same recovery from both manufacturers and from other liable parties. Chapter 686A protects "peripheral," or non-manufacturer, defendants by requiring plaintiffs to collect what they can from the manufacturers' 529(g) trusts. *See* Iowa Code §§ 686A.3(1)(*a*) (requiring ***686** plaintiffs to provide an affidavit indicating they have investigated available trusts and filed claims in all applicable trusts), .3(3) (allowing the court to dismiss an asbestos action if the plaintiff fails to comply with these requirements). Amounts recovered or recoverable from 529(g) trusts are allowed as a setoff against any recovery from a defendant in an asbestos action. *See id.* § 686A.7 ("In any asbestos action in which damages are awarded and setoffs are permitted under applicable law, a defendant is entitled to a setoff or credit in the amount the plaintiff has been awarded from an asbestos trust identified in section 686A.6, subsection 1, and the amount of the valuation established under section 686A.6, subsection 2."). Chapter 686A does not, however, prevent asbestos actions against other non-manufacturing asbestos defendants. Yet if section 686B.7(5) granted the broad immunity allowed by the district court and limited liability to manufacturers, it would essentially do just that. Further, there would be little need to identify 529(g) trusts to defendants in asbestos actions if the only defendants were manufacturers, nearly all of which are protected by those trusts.

We also consider the consequences of the district court's interpretation of section 686B.7(5), which eliminates liability for defendants like Alcoa that do not sell or manufacture the offending asbestos-containing product. *See* Iowa Code § 4.6(5) (directing courts, in interpreting ambiguous statutes, to consider "[t]he consequences of a particular construction"). Premises liability claims are well-recognized claims that arose in asbestos litigation after manufacturers started seeking bankruptcy protection. *See* Hanlon at 668 ("In the late 1980s, premises cases began to be brought against electric utilities, and in the 1990s they extended to other kinds of companies, including paper mills, steel mills, and other facilities where asbestos was widely used."). At common law, Beverage could assert a claim against Alcoa based on its status as a premises owner, *see, e.g.*, *Van Fossen v. MidAm. Energy Co.*, 777 N.W.2d 689, 696 (Iowa 2009) (distinguishing between a duty owed by a premise's owner to an independent contractor under Restatement (Second) of Torts § 413 and the lack of duty owed to the invitee's spouse who never visited the site), or as the one who retained control over Beverage's work environment, *see McCormick v. Nikkel & Assocs., Inc.*, 819 N.W.2d 368, 371 (Iowa 2012) (addressing liability of the employer of an independent contractor under Restatement (Second) of Torts § 414). Neither form of liability depended on Alcoa selling or manufacturing an asbestos-containing product. Yet the district court's interpretation of section 686B.7(5) completely eliminates both types of liability.

"We have often repeated the rule that 'statutes will not be construed as taking away common law rights existing at the time of enactment unless that result is imperatively required.' " *Ford v. Venard*, 340 N.W.2d 270, 273 (Iowa 1983) (quoting *Porter v. Porter*, 286 N.W.2d 649, 655 (Iowa 1979) (en banc)); *see also Collins v. King*, 545 N.W.2d 310, 312 (Iowa 1996) (same). If the general assembly intended to eliminate all common law claims against all defendants except asbestos product manufacturers or sellers, it could have much more directly done so without burying it in a subsection focused on procedure. *See Sullivan v. Chi. & Nw. Transp. Co.*, 326 N.W.2d 320, 323 (Iowa 1982) (rejecting defendant's argument that legislature made sweeping changes to the railroad-grade-crossing common law based on statutory language—"A railroad crossing shall not be found to be particularly hazardous for any purpose unless the department has determined it to be particularly hazardous"—given ***687** its placement in a provision explaining the responsibilities owed by the railroad transportation division to the department of transportation (quoting Iowa Code § 307.26(5)(*b*) (1981))). If that was the purpose of section 686B.7(5), then why, in the same piece of legislation, did the general assembly enact such a complex scheme for asbestos plaintiffs to identify facts relevant to establishing the basis of liability for each defendant? Why enact the detailed provisions of chapter 686A, the Asbestos Bankruptcy Trust Claims Transparency Act, to identify liable manufacturers if the only potentially liable parties in an asbestos action are the manufacturers and sellers of the offending product? The context of the entire legislation must be considered in interpreting section 686B.7(5).

Finally, we note that section 686B.3 was amended in 2020, less than three years after the original legislation was enacted. In addition to requiring the plaintiff to "specify[ ] the evidence that provides the basis for each claim against each defendant," the amendment added the following sentence to subsection 5's dismissal provision: "The court shall dismiss the asbestos action ... without prejudice as to any defendant whose product *or premises* is not identified in the information

required pursuant to subsection 2." 2020 Iowa Acts ch. 1030, § 3 (codified at Iowa Code § 686B.3(4) (2021)) (emphasis added). Allowing a defendant to be dismissed, without prejudice, if its premises is not identified is a clear reference to a premises liability claim untethered from a products liability claim. If section 686B.7(5) already excluded premises liability claims by limiting liability to only manufacturers, this would be an odd addition. If the general assembly thought it had previously excluded premises liability claims but wanted to reinstate premises liability, this would be an even odder way to create liability it had eliminated through section 686B.7(5). The revision reveals that the legislation allowed premises liability claims before the 2020 amendment, contrary to the conclusion that section 686B.7(5)'s immunity provision extinguished all premises liability claims. *See* *Griffin Pipe*, 663 N.W.2d at 867 (holding amendment "clarified rather than changed the existing law").

Although the district court did not have the benefit of this amendment, and we are cautious in ascribing meaning to a prior legislature based on a later legislature's actions, we cannot ignore the legislature's clear indication that premises liability claims were viable under the 2018 version of the statute. Under the district court's reading, the original statute unambiguously eliminated premises liability claims. But if that is true, did the general assembly reinstate those claims just three years later? At a minimum, the 2020 amendment reveals an ambiguity as to whether section 686B.7(5) provides immunity to every defendant that does not manufacture or sell the asbestos-containing product or component part. *Cf.* *Food & Drug Admin. v. Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 132–33, 120 S.Ct. 1291, 146 L.Ed.2d 121 (2000) (holding the Food, Drug, & Cosmetic Act did not give the Food & Drug Administration jurisdiction to regulate cigarettes and smokeless tobacco as "drug delivery devices" within the context of 21 U.S.C. § 353(g)–(h) (1994) in part by considering extensive legislation of tobacco products enacted after § 353, explaining "the meaning of one statute may be affected by other Acts, particularly where Congress has spoken subsequently and more specifically to the topic at hand"). The subsequent amendment clarifies what the initial legislation already allowed: claims based on exposure to asbestos on a defendant's premises are allowed as distinct claims that do not turn on that ***688** defendant's involvement in the manufacture or sale of the offending product. *Cf.* *Taft v. Iowa Dist. Ct.*, 828 N.W.2d 309, 317–18 (Iowa 2013) ("When a statute is amended soon after controversy has arisen as to the meaning of ambiguous terms in an enactment, the court has reason to believe the legislature intended the amendment to provide clarification of such terms.").

Iowa Code section 686B.7(5) limits products liability claims against manufacturers or sellers to exposures from their own products or component parts but protects manufacturers or sellers from products liability claims premised on products or component parts made or sold by others. The provision does not address asbestos claims outside the context of a products liability claim, such as a premises liability claim. But it still does real work. We had not previously addressed the bare-metal defense at common law, and as the Supreme Court explained in *DeVries*, it has been implemented in different ways. *See* 139 S. Ct. at 993. Here, the general assembly has declared the defense to be broadly available to eliminate a manufacturer's or seller's liability for exposure to asbestos-containing products or component parts made or sold by others. But it is still a products liability defense. It simply has no relevance outside of a products liability claim.

III. Application of Section 686B.7(5) to Claims Against Defendants.

With this understanding of the provision's reach, the district court erred in granting summary judgment to Alcoa. Beverage's claims against Alcoa are based on Alcoa's actions of failing to provide Charles with a safe environment to work, either as a premises owner or as the one who controlled his work environment. These are not products liability claims that turn on who made or sold the asbestos-containing product, and the limitation of liability in section 686B.7(5) does not extend to Beverage's claims against Alcoa.

Beverage sued IITI for its role in supplying and installing the insulation at the Alcoa plant. Beverage's claims against IITI do sound in products liability, so section 686B.7(5) could apply if the claimed exposure was from someone else's product or component part, as opposed to IITI's. The district court reasoned that the insulation was made by third parties Johns Manville and Eagle-Pitcher, not IITI, so the statutory language "made or sold" protected IITI. *See* Iowa Code § 686B.7(5). The district court replaced the disjunctive "or" with the conjunctive "and," limiting liability only to a defendant who both made and sold the offending product. By using the disjunctive "made or sold," the general assembly sought to capture those in the line of distribution for the offending product or component part—as opposed to products

or component parts made or sold by third parties. Here, the summary judgment record establishes that IITI sold the insulation to Alcoa. That the insulation was made by Johns Manville or Eagle-Pitcher and only sold by IITI does not assist IITI here. The exposure was allegedly from a product sold by IITI, not a product "made or sold by a third party." The district court erred in granting summary judgment to IITI.

IV. Conclusion.

The district court erred in granting summary judgment to Alcoa and IITI. Judgment is reversed and the case is remanded for further proceedings.

COURT OF APPEALS DECISION VACATED; DISTRICT COURT JUDGMENT REVERSED.

Christensen, C.J., and Appel and McDonald, JJ., join this opinion. Waterman, J., files a dissent, in which Mansfield and McDermott, JJ., join.

WATERMAN, Justice (concurring in part and dissenting in part).

***689** I respectfully dissent in part. I concur with the majority's reversal of summary judgment in favor of Iowa-Illinois Taylor Insulation, Inc. (IITI). IITI supplied much of the asbestos-containing insulation at issue. But the plain text of Iowa Code section 686B.7(5) (2018) bars any claim against Alcoa, Inc. Alcoa neither made nor sold asbestos or an asbestos-containing product. The summary judgment in favor of Alcoa should be affirmed.

The text of the statute is dispositive. It provides, "A defendant in an asbestos action or silica action shall not be liable for exposures from a product or component part made or sold by a third party." *Id.* "Asbestos action" is in turn defined as "a claim for damages or other civil or equitable relief presented in a civil action arising out of, based on, or related to the health effects of exposure to asbestos." *Id.* § 686A.2(2); *see id.* § 686B.2(3). This case is an asbestos action, and third parties—not Alcoa—made and sold the asbestos and asbestos-containing products. Accordingly, Alcoa is entitled to summary judgment.

I am tempted to stop here. *See Rhoades v. State*, 880 N.W.2d 431, 451 (Iowa 2016) (Waterman, J., concurring specially) ("To me, the plain language of the statute is dispositive.... No further analysis is required."). But I will respond briefly to some of the claims of the majority.

First, the majority asserts that Iowa Code section 686B.7(5) was meant to codify the so-called "bare metal defense." That term—"bare metal defense"—appears nowhere in chapters 686A, 686B, or 686C. It is never mentioned in the legislative debate. Furthermore, section 686B.7(5) is a unique provision with no counterpart in any other state. Even if the purpose of a statute could somehow override plain language, and it can't, the majority has not made its case.

Second, the majority contends that Iowa Code section 686B.7(5) only applies to product liability claims, not to premises liability claims. That contention runs head-on into section 686A.2(2), which defines an "asbestos action" as "a claim for damages ... arising out of, based on, or related to the health effects of exposure to asbestos."[9] How do our colleagues in the majority get around this plain language? *See P.M. v. T.B.*, 907 N.W.2d 522, 540 (Iowa 2018) ("When the legislature has defined words in a statute—that is, when the legislature has opted to 'act as its own lexicographer'—those definitions bind us." (quoting *In re J.C.*, 857 N.W.2d 495, 500 (Iowa 2014))). They can't.[10]

***690** Third, the majority relies on "the rule that 'statutes will not be construed as taking away common law rights existing at the time of enactment unless that result is imperatively required.' " *Ford v. Venard*, 340 N.W.2d 270, 273 (Iowa 1983) (quoting *Porter v. Porter*, 286 N.W.2d 649, 655 (Iowa 1979) (en banc)). The majority fails to mention that Iowa's legislature has codified a contrary rule for interpreting our state statutes: "The rule of the common law, that statutes in derogation thereof are to be strictly construed, has no application to this Code." Iowa Code § 4.2. The legislature is free to alter common law rights of action and did so in section 686B.7(5). This new statute supersedes prior common law.

Difficult cases of statutory interpretation do exist. *See Schmett v. State Objections Panel*, 973 N.W.2d 300, 304 (Iowa 2022) (per curiam) ("Statutory interpretation is not like proving math theorems, and it is sometimes difficult to come up with a neat answer that is intellectually satisfying."). This is not one of them.

Mesothelioma is a horrible disease. Reasonable people can argue that there are circumstances when even a non-seller or non-manufacturer of asbestos should be liable in an asbestos action. However, the legislature enacted a different rule

in 2017, and we are obligated to follow it. *In re Det. of Geltz*, 840 N.W.2d 273, 274 (Iowa 2013) ("We must apply unambiguous operative statutory language as written without second-guessing the policy choices of the legislature."). [11] I would affirm the grant of summary judgment in favor of Alcoa.

Mansfield and McDermott, JJ., join this concurrence in part and dissent in part.

All Citations

975 N.W.2d 670

Footnotes

1 Alcoa, Inc. is now known as Arconic, Inc. We refer to the defendant as "Alcoa" to maintain consistency with the caption of the case.

2 Beverage originally filed suit in Missouri state court, naming a number of other defendants in addition to Alcoa and IITI. That case was dismissed for lack of personal jurisdiction over the defendants, and Beverage then filed this action in Iowa state court.

3 The Beverage family also raised constitutional challenges to section 686B.7(5) on appeal. But as the court of appeals noted, those claims were not raised below and were therefore not preserved for appellate consideration. We agree with the court of appeals' resolution of the constitutional challenges and do not disturb its analysis of those claims.

4 Even before becoming part of the industrial revolution,

> [a]sbestos was used in ancient times to make pottery and wicks for oil lamps. Later, it was used for textiles, including a purse for Benjamin Franklin and even a suit that enabled a person to walk through fire. Asbestos was even incorporated into paper to increase the archival quality of important Vatican documents for Pope Pius IX.

Mueller, 25 J. Contemp. Health L. & Pol'y at 440 (footnotes omitted).

5 *See, e.g.*, Ga. Code Ann. §§ 51-14-1 to -10 (West, Westlaw through Act 753, 2022 Reg. Sess.) (outlining the items an exposed person can provide to show they received a medical diagnosis showing they sustained an asbestos-related injury); Kan. Stat. Ann. §§ 60-4901 to -4911 (2021); S.C. Code Ann. §§ 44-135-10 to -110 (2021); Tex. Civ. Prac. & Rem. Code Ann. §§ 16.0031, 90.001–.012 (West 2022); W. Va. Code Ann. § 55-7G-1 to -10 (West, Westlaw through 2022 First Spec. Sess., Reg. Sess., and Second. Spec. Sess., Mar. 27, 2022).

6 *See Toxic Torts Litigation Guide* § 33:37 (discussing Ohio's enactment of asbestos bankruptcy trust transparency legislation in 2012, codified at Ohio Rev. Code Ann. §§ 2307.951–.954, and the states that followed). Other states have enacted similar legislation. *See, e.g.*, Ariz. Rev. Stat. § 12-782 (2022); Ga. Code Ann. § 51-14-7; Okla. St. tit. 76, §§ 81–89 (2021); Tenn. Code Ann. § 29-34-601 to -609 (2022); Tex. Civ. Prac. & Rem. Code Ann. §§ 90.051–.058; Utah Code Ann. §§ 78B-6-2001 to -2010 (2021); Wis. Stat. § 802.025 (2022).

7 *See, e.g.*, Ala. Code § 6-5-682 (2019); GA Code Ann. § 51-15-3 to -7 (2021); Ind. Code § 34-31-8-8 (2021); N.D. Cent. Code § 32-46-01 to -06 (2021); Ohio Rev. Code Ann. § 2307.97; 15 Pa. Stat. and Cons. Stat.

Ann. § 1929.1 (2021); S.D. Codified Laws § 20-9-39 (2021); Wis. Stat. § 895.61 (2022); Wyo. Stat. Ann. § 1-1-134 (2021).

8 The Georgia legislature proposed adding a similar provision to its asbestos code that provided: "A product liability defendant in an asbestos action shall not be liable for exposures from a product or component part made or sold by a third party." H.B. 638, 156th G.A., 2021–22 Reg. Sess., § 3 (Ga. 2021). The legislation did not pass. *See GA HB 638*, LegiScan, https://legiscan.com/GA/bill/HB638/2021 (last visited June 6, 2022) (noting the bill died in chamber).

9 The legislature knows how to limit tort reform statutes to specify either premises liability or product liability claims, as it has done in separate statutes of repose. *Compare* Iowa Code § 614.1(11) (premises liability), *with* *id.* § 614.1(2A) (product liability); *see also id.* § 613.18 (codifying limitation of products liability of non-manufacturers). It has not done so here. The majority is wrong to conclude that a plain-meaning interpretation of section 686B.7(5) renders other provisions surplusage. To the contrary, the product identification and notice provisions apply when a seller, such as IITI is sued, to avoid double-dipping and to properly allocate fault among parties who made or sold the asbestos that injured the plaintiff.

10 The majority also relies on a subsequent amendment to a different provision adding "or premises" after "product" in section 686B.3(4), governing dismissals. *See* 2020 Iowa Acts ch. 1030, § 3 (codified at Iowa Code § 686B.3(4) (2021)). They read too much into that two-word amendment when they infer that premises liability claims must not have been included in the original enactment if the legislature chose to add "or premises" to section 686B.3(4) three years later. To me, that legislative tweak is simply a belt-and-suspenders clarifying amendment, understandably motivated by the controversy exemplified in this litigation over the scope of the statutory requirements. *See* *Griffin Pipe Prods. Co. v. Guarino*, 663 N.W.2d 862, 867 (Iowa 2003) (holding amendment "clarified rather than changed the existing law" in response to controversy "within the legal community concerning the correct application of the original statute"). Importantly, the legislature left intact the broad definition of "asbestos action" in section 686A.2(2) as used in the immunity provision, section 686B.7(5).

11 I agree with the determination by the court of appeals and our court's majority that the plaintiffs failed to present any constitutional challenge to the statute in district court and therefore failed to preserve error on any constitutional claim. The plaintiffs could have filed this action in Iowa before the effective date of this statute but failed to do so. *See* Iowa Code § 686B.9(1) ("This chapter applies to all asbestos actions and silica actions filed on or after July 1, 2017."). Charles Beverage died of mesothelioma in 2015. The plaintiffs had already sued Alcoa and other parties in Missouri state court in 2016 but ultimately voluntarily dismissed that action after Alcoa challenged personal jurisdiction there.

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

IN RE THE MARRIAGE OF LAUREN UNDERWOOD f/k/a LAUREN NYGREN AND TREY NYGREN

Upon the Petition of LAUREN UNDERWOOD f/k/a/ LAUREN NYGREN, Petitioner, and Concerning, TREY NYGREN, Respondent.	EQUITY NO. CDCD061372 RULING ON MODIFICATION

On March 30, 2021, the above captioned matter came before the Court for trial on the Petitioner's Application to Modify and her Application for Rule to Show Cause. The Petitioner (Lauren) was present and represented by attorney Leanne Tyler. The Respondent (Trey) was present and self-represented. The Court heard from the parties and the following witnesses: Casey Mohr, Gary Mohr, Chelsea Clark, Mark Underwood, Melissa Underwood, Ben Layer, Elise Matson, and Stephanie Romagnoli. After reviewing the testimony and the exhibits the Court enters the following ruling.

Findings of Fact

The Court informed the parties of its findings on the record, but will go into some more specifics in this written ruling. The Court does not find it necessary to regurgitate the factual disputes of the parties. They each made their points of view clear through their own testimony and the testimony of their witnesses. For purposes of this ruling the Court will provide a brief factual summary and provide greater analysis in the discussion section.

The parties entered into a stipulated decree on July 9, 2019. The decree granted Trey and Lauren joint legal and joint physical custody of their minor child T.M.N. born 2017. Both Lauren and Trey have significant others in their lives who are positive influences in their lives. Lauren is currently living with her significant other, Casey Mohr, in Bettendorf. Trey is living with his significant other, Elise Matson, in Buffalo, Iowa. Trey and Elise have a child together who was born in 2020. Casey and Lauren do not have any children together. Both couples testified they planned on getting married at some point in the relationship.

Lauren works in real estate for Grampp Realty and assists Casey with some of his commercial properties. Trey is working at a nursing home in Walcott, Iowa, but will soon be working as a physician's assistant. The parties both agreed not to address the issue of child support because it is anticipated that Trey's income will be substantially different once he becomes a physician's assistant.

The main issue for the modification is whether or not to change the custody arrangement from joint physical care to primary care to one of the parents. The factual disputes between the parties can be summarized by saying that Lauren feels as though Trey is not doing enough or involved enough as a father.

Relevant Law and Discussion

Modification in General

Modification of a dissolution decree is only allowed when there has been a material and substantial change in circumstances since the original decree. *In re Marriage of Cooper*, 524 N.W.2d 204, 206 (Iowa Ct. App. 1994). The changed circumstances relied upon must be such as were not within the knowledge or contemplation of the Court when the decree was entered. *In re Marriage of Feustel,* 467 N.W.2d 261, 263 (Iowa 1991). The emphasis is on what the decretal court actually knew, not on what the parties knew or should have known, or should have

produced at the earlier trial. The original decree is entered with a view to reasonable and ordinary changes that may be likely to occur in the relations of the parties. *In re Marriage of Robbins,* 510 N.W.2d 844, 845 (Iowa 1994). The applicant bears the burden of proving the substantial change in circumstance by a preponderance of the evidence.

Custody

"To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well-being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons." *In re Marriage of Frederici*, 338 N.W.2d 156, 158 (Iowa 1983).

The Court considers the following factors when making a determination concerning joint physical care: 1) stability and continuity, 2) communication and respect, 3) degree of conflict, and 4) agreement about child-rearing practices. *In re Marriage of Hansen*, 733 N.W.2d 683 (Iowa 2007).

The question before the Court is whether or not there has been a substantial change in circumstances since the entry of the original decree which demonstrates that Lauren or Trey is the *superior* parent. *In re Marriage of Ivins*, 308 N.W.2d 75, 78 (Iowa 1981). Both parties bear a

heavy burden in attempting to make this showing. *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002).

As the Court stated to the parties on the record, this is a very, very difficult case for the Court. In this case specifically, the Court dislikes the language used by *Ivins* stating that one parent is superior. Here, both parents are very good parents. They are smart, capable, and loving parents. That being said, in examining the four *Hansen* factors required for joint physical care, the Court finds there has been a substantial change in circumstances.

Both parties have had numerous difficulties and challenges since the entry of their decree. The most obvious one is the impact of a global pandemic on their lives and their son's life. Obviously, the Court does not think those challenges will be long term enough to create a substantial change in circumstances necessary in a modification. The larger issues are around stability and continuity, communication and respect, conflict, and agreement about child rearing practices.

The Court will first examine stability and continuity. Trey and Elise have a good home where they live with their infant son and Elise's two daughters. They live in Buffalo, Iowa which is approximately 30 minutes from Lauren's home in Bettendorf, Iowa. There are a number of changes on the horizon for Trey and Elise. Trey does not know where he will be working as a P.A. Elise will need to remain somewhat close to Muscatine since her children go to school in the Louisa-Muscatine schools and she shares care with their father.

Lauren and Casey live in Bettendorf very near the school the parties' son will be attending. The parties continue to agree that their son should go to school in the Pleasant Valley School District. The Court finds Lauren and Casey credible that they will be remaining in this

area. Lauren and Casey both work flexible schedules which allows them to work from home when needed.

The Court is not making a finding that Trey lacks stability as a parent. But when the Court compares the situations of Trey and Lauren in the long term, it appears that Lauren will be in a better situation to provide more stability and continuity than Trey will. Trey simply has more moving parts in his life than Lauren does. That isn't a bad thing, but it is a factor when examining stability and continuity.

The next two *Hansen* factors can be analyzed together. A major issue for both Trey and Lauren is their communication. The majority of their communication is through email and text. Admittedly, Trey does not check his email as frequently as he should when that is their main form of communication. This results in frustration from Lauren which can cause the tone of her emails and texts to be more negative and creates more conflict. The Court understands there is a backstory between the parties and a reason why they divorced. Since this is a modification the Court did not allow the parties to present evidence on those issues. There is no doubt from listening to the testimony and observing the parties that there are still emotional wounds that need to heal.

While the parties acknowledge they each need to improve their communication and work to reduce the conflict between them, nearly two years have gone by since the entry of their decree and there has been little improvement. Their communication issues make a shared care arrangement more difficult than it needs to be between two very good parents. The Court admonished both parties on the record that they need to improve this part of their co-parenting relationship.

The fourth and final factor for the Court to consider is the agreement on child rearing practices. In reviewing the evidence, the Court believes the parties are generally in agreement on the big decisions such as attending Pleasant Valley Schools or more generally wanting the best opportunities for their child. The issue arises when it comes to executing on these plans. Lauren is very organized and clearly has a plan for their son. Trey is more laid back and flexible when it comes to making plans involving their son.

Neither of their approaches are perfect. The evidence demonstrates that there are times where Lauren could let go and allow Trey some latitude, such as a snow day from daycare. There are also plenty of times when Trey could respond and make an effort at a plan with Lauren to ease any anxiety that she may have. The Court's decision in this case is not a comment that one parent's way of doing things is per se better. It is not a comment that all of Lauren's decisions are right and all of Trey's are wrong. By granting primary physical care to Lauren the Court is attempting to provide more stability and consistency to the child because that is in his best interests. The Court finds that perhaps some more parameters for the parties will result in more clear communication and expectations. As the Court informed the parties at the trial, no ruling is perfect, and no ruling can anticipate every issue. Lauren and Trey have the ability to work together and co-parent their child, the question is whether they are each willing to make some changes to allow that to happen.

The Court finds for the above reasons that a joint physical care arrangement is not in the minor child's best interests. The Court finds the evidence presented demonstrated a substantial change in circumstances. In addition to the above *Hansen* analysis, the parties each have new significant others in their lives which have resulted in changes that will likely be long term or

permanent. The Court finds it is appropriate to modify the decree to grant Lauren primary physical care of T.M.N.

Visitation

Subsumed within the custody and physical care determination is the issue of appropriate visitation for the noncustodial parent or parent who does not receive primary physical care. Establishing appropriate visitation requires that the Court balance the possibly conflicting goals of maximizing continuing physical and emotional contact with both parents and avoiding excessive disruption in the life of the child. See Iowa Code Section 598.41(1)(a).

"In determining visitation rights the governing consideration is, as always, the best interest of the child. Liberal visitation rights are in the best interest of the child." *In re Marriage of Drury*, 475 N.W.2d 668, 670 (Iowa Ct. App. 1991) (citations omitted) also see Iowa Code Section 598.41(1)(a).

The parties may modify any part of the visitation schedule by mutual agreement. Trey shall have visitation every Wednesday evening from after school to Thursday morning. Trey shall have visitation every other weekend beginning after school on Friday to Monday morning. Trey shall pick up and drop the child off at school or at Lauren's if school is not in session. This visitation schedule shall begin April 21, 2021.

The parties shall cooperate with each other to ensure that the children are, to the extent possible, able to attend weddings of family members, funerals, family reunions, and other significant events that are celebrated by the parties' respective families. Both parties are able to attend any extracurricular activities of the children, school functions or medical appointments related to the children. The parents should make every effort to sign the child up for activities in

Bettendorf and the surrounding communities to limit scheduling conflicts and additional transportation issues.

Each party shall receive two (2) nonconsecutive weeks for summer visitation with the minor child, T.M.N., (born in 2017). Additionally, the Petitioner/Respondent shall forfeit his/her summer visitation with the minor child, should he/she not provide proper notice to the other party. Notice shall be given as outlined in the parties' Stipulation and Agreement to Decree of Dissolution of Marriage filed on July 8, 2019.

HOLIDAY SCHEDULE

Given Holiday	Odd Years	Even Years
Easter Sunday at 10:00 a.m. until 5:00 p.m.	Dad	Mom
Spring Break (When the minor child reaches school age) from after school the day the child is released until the day before school resumes at 5:00 p.m. Easter visitation takes precedence over Spring Break.	Mom	Dad
Mother's Day 9:00 a.m.- 5:00 p.m.	Mom	Mom
Memorial Day Friday at 5:00 p.m., or after school until Monday at 5:00 P.M.	Mom	Mom
Father's Day 9:00 a.m.- 5:00 p.m.	Dad	Dad
Fourth of July 12:00 p.m. on July 4 until 12:00 p.m. on July 5.	Mom	Dad
Labor Day Weekend Friday at 5:00 p.m., or after school until Monday at 5:00 P.M.	Dad	Dad
Thanksgiving - PART 1 Wednesday at 5:00 p.m., or after school until Friday at 5:00 p.m.	Mom	Dad

Thanksgiving - PART 2 Friday at 5:00 p.m. until Sunday at 5:00 p.m.	Dad	Mom
Christmas (Part 1) December 23 at 12:00 p.m. until December 25 at 12:00 p.m.	Dad	Mom
Given Holiday	**Odd Years**	**Even Years**
Christmas (Part 2) December 25 at 12:00 p.m. until December 27 at 12:00 p.m.	Mom	Dad
New Year's Eve December 31 at 12:00 p.m. until January 1 at 12:00 p.m.	Mom	Dad

Holiday and extended summer visitation supersede regular parenting time, including weekends.

Child Support and Health Insurance

The Court reserves this issue pursuant to the original decree. The Court anticipates a significant change in income and benefits for Trey and the issue is not ripe for consideration at this point.

Contempt

The Court heard testimony on the allegations that Trey failed to pay for certain expenses and failed to pay child support. The Court finds there was insufficient evidence that Trey willfully disobeyed the court order. Trey shall reimburse Lauren for costs that would have been shared under the previous decree.

Remaining Portions of the Decree

All remaining portions of the July 8, 2019, decree remain in effect.

Costs

Costs of this action are taxed to Trey.

ALL OF THE ABOVE IS ORDERED

975 N.W.2d 48 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

IN RE the MARRIAGE OF Lauren NYGREN and Trey Nygren
Upon the Petition of Lauren Nygren, Petitioner-Appellee,
And Concerning Trey Nygren, Respondent-Appellant.

No. 21-0822
|
Filed February 16, 2022

Appeal from the Iowa District Court for Scott County, Patrick McElyea, Judge.

A father appeals from the modification of a joint physical care arrangement. **REVERSED.**

Attorneys and Law Firms

Chase Cartee of Cartee Law firm, P.C., Davenport, for appellant.

M. Leanne Tyler of Tyler & Associates, P.C., Bettendorf, for appellee.

Considered by Schumacher, P.J., and Ahlers, J., and Vogel, S.J. *

Opinion

SCHUMACHER, Presiding Judge.

***1** Trey Nygren appeals from the modification of a joint physical care provision. Upon our de novo review, we find there has not been a substantial and material change in circumstances warranting modification of the physical care provision of the parties' original decree. Accordingly, we reverse.

I. Facts & Proceedings

Trey Nygren and Lauren Underwood, formerly known as Lauren Nygren, entered into a stipulation to dissolve their marriage. The stipulation incorporated an agreement for joint legal custody and joint physical care, along with a parenting plan for their only child, T.N., born in 2017. This stipulation was adopted by decree filed on July 8, 2019. Trey had parenting time with the child every Wednesday and Thursday, as well as every other weekend. On the weeks he did not have weekend parenting time, Trey had parenting time with T.N. from Wednesday to Friday. On days other than those awarded to Trey, Lauren had parenting time. The decree afforded both parents specific vacation time with the child and designated holidays. Trey was ordered to pay child support and Lauren was ordered to pay the expenses incurred from daycare and school activities. The parties were ordered to split medical costs incurred for T.N.

At the time of the modification trial, both Trey and Lauren had entered into other relationships and were residing with their significant others. Both individuals were reported to be positive influences on T.N. Trey and his significant other have a five-month-old baby together. Trey's significant other also has two daughters she shares custody of with her ex-husband. T.N. is the only child that resides in Lauren's home. The record reflects that T.N. is an intelligent, well-mannered child that is bonded to both his mother and father.

Trey and Lauren live roughly thirty minutes apart. Lauren lives within walking distance of the school the child will likely attend. The parties agreed as to the school district for T.N. in the original decree and such is not an issue for this appeal. Lauren works in real estate. At the time of trial, Trey was employed at a long-term care facility doing maintenance work, directing activities, and assisting in a memory care unit. He passed his boards a few weeks prior to trial to become a physician assistant.

Six months after the entry of the original dissolution decree, Lauren filed a petition for modification of the physical care provision of the decree. She alleged, among other things, Trey did not communicate effectively with her, Trey caused their child to be late or miss daycare, Trey did not attend medical appointments, and Trey failed to utilize his allotted summer vacation time. Lauren also filed an application for rule to show cause, arguing Trey should be held in contempt for failing to pay child support and his share of the child's medical bills.

A trial was held on March 30 and 31, 2021. At the time of trial, T.N. was three years old. Lauren requested that the joint physical care arrangement be modified to award her physical care. Trey requested that Lauren's petition be dismissed or that the court consider awarding Trey physical care. [1] The district court summarized the factual disputes between the parties as "Lauren feels as though Trey is not doing enough or involved enough as a father." The district

court noted that "this is a very, very difficult case" because "both parents are very good parents ... [who] are smart, capable, and loving." The court found that there had been a substantial change in circumstances and awarded Lauren "primary physical care."[2] The court noted the most obvious challenge since the entry of the decree was the impact of a global pandemic, but did not believe such would be long term. The court determined that Lauren was in a better situation to provide more stability and continuity than Trey. The court determined that Trey had not willfully disobeyed the court order to pay child support and medical bills. Trey appeals the court's modification ruling.

II. Standard of Review

***2** "Petitions to modify the physical care provisions of a divorce decree lie in equity. Thus, we review the district court's decision de novo. Though we make our own findings of fact, we give weight to the district court's findings." *In re Marriage of Harris*, 877 N.W.2d 434, 440 (Iowa 2016) (quotation marks and citations omitted). "Prior cases have little precedential value, and we must base our decision primarily on the particular circumstances of the parties presently before us." *Melchiori v. Kooi*, 644 N.W.2d 365, 368 (Iowa Ct. App. 2002). "The controlling consideration in child custody cases is always what is in the best interests of the [child]." *In re Marriage of Thielges*, 623 N.W.2d 232, 235 (Iowa Ct. App. 2000) (quoting *In re Marriage of Swenka*, 576 N.W.2d 615, 616 (Iowa Ct. App. 1998)).

III. Discussion

Trey alleges the district court erred in determining a substantial and material change of circumstances existed that warranted modification of the joint physical care arrangement. Both Trey and Lauren request appellate attorney fees.

A. Modification of Physical Care

The legal framework for determining whether to modify a physical care provision of a dissolution decree is well established:

> To change a custodial provision of a dissolution decree, the applying party must establish by a preponderance of evidence that conditions since the decree was entered have so materially and substantially changed that the children's best interests make it expedient to make the requested change. The changed circumstances must not have been contemplated by the court when the decree was entered, and they must be more or less permanent, not temporary. They must relate to the welfare of the children. A parent seeking to take custody from the other must prove an ability to minister more effectively to the children's well being. The heavy burden upon a party seeking to modify custody stems from the principle that once custody of children has been fixed it should be disturbed only for the most cogent reasons.

In re Marriage of Frederici, 338 N.W.2d 156, 158 (Iowa 1983); *see also* *Harris*, 877 N.W.2d at 440.

Lauren points to three broad factors to demonstrate a substantial change in circumstances: (1) the difficulty Lauren and Trey have in communicating; (2) Trey's lack of involvement in their child's medical appointments, daycare, and extracurricular activities; and (3) Trey's failure to pay child support and medical bills.[3] Trey characterizes Lauren's allegations as relating to his struggles in passing his licensing exam. We determine that Lauren's evidence admitted at trial does not rise to the level of a substantial and material change of circumstances that is permanent and not within the contemplation of the original trial court. We further determine that the record does not support that modification of the joint physical care arrangement is in T.N.'s best interest.

As reflected in this record, the COVID-19 pandemic has complicated the parties' joint parenting agreement. To be certain, when the decree was entered in 2019, the district court and the parents could not have anticipated or developed a playbook for co-parenting in a global pandemic. Trey believed the child should stay with him during the day when he was not working to limit exposure, while Lauren believed that daycare and the hiring of a private teacher was more appropriate. Outside of the COVID-19 issue, neither party's

communication to the other parent has been perfect. Trey has not always informed Lauren when he plans to keep the child at home with him rather than taking the child to daycare. Trey does not check his email every day, which is one of the parties' forms of communication. Trey did not immediately update Lauren with his new address. Lauren failed to inform Trey of a therapy consultation appointment for the child until after the fact. And, as the district court noted, there are times when Lauren could allow some latitude and Trey could make an effort to plan.

***3** Our courts have recognized that difficulty communicating between parents can constitute a change of circumstances. *See* *Harris*, 877 N.W.2d at 441 ("An important factor to consider ... is the ability of the spouses to communicate and show mutual respect." (quotation and citation omitted)). Although difficulty communicating certainly makes joint physical care difficult, "[t]o be significant enough to justify a denial of joint [physical care], a lack of ability to communicate must be something more than the usual acrimony that accompanies a divorce." *In re Marriage of Ertmann*, 376 N.W.2d 918, 920 (Iowa Ct. App. 1985); *see also* *Armstrong v. Curtis*, No. 20-0632, 2021 WL 210965, at *2 (Iowa Ct. App. Jan. 21, 2021) ("Tension between the parents is not alone sufficient" to warrant modification).

Modification may be proper when the evidence shows animosity that goes beyond communication difficulties. *See* *Tressel v. Kuehl*, No. 18-1189, 2019 WL 1294216, at *3 (Iowa Ct. App. Mar. 20, 2019) (holding that the assault of the mother by the father in the child's presence and issuance of a no-contact order preventing contact between the parents warranted modification of a shared physical care arrangement); *In re Marriage of Malloy*, No. 16-0274, 2016 WL 7404611, at *5 (Iowa Ct. App. Dec. 21, 2016) (denying request for modification of shared physical care based on mother's allegations that the father exercised inconsistent and unannounced visits that interrupted the children's lives). Furthermore, the animosity must have "a disruptive effect" on their child's life. *See* *Melchiori*, 644 N.W.2d at 368.

Lauren and Trey's communication difficulties do not rise to the level warranting modification. The record contains many text messages and email conversations demonstrating the parents are able to converse civilly about their child, ensuring they are each informed and able to meet the child's needs. *See* *Ertmann*, 376 N.W.2d at 920 (noting that a willingness to communicate for the sake of the child weighed against modification). The communication is frequent. Moreover, it appears both parents take active steps to avoid speaking negatively of the other in front of their child and have instructed their significant others and extended family to refrain from such as well. Consequently, this is not a case where "[t]he depth of [the parents'] animosity toward each other is not lost on the [child]." *Harris*, 877 N.W.2d at 434; *cf.* *Malloy*, 2016 WL 7404611, at *5 ("The record reflects the children have thrived and maintained a close relationship with both parents.").

To both parents' credit, Trey and Lauren's disagreements do not appear to have a disruptive effect on their child. Both have worked diligently to keep their young child out of the middle and out of earshot of any disagreements. A school psychologist met with T.N. twice at Lauren's request. The psychologist testified he had no concerns about the child and that he is a "developmentally really strong little dude." Other witnesses described the child as intelligent for his age and happy. The record does not indicate that the parents' communication is having a negative impact on their child's development and well-being. *See* *In re Marriage of Dauterive*, No. 18-0381, 2019 WL 1056816, at *3 (Iowa Ct. App. Mar. 6, 2019) (finding the parents' disagreements did not warrant modification when the child's "well-being was [not] imperiled by the acrimony"). Lauren and Trey's communication does not result in a substantial and material change in circumstances. *See* *In re Marriage of Hansen*, 733 N.W.2d 683, 695 (Iowa 2007) ("Physical care issues are not to be resolved based upon perceived fairness to the spouses, but primarily upon what is best for the child." (emphasis omitted)).

***4** Similarly, Lauren's allegations of Trey's lack of involvement in organizing and participating in his child's medical care and extracurricular activities do not amount to a substantial and material change in circumstances. Trey admitted to not attending all of the medical appointments if Lauren was present. However, this pattern has not impacted the child's welfare. Quite the opposite, Lauren and Trey's child was described at trial as outgoing, intelligent, happy, and healthy. T.N. has not suffered medically as a result of Trey's parenting. On these allegations, we determine a lack of a substantial and material change in circumstances warranting modification of the parties' joint physical care arrangement. We further determine that Trey's admission that he did not sign the child up for any extra-curricular activities does not equate to a substantial and material change in circumstances.

In reaching its decision, the district court focused on factors enunciated in *Hansen*: stability and agreement on child rearing practices. *See id.* at 696-99. While being careful to clarify that it was not finding Trey lacked stability, the court found, "Lauren will be in a better situation to provide more stability and continuity than Trey will." The court rested this finding on the fact that Trey is searching for a new job and may need to move in the future. We determine this does not rise to the level of a substantial and material change. The moving party bears a significant burden in a modification action. See Harris, 877 N.W.2d at 440 ("The party seeking to modify a dissolution decree thus faces a heavy burden ...."). Factors that may be important to an initial physical care determination may not be able to overcome the strong burden of proof necessary in a modification action. *See In re Marriage of Dethrow*, 357 N.W.2d 44, 45 (Iowa Ct. App. 1984) (distinguishing between the standards used in initial custody awards from the standard used in modifications of custody awards).

To the extent relevant to the instant modification, on the record before us, Trey has yet to obtain employment as a physician assistant. However, that issue was squarely "contemplated by the court when the decree was entered." *See Frederici*, 338 N.W.2d at 158. For instance, the stipulation provided that Trey would be obligated to increase the amount of child support he paid after passing his boards and obtaining a job as a physician assistant. At the time of trial, Trey had not changed employment. We determine potential future employment without further information as to location and distance from Trey's current residence is not a substantial and material change in circumstances. [4]

The district court correctly noted that Lauren and Trey are largely in agreement over child-rearing practices. For instance, the parents agree on where their child should attend school. Both parents agree the other is loving and supportive of their child. The only notable disagreements on child rearing in the record before us, outside of the COVID-19 concerns, involve how to deal with their child's "sleep hygiene" and disagreement on Trey occasionally keeping T.N. out of daycare so the child could have more "dad days." No doubt, the parents have different parenting styles. However, the parents' general agreement on how to raise their child further supports maintaining joint physical care.

Trey was behind in child support payments and expenses for medical care at the time of trial. He attributes this to a delay in passing his boards. Lauren acknowledges such is not determinative of physical or shared care. While we do not condone this delinquency, the district court determined that Trey was not in contempt of court, and such finding has not been appealed.

***5** While there have been some minor changes in the parties' lives following the entry of the decree, on this record, we do not determine "that conditions since the decree was entered have so materially and substantially changed that the [child's] best interests make it expedient to make the requested change." *See id.* We also determine the evidence does not support finding a modification is in the child's best interest. We reverse the modification of the joint physical care arrangement.

B. Appellate Attorney Fees

Both parties seek an award of appellate attorney fees. Iowa Code section 598.36 permits an award of attorney fees to the prevailing party. *In re Marriage of Minjares*, No. 19-0623, 2019 WL 6894283, at *2 (Iowa Ct. App. Dec. 18, 2019). "Appellate attorney fees are not a matter of right, but rather rest in this court's discretion." *In re Marriage of Okland*, 699 N.W.2d 260, 270 (Iowa 2005). We may consider "the needs of the party seeking the award, the ability of the other party to pay, and the relative merits of the appeal." *Id.* (citation omitted). Given these factors relative to these parties, we decline to award appellate attorney fees.

REVERSED.

All Citations

975 N.W.2d 48 (Table), 2022 WL 470364

Footnotes

* Senior judge assigned by order pursuant to Iowa Code section 602.9206 (2022).

1 On appeal, Trey argues only that the court erred in modifying the joint physical care arrangement.

2 We interpret the court's order as granting Lauren physical care of the child, while providing Trey liberal visitation. *See* Iowa Code §§ 598.1, .41 (2020).

3 Neither party alleges that the slight increase in distance between the parties' respective homes is a substantial and material change of circumstances. The parties' residences both remain in Scott County, as was the case at the time of the original dissolution decree.

4 While the district court cited future employment for Trey as a basis for modification, Trey expressed intent to move closer to his son for work, rather than further away.

E-FILED 2020 OCT 28 4:27 PM SCOTT - CLERK OF DISTRICT COURT

IN THE IOWA DISTRICT COURT FOR SCOTT COUNTY

IN RE THE MARRIAGE OF JEFFERY MAU AND ANN MARIE MAU

Upon the Petition of JEFFERY MAU, Petitioner, and Concerning, ANN MARIE MAU, Respondent.	EQUITY NO. CDCD062469 RULING ON QDRO

On October 16, 2020, the above captioned matter came before the Court for hearing on the entry of a Qualified Domestic Relations Order (QDRO). The parties were present through counsel. Jeff Mau was represented by attorney Paul Macek and Ann Marie Mau was represented by attorney Meghan Corbin. The Court heard arguments by counsel and a professional statement from attorney Michael Rock who previously represented Ms. Mau.

In fashioning this decision, the Court has not considered the professional statements made by counsel regarding the settlement negotiations, nor has the Court reviewed the transcript of the acceptance of the settlement by this Court. The Court has only considered the language in the signed stipulation filed February 14, 2020. Specifically the Court has considered the first paragraph under the heading “Assets” arriving at this decision.

The issue before the Court is whether the stipulation as written is fair and equitable with respect to the division of the Ameriprise retirement plan (Ameriprise

account). The specific section of the stipulation that is in dispute is contained in the first paragraph under "Assets." The parties agree that they divided the premarital portion of this account pursuant to the stipulation. $100,000 of the Ameriprise account went to Ann Marie and $11,000 went to Jeff. The stipulation provided that the remaining balance would be divided pursuant to the *Benson* formula. The issue is whether the division pursuant to the *Benson* formula is fair and equitable.

Ann Marie argued the remaining balance in the account should be divided equally and not subject to the *Benson* formula. Her reasoning is that the *Benson* formula creates a second offset for the premarital contributions resulting in Jeff essentially "double dipping," and reducing Ann Marie's share with this offset. Ann Marie argued there is no need to apply *Benson* because the parties already accounted for the premarital portions in the stipulation.

Jeff's position is quite simple. This is the agreement the parties entered into. The stipulation was signed by counsel, agreed to on the record, and approved by the court. Jeff's position is the stipulation speaks for itself and the Court should not disturb the agreement of the parties.

The parties agreed during the hearing that the net effect of applying the *Benson* formula to the remaining portion of the Ameriprise account resulted in Jeff receiving roughly $53,000 more than Ann Marie does.

"The partners to a marriage are entitled to a just and equitable share of the property accumulated through their joint efforts. Iowa courts do not require an equal division or percentage distribution. The determining factor is what is fair and equitable in each circumstance." *In re Marriage of Miller*, 552 N.W.2d 460 (Iowa Ct. App. 1996)

(Internal citations omitted). The parties are aware, and the Iowa Code is clear, that Iowa Code 598.21 requires the Court to distribute property equitably.

This case presents a difficult situation for the Court. This Court believes strongly in the parties' ability to bargain and construct an agreement. The Court understands that there may be portions of an agreement that subjectively look unfair or inequitable, but for lack of a better term, "get the deal done." This situation is complicated further by the fact that counsel for both parties signed off on the stipulation assenting to the provisions in the agreement, and the Court approved the settlement on the record.

The stipulation does grant the Court continuing jurisdiction to "enter any subsequent orders that are necessary to do equity or implement this portion of the Decree." This is the hook the Court is hanging its hat on to modify the terms of the parties' agreement. The Court finds application of the *Benson* formula results in a second offset for premarital contributions and creates an inequitable result. The Iowa Court of Appeals has affirmed the concept that a function of the *Benson* formula is to create an offset for premarital contributions. See *In re Marriage of Freudenberg*, 926 N.W.2d 569 (Iowa Ct. App. 2018) and *In re Marriage of Wattonville*, 817 N.W.2d 32 (Iowa Ct. App. 2012). These cases are persuasive authority for the proposition that the goal of the *Benson* formula is to account for premarital contributions.

The Court finds an equitable distribution would be each party receiving one-half of the remaining balance in the Ameriprise account.

IT IS THEREFORE ORDERED that the remaining balance of the Ameriprise account shall be divided equally among the parties. The parties shall use the same

valuation dates as previously agreed. All other portions of the Decree remain in full force and effect.

The costs of this action shall be assessed to the Petitioner.

964 N.W.2d 358 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

IN RE the MARRIAGE OF
Jeffery MAU and Ann Marie Mau
Upon the Petition of Jeffery Mau, Petitioner-Appellant,
And Concerning Ann Marie Mau, Respondent-Appellee.

No. 20-1422
|
Filed April 28, 2021

Appeal from the Iowa District Court for Scott County, Patrick A. McElyea, Judge.

Jeffery Mau appeals from the district court's ruling on the entry of the parties' qualified domestic relations order. **REVERSED AND REMANDED.**

Attorneys and Law Firms

Paul L. Macek of Hopkins & Huebner, P.C., Davenport, for appellant.

Ryan M. Beckenbaugh of H.J. Dane Law Office, Davenport, for appellee.

Considered by Vaitheswaran, P.J., and Greer and Schumacher, JJ.

Opinion

VAITHESWARAN, Presiding Judge.

***1** This is an appeal from the denial of a motion to approve a qualified domestic relations order (QDRO).

The facts are essentially undisputed. Jeffery and Ann Marie Mau married in 2011 and divorced in 2020. The parties, both represented by counsel, stipulated to division of their assets. The relevant portion of the stipulation stated:

ASSETS

> IT IS FURTHER STIPULATED AND AGREED the Petitioner, JEFFERY MAU, is awarded all right, title, and interest in the following assets: ... the petitioner's Ameriprise Account. Provided that the Ameriprise qualified accounts (the retirement accounts) shall be divided as follows: $100,000 of the qualified accounts shall be rolled over into a 401k, IRA or other retirement account to be established or designated by the Respondent and shall be the property of the Respondent. $11,000.00 of the qualified accounts shall remain in the qualified account and shall be the property of the petitioner. In respect to this sum of $11,000.00, the Petitioner shall benefit by any increase in value of this sum or incur any reduction in value. The balance of the qualified accounts shall be divided between the parties pursuant to the *Benson* Formula, The Court reserves jurisdiction of the Ameriprise qualified accounts to enter any subsequent Orders that are necessary to do equity or implement this portion of the Decree. [1]

The parties further stipulated that the "agreement [did] justice between the parties and [was] an *equitable division of the parties' assets and liabilities* and [was] in the best interest of the parties." (Emphasis added.) The district court filed a dissolution decree making "the terms and provisions" of the parties' "Stipulation and Agreement ... a part of [the] Decree" and incorporating them and making them "enforceable as if same were set forth verbatim."

Following entry of the decree, Jeffrey sought the court's approval of a QDRO to divide the balance of the Ameriprise individual retirement account. His proposed QDRO provided:

> **FIRST AWARD:** The Custodian is directed to transfer directly into a separate account to be established by the Alternate Payee one hundred thousand dollars **($100,000)** from the value of the Account Holder's account as of the date of account segregation/transfer. The transfer shall be made as soon as practicable after this Order has been served upon the Custodian. The amount awarded to the Alternate Payee in this paragraph shall be transferred in cash after a proportionate share of the underlying investments are liquidated. Said transfer shall be made directly into a separate account for the Alternate Payee. The determination of the exact division and transfer of funds shall be made by the Custodian to the best of their ability.
>
> ***2 SECOND AWARD:** After deducting Eleven Thousand Dollars ($11,000) from the remaining funds, after the "First Award", the Custodian is directed to transfer directly into a separate account to be established by the Alternate Payee **Fifty Percent** (50%) of the value of the Account Holder's account as of **February 14, 2020** multiplied by a fraction the numerator of which represents the years of marriage from November 11, 2011 to the parties date of divorce February 14, 2020

(8.27 yrs.) divided by the number of years the account existed. The amount awarded to the Alternate Payee in this paragraph shall be adjusted for any market value and/or investment gains or losses from February 14, 2020 to the date a separate (temporary) account is established on behalf of the Alternate Payee. Recognizing that the account balance consists of publicly registered securities and/or cash equivalents, said account and/or securities transferred shall be determined on a proportionate basis to the amount assigned to the Alternate Payee and the market value of each security, account or cash equivalent in the account as of the date of transfer directly into a separate account for the Alternate Payee. The determination of the exact division and transfer of funds shall be made by the Custodian to the best of their ability.

At a hearing on the application, the parties agreed the total amount in the account as of the dissolution date was $372,454. After subtraction of the $100,000 and $11,000, there remained a balance of $261,454 to be divided pursuant to the formula. Ann Marie's attorney explained that an equal division of the balance would afford each party an additional $130,727, whereas application of "the *Benson* formula [would leave] Ms. Mau with $78,436 instead of the 130." Jeffrey's attorney responded that "would reflect [his] understanding." He stated "the net impact if the second *Benson* application is made nets Ms. Mau about $53,000 less." [2]

The district court agreed with the parties that "the net effect of applying the *Benson* formula to the remaining portion of the Ameriprise account resulted in Jeff receiving roughly $53,000 more than Ann Marie does." The court then stated:

> This case presents a difficult situation for the Court. This Court believes strongly in the parties' ability to bargain and construct an agreement. The Court understands that there may be portions of an agreement that subjectively look unfair or inequitable, but for lack of a better term, "get the deal done." This situation is complicated further by the fact that counsel for both parties signed off on the stipulation assenting to the provisions in the agreement, and the Court approved the settlement on the record.
>
> The stipulation does grant the Court continuing jurisdiction to "enter any subsequent orders that are necessary to do equity or implement this portion of the Decree." This is the hook the Court is hanging its hat on to modify the terms of the parties' agreement. The Court finds application of the *Benson* formula results in a second offset for premarital contributions and creates an inequitable result. The Iowa Court of Appeals has affirmed the concept that a function of the *Benson* formula is to create an offset for premarital contributions. *See In re Marriage of Freudenberg*, 926 N.W.2d 569 (Iowa Ct. App. 2018) and *In re Marriage of Wattonville*, 817 N.W.2d 32 (Iowa Ct. App. 2012). These cases are persuasive authority for the proposition that the goal of the *Benson* formula is to account for premarital contributions.
>
> The Court finds an equitable distribution would be each party receiving one-half of the remaining balance in the Ameriprise account.

Jeffrey appealed. Our review is de novo. *See In re Marriage of Veit*, 797 N.W.2d 562, 564 (Iowa 2011) (applying de novo review in determining whether QDRO fulfilled terms of dissolution decree); *In re Marriage of Brown*, 776 N.W.2d 644, 647 (Iowa 2009) (reviewing de novo whether district court properly interpreted dissolution decree).

***3** Preliminarily, Jeffrey argues the district court lacked authority to modify the property provisions of the dissolution decree. We find the district court had authority to enter a QDRO to effectuate the terms of the stipulation. *See Brown*, 776 N.W.2d at 648. There, the court began by noting, "[w]e have never decided whether a QDRO is a necessary part of the judgment of dissolution or if it should be regarded as supplemental to the divorce proceeding." *Brown*, 776 N.W.2d at 648. The court held a QDRO was "supplemental and not a part of the underlying decree." *Id.*; *see also Veit*, 797 N.W.2d at 564 (noting a party's abandonment of the identical argument in light of *Brown*); *In re Marriage of Heath-Clark*, No. 15-0525, 2016 WL 2753779, at *3 (Iowa Ct. App. May 11, 2016) ("Richard's request is not for modification of the property division. He is asking the QDRO be modified to conform to the property division as set forth in the decree."). Applying *Brown*, the district court possessed authority to enter the QDRO.

To the extent Jeffrey argues the district court incorrectly modified the property division of the decree, we agree. Jeffrey contends the stipulation incorporated into the dissolution decree provided that the balance would be divided by the *Benson* formula and the QDRO implemented that language. In his view, if the parties wanted an equal division of the balance, they could have said so and Ann Marie's argument to the contrary "is asking this Court to either ignore or delete

two words in the decree, to-wit: *Benson* formula." Ann Marie responds that application of the *Benson* formula is inequitable because the stipulation "already separates the premarital portion of Jeffrey's Ameriprise account." She asserts that equity dictates an equal division of the balance.

The district court approved the stipulation, which plainly and unambiguously provided that "[t]he balance of the qualified accounts shall be divided between the parties pursuant to the *Benson* [f]ormula." *See In re Marriage of Jones*, 653 N.W.2d 589, 594 (Iowa 2002) ("[O]nce the court enters decree, the stipulation, as a practical matter, has no further effect."); *In re Marriage of Lawson*, 409 N.W.2d 181, 182 (Iowa 1987) ("When the stipulation is merged in the dissolution decree it is interpreted and enforced as a final judgment of the court, not as a separate contract between the parties." (quoting *Prochelo v. Prochelo*, 346 N.W.2d 527, 529 (Iowa 1984))). The QDRO implemented that language. *See Heath-Clark*, 2016 WL 2753779, at *4 ("[T]he inquiry is whether the decree and the QDRO implement the *Benson* formula or whether the QDRO must be modified to reflect the decretal court's intent."). "There is nothing inequitable in enforcing the bargained-for agreement." *Id.* at *7. We reverse the district court's ruling and remand with instructions to approve the proposed QDRO.

Ann Marie seeks appellate attorney fees of $2500. Because she was not the prevailing party, we deny her request. *See In re Marriage of Hoffman*, 891 N.W.2d 849, 852 (Iowa Ct. App. 2016).

REVERSED AND REMANDED.

All Citations

964 N.W.2d 358 (Table), 2021 WL 1663608

Footnotes

1 In *In re Marriage of Benson*, 545 N.W.2d 252, 257 (Iowa 1996), the court expressed the equation as follows:

$$\text{[Wife]'s share} = \frac{\text{\# of years [Husband] was both married and covered by the pension plan}}{\text{\# of years covered by plan prior to conclusion (maturity)}} \times 50\% \times \text{value of monthly pension benefit}$$

545 N.W.2d at 255.

2 At the hearing, Jeffrey's attorney explained "[t]he retirement account existed for approximately 13 years and predated the marriage. So the ... marital formula would be 9 over 13" and [t]hat then gets divided by half." In fact, the proposed QDRO for the Ameriprise account states the "years of marriage" during the life of the account was actually "8.27" years. To come up with the $53,000 difference between an equal division of the account balance and a *Benson* formula division of the account balance, we would have to presume the Ameriprise account existed for 13.78 years.

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IN THE IOWA DISTRICT COURT IN AND FOR SCOTT COUNTY

STATE OF IOWA, **Plaintiff,** **vs.** **DOMINIQUE PARROW, SR.,** **Defendant.**	**CASE NO. OWCR403978** **And OWCR395411** **SENTENCING ORDER**

(HERM) Defendant appeared telephonically over the Zoom platform with Attorneys Joel Walker and Barbara Maness. State also appeared telephonically by Assistant County Attorney Wayne Kelley. The Court acknowledges receipt of the report of Presentence Investigation and counsel acknowledges having seen the same and state that they know of no reason that sentence should not be imposed. Pursuant to the Defendant's plea of guilty in OWCR403978 Ct. 1: Operating while Intoxicated, Third or Subsequent Offense, in violation of Section 321J.2(2)(c), and the Court's guilty verdict in OWCR395411: Ct. 2, Driving While Barred in violation of Section 321.561 and Ct. 3, Driving While Revoked in violation of Section 321J.21, and as provided by Section 902.3, 902.9 and 901.3, the Court hereby enters judgment and sentence.

In OWCR403978, the Operating While Intoxicated, Third or Subsequent Offense, the Court orders that the Defendant shall pay a fine of $3,125 and be committed to the custody of the Director of the Iowa Department of Corrections for a period not to exceed five years. However, all but 30 days of this sentence is suspended and the defendant shall be placed in the custody of the Iowa Department of Corrections on the OWI corrections continuum with the initial sentence to be served at the Residential Correctional Facility located at 1330 West Third Street in Davenport, Iowa. The Defendant shall report to the RCF at **8:00 a.m. on December 7, 2020**. The Director of the Iowa Department of Transportation is directed to revoke the Defendant's driving privileges for a period of six years.

In OWCR395411 in Count 2, the Court orders that the Defendant shall pay a fine of $625.00 and be committed to the custody of the Director of the Iowa Department of Corrections for a period not to exceed two years. In Count 3, the Court orders that the Defendant shall pay a fine of $1,000.00 and be committed to the custody of the Scott County Jail for a period of one year. However, these sentences of incarceration are suspended and the Defendant is placed on probation for a period of three years. Conditions of probation shall include that the Defendant complete programming at the RCF OWI facility, and that he obtain a substance abuse evaluation and follow through with any recommended treatment. The aforementioned sentences shall run concurrently. Mittimus shall issue on December 7, 2020 at 8:00 a.m. The Defendant shall submit a sample for DNA profiling.

Pursuant to Iowa Code Section 910.2A, the defendant is presumed to have the

reasonable ability to pay the full amount for Category B restitution, which includes the contribution of funds to a local anti-crime organization which provides assistance to law enforcement in an offender's case, crime victim compensation program reimbursements, payment of restitution to public agencies pursuant to Section 321J.2(13)(b), court costs, court-appointed attorney fees ordered pursuant to Section 815.9, including the expense of a public defender, and payment to the medical assistance program pursuant to Chapter 249A for expenditures paid on behalf of the victim resulting from the offender's criminal activities, including investigative costs incurred by the Medicaid Fraud Control Unit pursuant to Section 249A.50.

With regard to the restitution set forth in this section, the Court finds the following:

RAP REQUESTED: The Court finds that the defendant has made a request under Iowa Code Section 910.2(a) to determine the amount of Category B restitution payments that the defendant is reasonably able to make toward paying the full amount of restitution. The Court further finds that the defendant furnished to the prosecuting attorney and sentencing court a completed financial affidavit. The prosecuting attorney, the attorney for the defendant, and the Court had the opportunity to question the defendant regarding the defendant's reasonable ability to pay.

The Court finds that the defendant affirmatively proved by a preponderance of the evidence that the defendant does not have the reasonable ability to pay any amount of Category B restitution.

The Court has considered the following factors, if applicable: the nature or length of the sentence imposed; Defendant's application for court-appointed counsel, including the financial resources of Defendant including income and assets; the fines, surcharges, penalties, and victim restitution already assessed; Defendant's earning ability; Defendant's dependents; Defendant's basic human needs; the hardship to Defendant or Defendant's family; and any other factor relevant to this determination.

Upon motion by the State, **Counts 2 and 3 in OWCR403978, NTA0335611, NTA0335612, NTA0335613 and STA0335619 are** hereby dismissed with costs assessed to the State.

Defendant has a right to appeal this judgment to the Iowa Supreme Court. To appeal, Defendant must file a written notice of appeal with the Clerk of the District Court no later than thirty (30) days from the date of this order. If Defendant fails to file a notice of appeal before the deadline, Defendant may lose his/her right to appeal this judgment.

If Defendant appeals this ruling and cannot afford an attorney for or the cost of an appeal, Defendant may apply for these to be provided at State expense. If an attorney is appointed by the Court to represent Defendant on appeal, Defendant may be assessed the cost of the court appointed attorney when a claim for such fees is presented to the Clerk of the District Court following the appeal. The Court will make a preliminary determination of Defendant's reasonable ability to pay court appointed appellate attorney fees and will schedule a hearing if such a determination cannot be made. Defendant will be given an opportunity to be heard concerning Defendant's reasonable ability to pay appellate attorney fees before any such fees are assessed against Defendant.

BOND ON APPEAL is set at $5000.00 cash only in OWCR403978 and $2000.00 in OWCR395411.

Appearance bond, if any, is exonerated. Pursuant to Iowa Code section 602.8103(6), with proper notice, any refund to the person posting the cash bond will be applied to existing criminal debt due and owing to the State of Iowa.

966 N.W.2d 147 (Table)
Decision without published opinion. This disposition is referenced in the North Western Reporter.
Court of Appeals of Iowa.

STATE of Iowa, Plaintiff-Appellee,
v.
Domonique Deshawn PARROW Sr., Defendant-Appellant.

No. 20-1626
|
Filed August 18, 2021

Appeal from the Iowa District Court for Scott County, Patrick A. McElyea, Judge.

Domonique Parrow Sr. appeals the sentence imposed following convictions for guilty of driving while barred and driving while suspended. **SENTENCE VACATED AND REMANDED.**

Attorneys and Law Firms

Martha J. Lucey, State Appellate Defender, and Theresa R. Wilson, Assistant Appellate Defender, for appellant.

Thomas J. Miller, Attorney General, and Sharon K. Hall, Assistant Attorney General, for appellee.

Considered by Bower, C.J., and Vaitheswaran and Schumacher, JJ.

Opinion

VAITHESWARAN, Judge.

***1** The district court found Domonique Parrow Sr. guilty of driving while barred and driving while suspended. *See* Iowa Code §§ 321.561, 321J.21 (2018). The court sentenced Parrow to a prison term "not to exceed two years" on the driving-while-barred count and a one-year jail term on the driving-while-suspended count. The court suspended the sentences and placed Parrow on probation. In a case that is not the subject of this appeal, Parrow also was committed to the Iowa Department of Corrections for a period not exceeding five years on a conviction of operating a motor vehicle while intoxicated (OWI), third or subsequent offense. Parrow appealed.

Parrow contends "the District Court imposed an illegal sentence" in sentencing him "to both jail and prison when the total concurrent sentence amounted to more than one year and he was presently committed to the Department of Corrections" on the OWI conviction. He asks us to vacate the sentencing order "to the extent it specifies a jail sentence." Statute and precedent require that result.

Iowa Code section 903.4 states:

> All persons sentenced to confinement for a period of one year or less shall be confined in a place to be furnished by the county where the conviction was had unless the person is presently committed to the custody of the director of the Iowa [D]epartment of [C]orrections, in which case the provisions of section 901.8 apply. All persons sentenced to confinement for a period of more than one year shall be committed to the custody of the director of the Iowa [D]epartment of [C]orrections to be confined in a place to be designated by the director and the cost of the confinement shall be borne by the state. The director may contract with local governmental units for the use of detention or correctional facilities maintained by the units for the confinement of such persons.

"Section 903.4 clearly requires that any person sentenced to confinement for a period of more than one year shall be committed to the custody of the [d]epartment of [c]orrections." *State v. Kapell*, 510 N.W.2d 878, 880 (Iowa 1994). Section 901.8 states in pertinent part: "If the person is presently in the custody of the director of the Iowa [D]epartment of [C]orrections, the sentence shall be served at the facility or institution in which the person is already confined unless the person is transferred by the director." Section 901.8, in conjunction with section 903.4, "express a clear legislative intent that no defendant should be held in a county jail facility for more than one year." *State v. Morris*, 416 N.W.2d 688, 690 (Iowa 1987). Suspension of the sentences "does not alter their character as sentences of

confinement." *State v. Patterson*, 586 N.W.2d 83, 84 (Iowa 1988).

Parrow was presently in the custody of the department of corrections pursuant to the OWI conviction. He was sentenced to a period of confinement in excess of one year in connection with the charges that are a subject of this appeal. He should have been committed to the department of corrections. We vacate his sentence to the extent it specifies a jail sentence. We remand for entry of a corrected sentencing order consistent with this opinion.

***2 SENTENCE VACATED AND REMANDED.**

All Citations

966 N.W.2d 147 (Table), 2021 WL 3661422

IN THE IOWA DISTRICT COURT IN AND FOR MUSCATINE COUNTY

STATE OF IOWA, Plaintiff, v. ANNETTE DEE CAHILL, Defendant.	)	Case No. FECR059164 **RULING AND ORDER ON PRE-TRIAL MOTIONS**

INTRODUCTION

Before the Court are a variety of pre-trial motions: Defendant's Motion for a 5.104 Ruling, Defendant's Motion in Limine, the State's Motion in Limine, and Defendant's Motion to Compel Discovery. A hearing was held on the parties' pre-trial motions on February 21, 2019, and counsel argued the motions to the Court. Ms. Cahill was represented by Attorneys Clemens Erdahl, Elizabeth Araguas, and Jonathon Munoz. Muscatine County Attorney Alan Ostergren and Assistant Attorney General Coleman McAllister appeared on behalf of the State. After having considered the written and oral arguments of counsel, and the applicable law, the Court enters the following ruling on the parties' pre-trial motions:

DISCUSSION

I. Defendant's Motion for a 5.104 Ruling.

Iowa Rule of Evidence 5.104 permits the Court to "decide any preliminary question about whether a witness is qualified, a privilege exists, or evidence is admissible." Iowa R. Evid. 5.104(a). But this "does not limit a party's right to introduce before the jury evidence that is relevant to the weight or credibility of other evidence."

Cahill first moves for a court order finding the testimony of Witness A and Witness B inadmissible prior to trial.[1] As fully outlined in the Court's February 14, 2019, Ruling on Defendant's Motion to Dismiss, Witness A intends to testify that, 26 years ago, she overheard Cahill confess to the murder of Corey Wieneke while spending the night at the house of one of the defendant's relatives as a nine-year-old child. The State anticipates Witness B, the mother of Witness A, to corroborate her account of the alleged confession, to whom Witness A recounted the alleged confession. Cahill contends the lack of experiential detail and internal contradictions in Witness A's anticipated testimony, along with inconsistencies with Witness B's purportedly corroborating testimony, renders both objectively unreliable and "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *See Graham v. Chicago & N.W. Ry. Co.*, 143 Iowa 604, 119 N.W. 708, 711 (Iowa 1909).

Witness credibility is ordinarily an issue for the jury, but Iowa has in the past recognized a narrow exception to this general rule in extraordinary situations where the testimony of a witness is "something more than a contradiction" and "in the highest degree inconsistent," testimony that is "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *Graham v. Chicago & N.W. Ry. Co.*, 143 Iowa 604, 119 N.W. 708, 711 (Iowa 1909). The exception laid out by this early 20th Century ruling by the Iowa Supreme Court is very narrow, reserved only for the most serious instances.

> The rule that it is for the jury to reconcile the conflicting testimony of a witness does not apply where the only evidence in support of a controlling fact is that of a witness who so contradicts himself as to render finding of facts thereon a mere guess. We may concede that, ordinarily, contradictory statements of a witness do not make an issue of fact; and that such situation may deprive the testimony of all probative force.

[1] The identities of Witness A and Witness B have been sealed by previous order of this Court pursuant to the request of the parties.

State ex rel. Mochnick v. Andrioli, 216 Iowa 451, 249 N.W. 379 (Iowa 1933).

Only one Iowa case has ever successfully applied the *Graham* exception to exclude testimony against a defendant. In *State v. Smith*, 508 N.W.2d 101 (Iowa Ct. App. 1993), the Court of Appeals overturned the conviction of the defendant for sexual abuse and assault of his stepdaughters based almost exclusively on the testimony of the three child victims. The children gave conflicting accounts of when, where, and how the defendant touched them; sometimes they were unable to completely answer detailed follow-up questions regarding the allegations. *Id.* at 103. The Court of Appeals found the alleged victims' testimony little credence, scrutinizing the children's testimony:

> Yet there was no testimony at trial by any witness that S.A.K. ever reacted to the hurt such as saying "ouch" or "that hurts" or that she moved away from him or that anyone else observed anything even though they were in close proximity in the same room. Nor was there any physical evidence of abuse found in a careful medical examination. This testimony lacks the probative value necessary to enable a rational jury to find beyond a reasonable doubt that appellant abused [the children].

Id. "When read separately or together," the Court concluded, "the accounts of alleged abuse are inconsistent, self-contradictory, lacking in experiential detail, and, at times, border on the absurd." *Id.*; *cf. State v. Mitchell*, 568 N.W.2d 493, 503–04 (Iowa 1997) (contrasting the victim's allegations as "never as impossible as the testimony in *Smith*" and noting the record contained evidence corroborating the victim's testimony).[2]

Here, the Court concludes the anticipated testimony of Witness A and Witness B is not "so impossible and absurd and self-contradictory that it should be deemed a nullity by the court." *Graham*, 119 N.W. at 711 (emphasizing the Court's duty to "to protect the right of jury trial

[2] *Smith* is hardly a model example for modern-day prosecution of sex crimes and the treatment of testimony by sex abuse victims. *See, e.g.*, *Ohio v. Clark*, 135 S. Ct. 2173, 2191–82 (2015); *State v. Dudley*, 856 N.W.2d 668, 675–76 (Iowa 2014); *State v. Payton,* 481 N.W.2d 325, 327 (Iowa 1992); *State v. Gettier,* 438 N.W.2d 1, 6 (Iowa 1989).

against encroachment by the courts under any guise," including "the right to have the credibility of the witness determined by the jury"). The true exception outlined by *Graham* is concerned much more with sanctioning an attempted fraud on the Court where the nature and timing of the inconsistent testimony by the plaintiff's key witness—his employee—suggested the opportunity, motive, and likelihood to lie. In this respect, *Graham* is a very narrow exception to the general rule and *Smith* is, by all accounts, an outlier in its application. *Cf. Mitchell*, 563 N.W.2d at 504; *State v. Lopez*, 785–86 (Iowa 2001); *State v. Frank*, 298 N.W.2d 324, 329–30 (Iowa 1980); *Andrioli*, 253 N.W. at 380. And unlike the accounts detailed in *Smith*, the anticipated testimony of Witness A and Witness B are not "absurd or surreal." *See Mitchell*, 568 N.W.2d at 504 (declining to "depart from our general rule of leaving the credibility of witnesses to the jury and allowing it to resolve inconsistencies as it sees fit"). Rather, the inconsistencies, biases, and potential for tainted memory the defense argues are possessed by the State's two witnesses are the proper subject of cross-examination and should be weighed by the jury in its credibility determination; they do not rise to the level of *Graham*, rendering it a "mere guess," to justify the exclusion of this testimony under rule 5.104.

At this time Cahill's motion for a rule 5.104 ruling is premature and not ripe for adjudication.[3] It is not definitively known exactly how Witness A and Witness B will testify, and Cahill retains the opportunity to cross examine them. The issues raised by Cahill's motion are more appropriate to be decided by the jury as a matter of credibility. Cahill's Motion for a Rule 5.104 Ruling is therefore DENIED.

[3] Such a challenge might be appropriately brought in a motion for new trial in the event of a guilty verdict should the testimony of Witness A and Witness B prove to rise to the level of *Graham*.

II. Defendant's Motion in Limine.

At the hearing regarding the parties' pre-trial motions on February 21, 2019, defense counsel represented to the Court that only paragraph three of Cahill's motion in limine was at issue due to agreement by the parties. Other items (paragraphs one, two, and four) have been resolved by agreement of the parties. In paragraph three Cahill seeks to exclude her own out-of-court comments to law enforcement that were made as part of her voluntary participation in the investigation of the Wieneke murder. Without citing authority, Cahill argues these comments are inadmissible hearsay because they do neither include an admission of Cahill's guilt nor consist of any statement against her own interest; because they were voluntarily given to law enforcement in an effort to aid their investigation, she claims, it would be fundamentally unfair to use against her as incriminating in the context of her trial.

These statements, however, are statements by an opposing party. They are unequivocally excluded from the definition of hearsay. Iowa R. Evid. 5.801(d)(2). Cahill still has ample opportunity to cross-examine officers on the subject of these statements and challenge the weight the jury should give them. *See* Iowa R. Evid. 5.804(b)(3) (noting the statement against interest hearsay exception is only available where the declarant is *unavailable*). Cahill's motion in limine on paragraph three of her motion is therefore DENIED. To the extent of the parties' mutual understanding on the remaining matters in Cahill's motion in limine, her motion is GRANTED.

III. State's Motion in Limine.

The State advances numerous items which it contends should be excluded from trial. These items include: (a) evidence pertaining to a polygraph test; (b) expert witness testimony regarding childhood memory and perception; (b) evidence of third-party guilt; (c) out-of-court statements regarding other potential suspects and law enforcement's investigation of the

Wieneke murder; and (d) the penalty associated with conviction of first degree murder. Each will be addressed in turn.

A. Evidence of Polygraph Test Results and Defendant's Willingness to Submit to Questioning.

First, the State seeks to exclude evidence pertaining to polygraph tests taken by Cahill and others during the course of law enforcement's investigation into the Wieneke murder. The State seeks to exclude not only Cahill's polygraph test results, but also any testimony to the effect that Cahill was willing to submit herself a polygraph in her assistance with the Wieneke investigation.

Pursuant to longstanding Iowa law, the results of polygraph tests are categorically inadmissible, except on stipulation, because of their inherent unreliability. *State v. Countryman*, 573 N.W.2d 265 (Iowa 1998); *see also State v. Losee*, 354 N.W.2d 239, 242 (Iowa 1984); *State v. Hall*, 297 N.W.2d 80, 84–85 (Iowa 1980); *State v. Conner*, 241 N.W.2d 447, 458–59 (Iowa 1976); *State v. McNamara*, 104 N.W.2d 568, 574 (Iowa 1960). Defendants' rights under the 5th and 6th Amendments and their counterparts in the Iowa Constitution "do not prevent the court from following evidentiary rules that are designed to assure both fairness and reliability in the ascertainment of guilt and innocence." *Id.*; *accord Chambers v. Mississippi*, 410 U.S. 284, 302, 93 S. Ct. 1038, 1049 (1973). This rule applies with equal force to polygraph evidence: "the underlying rulings of inadmissibility are based on legitimate evidentiary rules regarding reliability and fairness" because "[i]t has not been demonstrated that this field has been subjected to the standards, policing and discipline which are necessary in a science involving such pretentious and awesome subject matter." *Countryman*, 573 N.W.2d at 266 (internal citations and quotations omitted).

Though the Iowa Supreme Court has not expressly weighed in on the specific issue of whether a defendant's *willingness* to take a polygraph is admissible when such evidence would tend to be exculpatory, the evidentiary rationale undergirding the rule of general inadmissibility naturally extends to testimony regarding a witness's willingness to take a polygraph examination as well. *See State v. Lopez*, No. 16-1489, 2018 WL 6719728, at *11 (Iowa Ct. App. Dec. 19, 2018); *cf. State v. Waters*, 194 F.3d 926, 930–31 (8th Cir. 1999) (refusing to admit evidence of the defendant's responses to a polygraph examination as inadmissible hearsay). Numerous other jurisdictions have almost universally held a defendant's offer to take a polygraph test is inadmissible. *DeBlase v. State*, ---- So.3d ----, ----, 2018 WL 6011199, at *36 (Ala. Crim. App. Nov. 16, 2018); *State v. Tyler G.*, 236 W.Va. 152, 163, 778 S.E.2d 601, 612 (2015); *State v. Mitchell*, 166 N.H. 288, 294, 94 A.3d 859, 865 (2014); *Commonwealth v. Elliott*, 622 Pa. 236, 292, 80 A.3d 415, 449 (2013); *State v. Sexton*, 368 S.W.3d 371, 409 (Tenn. 2012); *State v. Lavoie*, 1 A.3d 408, 412 (Me. 2010); *People v. Hinton*, 37 Cal.4th 839, 38 Cal.Rptr. 149, 195, 126 P.3d 981, 1019-20 (2006); *Commonwealth v. Martinez*, 437 Mass. 84, 88, 769 N.E.2d 273, 278-9 (2002); *Ramaker v. State*, 345 Ark. 225, 234, 46 S.W.3d 519, 525 (2001); *State v. Riley*, 568 N.W.2d 518, 526-27 (Minn. 1997); *State v. Esposito*, 235 Conn. 802, 831, 670 A.2d 301, 316 (1996); *State v. Webber*, 260 Kan. 263, 276, 918 P.2d 609, 620 (1996); *State v. Hawkins*, 326 Md. 270, 275, 604 A.2d 489, 492 (1992); *Kremer v. State*, 514 N.E.2d 1068, 1073 (Ind. 1987); *Gray v. Graham*, 231 Va. 1, 10, 341 S.E.2d 153, 158 (1986); *Roberts v. Commonwealth*, 657 S.W.2d 943, 944 (Ky. 1983); *State v. Britson*, 130 Ariz. 380, 384, 636 P.2d 628, 632 (1981); *State v. Biddle*, 599 S.W.2d 182, 185 (Mo. 1980); *State v. Clark*, 128 N.J.Super. 120, 126, 319 A.2d 247, 249 (1974), aff'd, 66 N.J. 339, 331 A.2d 257 (1975); *State v. Rowe*, 77 Wash. 2d 955, 958-59, 468 P.2d 1000, 1003 (1970); *State v. Austin*, 97 N.E.3d 1266, 1274 (Ohio Ct. App.

2017); *Roderick v. State*, 494 S.W.3d 868, 879 (Tex. Ct. App. 2016); *Folks v. State*, 207 P.3d 379, 383 (Okla. Crim. App. 2008); *People v. Muniz*, 190 P.3d 774, 784-87 (Colo. App. 2008), *abrogated on other grounds by People v. Elmarr*, 351 P.3d 431 (Colo. 2015); *State v. Hunter*, 907 So.2d 200, 212 (La. Ct. App. 2005); *Holland v. State*, 221 Ga. App. 821, 825, 472 S.E.2d 711, 715 (1996); *City of Bismarck v. Berger*, 465 N.W.2d 480, 481 (N.D. Ct. App. 1991); *People v. Eickhoff*, 129 Ill.App.3d 99, 84 Ill.Dec. 300, 303, 471 N.E.2d 1066, 1069 (1984). This Court declines to depart from this well-reasoned view.

Acknowledging the authorities binding this Court, Cahill submits technological improvements in the past decade have given cause for the Iowa Supreme Court to reconsider *Couchman* and Iowa's categorical rule on the exclusion of polygraph test results. Fundamentally, Cahill argues a criminal defendant should be allowed to present evidence of polygraph tests when such evidence is exculpatory in nature; *per se* exclusion of such exculpatory evidence, she argues, violates her rights under the Due Process Clause of the 5th Amendment and the Compulsory Process Clause of the 6th Amendment to the United States Constitution, along with article I, sections 9 and 10 of the Iowa Constitution. *See Rock v. Arkansas*, 483 U.S. 44, 61, 107 S. Ct. 2704, 2714 (1981) (declaring that, under *Chambers v. Mississippi*, "[a] state's legitimate interest in barring unreliable evidence does not extend to *per se* exclusions [of hypnotically refreshed testimony] that may be reliable in an individual case"). Cahill contends that, at a minimum, she should be allowed to present testimony of her willingness to submit to a polygraph test because she believed them to be exculpatory, bolstering her claim of innocence. *See Chambers*, 410 U.S. at 302.

The role of this Court, however, is to defer to existing legal principals. *See Healy v. Carr*, 449 N.W.2d 883, 883 (Iowa Ct. App. 1989) (noting the Supreme Court's admonition in *State v.*

Eichler, 83 N.W.2d 576, 578 (Iowa 1957) that "[i]f our previous holdings are to be overruled, we [the Supreme Court] should ordinarily prefer to do it ourselves"). Moreover, the United States Supreme Court has upheld *per se* exclusions of polygraph evidence in the past. *United States v. Schaffer*, 523 U.S. 303 (1998) (holding the unconditional exclusion of polygraph evidence under Military Rule of Evidence 707 did not violate defendants' 5th and 6th Amendment rights of accused persons to present a defense). Should the Iowa Supreme Court wish to clarify or extend the rule laid out in *Countryman* to permit a secured party to quash garnishment of collateral securing its own loan to the debtor in the absence of default, it is prerogative of the Supreme Court to do so, not that of the district court. This Court is bound by *Countryman* and its categorical exclusion of polygraph evidence. In any event, Cahill has not advanced evidence of why this particular polygraph test is more reliable than those in the past to justify its admission into evidence on its own merits.

The State's Motion in Limine as to paragraph one is therefore GRANTED to exclude the polygraph test results and testimony reflecting Cahill's willingness to submit to a polygraph.

B. Expert Witness.

The State also seeks to exclude testimony from an expert retained by Cahill, Dr. Katherine Jacobs, a forensic psychologist, contending Dr. Jacobs' testimony will only serve to impermissibly comment on the credibility of statements and claims of Witness A and Witness B. The defense maintains it does not advance Dr. Jacobs' testimony to opine on the credibility of any one witness, but for the limited purpose of explaining to the jury issues of childhood perception, bias, and memory, providing the jury with a framework by which to assess the testimony of Witness A and properly weigh the evidence against the defendant. Specifically, Cahill seeks to elicit testimony from Dr. Jacobs on (1) proper protocols for interviewing child

witnesses to ensure accurate perception, memory, and retelling while accounting for context, suggestibility, and bias contamination; and (2) psychological factors affecting memory over time.

Iowa Rule of Evidence 5.702 permits expert opinion testimony "if ... specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue." "In our system of justice," however, "it is the jury's function to determine the credibility of a witness." *State v. Dudley*, 856 N.W.2d 668 (Iowa 2014). Thus, expert testimony is disallowed where the expert—directly or indirectly— renders an opinion on a witness's credibility. *See id.*; *State v. Meyers*, 382 N.W.2d 91, 97 (Iowa 1986) (stating a witness's credibility "is not a 'fact in issue' subject to expert opinion").

However, experts are allowed to express opinions on matters that explain mental and psychological conditions relevant to an issue in the case. *See Meyers*, 382 N.W.2d at 97. Such testimony helps the jury understand complex scientific issues underlying the case, such as developmental and behavior psychology of children. *See Dudley*, 856 N.W.2d at 675. So long as the expert refrains from commenting on specific facts of case (or their hypothetical equivalent), expert witnesses are permitted to testify to objective scientific facts that bear on an important issue in the case. *Id.*; *see also State v. Pansegrau*, 524 N.W.2d 207, 211 (Iowa Ct. App. 1994); *State v. Palmer*, No. 04-1421, 2006 WL 468410, at *4 (Iowa Ct. App. Mar. 1, 2006).[4] An expert

[4] *Also compare State v. Pitsenbarger*, No. 14-0060, 2015 WL 1815989, at *8 (Iowa Ct. App. Apr. 22, 2015) (holding impermissible vouching resulted from the expert's testimony elicited by the State resulted in an "attempt[] to sanitize" the expert's opinion through "a methodical process [that] bolstered [the victim's] credibility by testimony via statistics, reports, and opinions on each of [the victim's] past statements, actions, and behaviors" as to "every significant purported and disputed fact") *with State v. Ingram*, No. 15-1984, 2017 WL 514403, at *5 (Iowa Ct. App. Feb. 8, 2017) (applying *Dudley* to conclude the expert witness did not impermissibly vouch for the victim's credibility where she "discussed generally the symptoms or behaviors common to children who have experienced sexual abuse"), *State v. Lusk*, No. 15-1294, 2016 WL 4384672, at *3 (Iowa Ct. App. Aug. 17, 2016) (concluding the expert did not impermissibly vouch for the victim's credibility where she "testified generally about whether child victims of sexual abuse sometimes delay reporting the abuse and whether sexual abuse of a child could occur when

crosses the line, however, where the expert testifies as to whether or not another witness's condition is consistent with the expert's model because such testimony bears on the credibility of that witness. *Compare Dudley*, 856 N.W.2d at 677 ("To allow an expert witness to testify a child's physical manifestations or symptoms are consistent with sexual abuse trauma or CSAAS allows the expert witness to indirectly vouch that the victim was telling the truth because the expert opines the symptoms are consistent with child abuse.") *with State v. Gettier*, 438 N.W.2d 1, 5–6 (Iowa 1989) (concluding expert testimony "limited to an explanation of the effects of PTSD and the typical reaction of a rape victim" did not impermissibly vouch for the victim's credibility); *State v. Payton*, 481 N.W.2d 325, 327 (Iowa 1992) (permitting expert testimony to explain to a jury why children victims may delay reporting their sexual abuse).

This nuanced analysis permits experts, like Dr. Jacobs, to testify to important issues of childhood perception, bias, and memory. But Dr. Jacobs must walk a delicate line—between providing a framework to aid the jury in analyzing certain issues and directly or indirectly vouching for or criticizing a lay witness's credibility. The former is allowed; the latter will not be tolerated. *See State v. Tyler*, 867 N.W.2d 136 (Iowa 2015) (holding circumstances analogous to *Dudley* rendered medical expert testimony inadmissible when the expert relied only on the defendant's inconsistent and uncorroborated statements to police and indirectly commented on the defendant's credibility pertaining to those incriminating statements).[5] To the extent the

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other people were in the room"), *State v. Beloved*, No. 14-1796, 2014 WL 8390222, at *5 (Iowa Ct. App. Dec. 9, 2015) (applying *Dudley* to conclude the expert witness's statement that the victim should receive counseling did not impermissibly endorse the victim's credibility), *State v. Brown*, 856 N.W.2d 685 (Iowa Ct. App. 2014) (concluding general reporting of the victim's interview did not constitute impermissible witness vouching, but one sentence "did not hesitate to display where [the defendant] allegedly touched her" "indirectly convey[ed] to the jury that [the victim] [was] telling the truth about the alleged abuse because the authorities should conduct a further investigation into the matter").

[5] This rule is consistent with federal law. *See U.S. v. Waters*, 194 F.3d 926 (8th Cir. 1999); *United States v. Johns*, 15 F.3d 740 8th Cir. 1994); *United States v. Whitted*, 11 F.3d 782 (8th Cir. 1993).

defense maintains this delicate balance, paragraph two of the State's Motion in Limine is DENIED.

C. Evidence of Third-Party Guilt.

Next, the State moves to prevent the defense from introducing evidence of third-party guilt that was not previously disclosed through Cahill's Motion to Dismiss. At the hearing held on this matter the State appeared to be in accord with assurances by defense counsel that the defense does not intend to introduce evidence of third-party guilt other than that previously disclosed.

Paragraph three of the State's motion is therefore GRANTED insofar as agreed by the parties.

D. Hearsay Statements of Other Potential Suspects.

Out-of-court statements offered to prove the truth of the matter asserted are hearsay and inadmissible for that purpose. Iowa R. Evid. 5.801(c)(2). Statements that would otherwise constitute inadmissible hearsay can be admissible if offered for legitimate alternative purposes, however. "When an out-of-court statement is offered, not to show the truth of the matter asserted but to explain responsive conduct, it is not regarded as hearsay." *State v. Mitchell*, 450 N.W.2d 828 (Iowa 1990). But statements purportedly offered to explain responsive conduct are closely scrutinized. In deciding whether an out-of-court statement is offered to explain responsive conduct, the court considers "whether the statement is truly relevant to the purpose for which it is being offered, or whether the statement is merely an attempt to put before the fact finder inadmissible evidence." *State v. Plain*, 898 N.W.2d 801, 812 (quoting *Mitchell*, 450 N.W.2d at 832). *Compare State v. DeWitt*, 811 N.W.2d 460, 477 (Iowa 2012) (concluding officer's testimony he received from a confidential source was admissible because it was offered to

explain why the police approached the defendant) *and State v. Mann*, 512 N.W.2d 528, 536 (Iowa 1994) (concluding officer's testimony about statements from other officers led her to believe an individual was the victim of sexual assault was properly admitted as "responsive conduct") *with State v. Tompkins*, 859 N.W.2d 631, 636 (Iowa 2015) (concluding the officer's account of out-of-court statements "went beyond the mere fact that a conversation occurred and instead actually stated what the witness said") *and State v. Elliott*, 806 N.W.2d 660, 667 (Iowa 2011) (opining that when an investigating officer "specifically repeats a victim's complaint of a particular crime, it is likely that the testimony will be construed by the jury as evidence of the facts asserted").

In light of the above discussion, the Court declines to definitively exclude the anticipated out-of-court statements of third-party guilt. Such statements are crucial to Cahill's defense and, when elicited in the proper manner, sufficiently resemble "responsive conduct" to reflect on the investigation—or lack thereof—prompted by those statements. The anticipated statements made by third-party suspects or witnesses may be admissible insofar as they address the adequacy of law enforcement's investigation and directly bear on that issue. But even if admitted as explaining responsive conduct, courts must scrupulously guard admission of such statements that would otherwise constitute inadmissible hearsay: "if the evidence is admitted, the court must limit its scope to that needed to achieve its purpose." *McElroy v. State*, 637 N.W.2d 488, 502 (Iowa 2001). The defense has limited leeway to pursue its line of questioning, and deviation into the substance of the statements will not be tolerated.

The Court therefore reserves ruling on the matter in order to ensure defense counsel respects the delicate balance between offering these statements to reflect the "responsive conduct" of law enforcement investigators rather than as truth of the matter asserted for third-

party guilt. Presently, no comment shall be made in jury selection or opening statements pertaining to these statements, however, due to the potential for them to give given undue weight or meaning by jurors without the context of "responsive conduct" crucial for their conditional admission.

E. Penalty Associated with Conviction.

Finally, the State seeks to exclude evidence or euphemisms pertaining to the severity of the penalty for the crime for which Cahill has been charged—murder in the first degree. The Court agrees. Such testimony is inadmissible and only tends to improperly influence the jury. *See* Iowa R. Evid. 5.403; *cf. State v. Donelson*, 302 N.W.2d 125, 131 (Iowa 1981) (holding it was reversible error to prohibit defense counsel from impeaching the accomplice-witness on cross-examination with the maximum penalties to which the witness plead in exchange for his testimony against the defendant). Moreover, the jury will know the charge Cahill faces and will likely have an understanding of the severity of such an allegation or the consequences thereof. *See State v. Armento*, 256 N.W.2d 228, 229 (Iowa 1977). The State's Motion in Limine, paragraph five, is GRANTED.

IV. Defendant's Motion to Compel Discovery.

As a final matter, Cahill filed a Motion to Compel what she claims are potentially exculpatory items. The State represented it has disclosed everything in its possession, but assured it would conduct a review of police records and turn over those requested items to the extent they exist or were found in its possession. To that effect and to the extent stated on the record Cahill's Motion to Compel is GRANTED.

RULING

It is therefore the Ruling and Order of this Court that:

(1) Defendant's Motion for Rule 5.104 Ruling is DENIED;

(2) Paragraph 3 of Defendant's Motion in Limine is DENIED;

(3) The State's Motion is Limine is GRANTED as to paragraphs 1, 3, and 5; the State's Motion is DENIED as to paragraph 2; the Court RESERVES RULING on paragraph 4 of the State's Motion;

(4) Defendant's Motion to Compel is GRANTED consistent with the effect of the parties' stipulations and assurances and to the extent stated on the record.

All of the above is SO ORDERED.