IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

ROBERT J. BRUNKHORST and RANDAL E. LEWIS, individually and as representatives of all similarly situated IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEMS MEMBERS, **Plaintiffs,** **vs.** IOWA PUBLIC EMPLOYEES' RETIREMENT SYSTEM, ET AL., **Defendants.**	**CASE NO. LACL104520** **RULING AND ORDER ON DEFENDANTS' MOTION TO DISMISS AND MOTION FOR SUMMARY JUDGMENT**

Pending before the Court are Defendants' Motion to Dismiss and Defendants' Motion for Summary Judgment. At the initial hearing on the motions, Defendants appeared through their counsel Tyler Smith, and Plaintiffs appeared through their counsel Alex Wonio and David Brown. The Court subsequently ordered additional briefing on the issue of whether Plaintiffs' claims are barred by the statute of limitations and ordered additional hearing on that issue. At the second hearing, the parties again appeared by and through their respective counsel. The matter is now deemed submitted. After reviewing the court file and otherwise being fully advised in the premises, the Court enters this Ruling and Order on Defendants' Motion to Dismiss and Defendants' Motion for Summary Judgment.

I. STATEMENT OF THE CASE

On February 7, 2007, Plaintiff Robert Brunkhorst filed his Petition at Law and Jury Demand. In his Petition, Brunkhorst asserted individual and class claims against the following defendants: Iowa Public Employees' Retirement System (hereinafter "IPERS"); Gregory Cusack, IPERS' former Chief Executive Officer, in his personal capacity and as representative of all

personnel of IPERS; Investment Board of IPERS, trustee of the IPERS Fund; all Advisors and Consultants of IPERS, defined as "those individuals, groups of individuals, businesses, and entities who were employed or contracted by IPERS to assist in the administration of the system;" and the State of Iowa, as the employer of several Defendants. (Petition at ¶¶ 3-7.) The putative class is defined as members of IPERS who have apparent or contingent interest in the retirement system. (Petition at ¶ 8.)

The thrust of Plaintiffs' claims is that Defendants' conduct caused a decrease in the amount of contributions paid to IPERS between the years 1999 through 2004. The Petition alleges that IPERS was established as an independent agency within the executive branch of state government to administer the retirement system for public employees established by the enabling statute. (Petition at ¶ 17.) Under certain circumstances, upon termination of employment, an employee may terminate participation in IPERS and request a refund of his/her accrued retirement benefit. (Petition at ¶ 21.) A public employee who receives such a refund from IPERS may subsequently purchase service credit, or "buy back," into IPERS by making additional contributions to IPERS. (Petition at ¶ 23.) In his Petition, Brunkhorst alleged that prior to July 1, 1999, a public employee could buy back into IPERS for only 40 percent of the actuarial cost of the service purchase. (Petition at ¶ 25.) Brunkhorst further alleged that a change in law effective July 1, 1999, required the buy-back to be 100 percent of the actuarial cost of the service purchase rather than 40 percent of the actuarial cost of the service purchase. (Petition at ¶ 24.) Brunkhorst further alleged that Defendants failed to implement the required change until January 14, 2004. Brunkhorst further alleged that IPERS would have collected an additional $37.8 million in contributions if the actuarial cost of service purchases were collected from the 4,183 employees that made a buy back contribution during the time period July 1, 1999, through September 2004, which is the date that IPERS continued to honor price quotations under the prior law. (Petition at ¶¶ 30, 31.) Brunkhorst

asserted five counts against Defendants arising out of Defendants' alleged failure to timely implement the law: (1) dereliction of statutory duty and breach of fiduciary duty; (2) negligence; (3) nonfeasance; (4) misfeasance; and (5) malfeasance.

On March 7, 2007, Defendants filed their Motion to Dismiss. On July 9, 2007, the court issued its Ruling on Motion to Dismiss (hereinafter "Ruling"). The court held that Brunkhorst did not have standing to pursue the asserted claims because "there is no conceivable way under the present law for the plaintiff or any member of the class to have suffered an actual or imminent injury." (Ruling at 6.) The court reasoned that Brunkhorst could not be harmed by any alleged misconduct because Brunkhorst was statutorily required to receive his defined benefit upon the occurrence of certain events without regard to the actuarial soundness of the IPERS retirement fund. (Ruling at 5.) In its Ruling, the court also held that Plaintiffs' statutory claim failed as a matter of law because there is no private right of action arising out of any violation or violations of Chapter 97B, which governs IPERS. The court further held that Plaintiffs' common law claims, other than their claim for "malicious or wanton misconduct," failed as a matter of law because of the statutory immunity granted in Iowa Code section 97B.4(7) for actions or omissions regarding the administration of IPERS.

On August 7, 2007, Brunkhorst filed his Notice of Appeal. The Court of Appeals reversed the judgment of the district court, concluding as follows:

> In his petition, Brunkhorst makes the following claim for damages:
>
> The failure to implement the statutory mandate has resulted in disparate contributions between members, has contributed toward the fund being considered actuarially unsound—thereby jeopardizing the benefits of Plaintiffs, and has contributed toward a need for increased and/or additional contributions from Plaintiffs and all other IPERS members in the future.
>
> Brunkhorst further alleged: 'As a direct and proximate result of Defendants' actions, Plaintiffs have been damaged.' As a member of IPERS who claims he suffered pecuniary harm, Brunkhorst has standing to bring the suit. Under our notice pleading requirement, he was not required to make more than a terse

> statement that he was damaged. As this is a motion to dismiss, this court must accept as true all statements in the petition. Whether Brunkhorst was actually harmed is a question of fact directed toward the merits of the lawsuit and is not appropriately addressed in a motion to dismiss.

Brunkhorst v. IPERS, No. 07-1340, 2008 WL 4724726, at *4 (Iowa Ct. App. Oct. 29, 2008) (internal citation omitted). The Court of Appeals did not address the district court's ruling that there is no private cause of action arising under Iowa Code Chapter 97B. Nor did the Court of Appeals address the district court's ruling that Plaintiffs' common law causes of action, other than the claim for wanton or malicious misconduct, failed as a matter of law because of statutory immunity. The case was remanded to the district court for further proceedings.

On May 7, 2009, Defendants filed their Answer. On July 1, 2009, Brunkhorst filed his Motion to Amend Petition at Law and Jury Demand. In the proposed First Amended Petition, Brunkhorst sought to add Plaintiff Randal Lewis. Other than this change, the proposed First Amended Petition contained the same causes of action as the Petition. On September 9, 2009, the court granted Plaintiff's Motion to Amend, provided, however, that the amendment did not prejudice the rights and defenses of Defendants. Specifically, in granting the Motion to Amend, the court relied on Brunkhorst's representation that adding Lewis as Plaintiff "will not alter the issues in this case in any way." (Ruling dated 09/02/2009.) On September 18, 2009, Defendants filed their Answer to Amended Petition. On July 5, 2012, Defendants filed their Motion for Leave to file an Amended Answer to the Amended Petition.

On July 5, 2012, Defendants also filed their Motion to Dismiss, arguing that the claims against Cusack must be dismissed pursuant to the Iowa Tort Claims Act, Iowa Code Chapter 669. In support of their Motion to Dismiss, Defendants filed a Certification of Scope of Employment, certifying that Cusack was acting within the scope of his employment at all times relevant to this action. On July 12, 2012, Defendants filed their Motion for Summary Judgment. In their Motion for Summary Judgment, Defendants argued that Plaintiffs lack standing, that Plaintiff Lewis's

claims are time-barred, that Plaintiffs' claims are barred by discretionary function immunity, and that Plaintiffs' claim for malicious or wanton misconduct fail as a matter of law. Plaintiffs timely resisted both motions. At the time of hearing, however, Plaintiffs withdrew their resistance to the Motion to Dismiss. Accordingly, Defendants' Motion to Dismiss should be granted.

II. SUMMARY JUDGMENT STANDARD

Summary judgment should be granted "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 matter of law." Iowa R. Civ. P. 1.981(3). The party seeking summary judgment has the burden of establishing that the facts are undisputed and that the party is entitled to judgment as a matter of law. See Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 677 (Iowa 2004). When a motion for summary judgment is made and properly supported, however, the opposing party may not rest upon the mere allegations or denials of the pleadings. See Iowa R. Civ. P. 1.981(5); Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 299 (Iowa 1996). Instead, the resisting party must set forth specific material facts, supported by competent evidence, establishing the existence of a genuine issue for trial. See Iowa R. Civ. P. 1.981(5); Bitner, 549 N.W.2d at 299. Evidence not admissible is not competent for summary judgment purposes. See Willis v. City of Des Moines, 357 N.W.2d 567, 572-73 (Iowa 1984).

The Court views the summary judgment record in the light most favorable to the party resisting the motion for summary judgment and indulges in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a genuine issue of fact. See Crippen v. City of Cedar Rapids, 618 N.W.2d 562, 565 (Iowa 2000). "A fact is material if it will affect the outcome of the suit, given the applicable law." Parish v. Jumpking, Inc., 719 N.W.2d 540, 543

(Iowa 2006). An issue of fact is "genuine" if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. See Fees v. Mutual Fire & Auto. Ins. Co., 490 N.W.2d 55, 57 (Iowa 1992). If the summary judgment record shows that the "resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); Iowa R. Civ. P. 1.981(3). In addition, summary judgment is correctly granted where the only issue to be decided is what legal consequences follow from otherwise undisputed facts. See Emmett County State Bank v. Reutter, 439 N.W.2d 651, 653 (Iowa 1989).

III. STATEMENT OF UNDISPUTED FACTS

IPERS is an independent agency charged with administering the defined benefit retirement system established under Iowa Code Chapter 97B. See Iowa Code § 97B.1(1).[1] IPERS is administered by its Chief Executive Officer, who, at times material to this action, was Cusack. See Iowa Code § 97B.3; Iowa Code § 97B.4. Moneys collected pursuant to Chapter 97B, together with all interest, dividends, rents, securities or investment income, and assets, are held in the Iowa Public Employees Retirement Fund (hereinafter "Retirement Fund") separate and apart from all other public moneys of the State of Iowa. See Iowa Code § 97B.7(1). The Treasurer of the State of Iowa is the custodian of the Retirement Fund. See Iowa Code § 97B.7(2). The Investment Board of the Iowa Public Employees' Retirement System (hereinafter "Investment Board") is the trustee of the Retirement Fund. See Iowa Code § 97B.8A(1). The Investment Board is charged with establishing policy and reviewing policy implementation in matters relating to the investment of the Retirement Fund. The Investment Board is also charged with the duty of selecting the actuary to be employed

[1] Unless otherwise noted, the citations to the Iowa Code in this Ruling and Order are to the 1999 Iowa Code.

by the system and adopting all other necessary factors for use in actuarial calculations required in administering IPERS. See Iowa Code § 97B.8A(3).

Participants in the retirement system are called "members" of IPERS. Active members of IPERS and their respective employers are required to make "contributions," or payments, to IPERS to fund retirement benefits. See Iowa Code § 97B.1A(7); Iowa Code § 97B.11. In 1999, an employee member's required contribution was 3.7 percent of the employee's covered wages. See Iowa Code § 97B.11. An employer's required contribution was 5.75 percent of an employee member's covered wages. See Iowa Code § 97B.11. In 1999, under this contribution formula, an employee member contributed 40 percent and an employer contributed 60 percent of the total contribution. "Accumulated contributions" refers to the total contributions made by a member with interest plus interest dividends. See Iowa Code § 97B.1A(2). "Accumulated employer contributions" refers to the total contributions made by an employer for a member with interest plus interest dividends. See Iowa Code § 97B.1A(2A). For each member, the accumulated contributions and accumulated employer contributions, taken together, are referred to as "the combined employee and employer contribution amount." 581 I.A.C. § 21.24(3) (1999).

A "member" of IPERS is an employee or former employee who maintains his or her "accumulated contributions" in the retirement system. See Iowa Code § 97B.1A(14). In 1999, upon termination of employment prior to retirement, a member could, among other things, request and receive a refund of his or her accumulated contributions. By definition, this amount did not include the accumulated employer contributions for the employee, which IPERS retained. A former employer is no longer a member of IPERS if he or she received a refund of his or her accumulated contributions. See Iowa Code § 97B.1A(14).

Under certain circumstances, a member may purchase service credits by paying additional monies into IPERS and thereby increasing the number of service years applied toward retirement.

There are two types of service credits: buy-backs and buy-ins. Prior to July 1, 1999, a vested or retired member who received a refund of his or her accumulated contributions could "buy back" service credits by repaying the accumulated contributions received plus accumulated interest and interest dividends from the date of receipt to the date of repayment. See Iowa Code 97B.74. The repayment amount thus only included the employee's accumulated contributions refunded. A member could also purchase service credit for service rendered to another public employer, which is referred to as a "buy-in." Unlike a buy-back, a buy-in required the member to pay both the employee and employer contribution for each calendar quarter of service purchased.

In 1998, a study conducted by IPERS' actuarial service firm, Milliman and Robertson (hereinafter "Milliman"), concluded that buy-backs and buy-ins were being purchased disproportionately by older members who were able to determine more easily the net benefit of the purchase. This adverse selection or selection bias was resulting in an unfunded actuarial accrued liability because of the manner in which service purchases were being funded. (Defendants' SOF at ¶¶ 15-19.)

In 1998, the General Assembly amended Chapter 97B in two respects material to this litigation. See 1998 Iowa Legis. Serv. Ch. 1183 (H.F. 2946). The two amendments—and IPERS' response to the same—are the crux of the parties' dispute. The parties have different interpretations of what the amendments required and what IPERS did in response to the changes in the law. While a disputed issue of fact may exist when different inferences can be drawn from the summary judgment record, the dispute must be genuine. An issue of fact is "genuine" if it is supported by competent evidence sufficient to support a jury verdict. See Fees, 490 N.W.2d at 57. When a motion for summary judgment is made and properly supported, as is the case here, the opposing party has the burden of setting forth specific material facts, supported by competent evidence, establishing the existence of a genuine issue for trial. See Iowa R. Civ. P. 1.981(5); Bitner, 549

N.W.2d at 299. Plaintiffs' statement of what the amendments required and what IPERS did in response to the same is not supported by competent evidence and/or reasonable inferences drawn from competent evidence. Instead, Plaintiffs' claim is predicated on incorrect statements of what the statutory amendments required and what IPERS did in response to the same.

The summary judgment record establishes that, as relevant here, House File 2496 made two amendments to Chapter 97B relevant to this litigation. First, one amendment required that effective July 1, 1999, all members wishing to purchase service credit "make contributions in an amount equal to the actuarial cost of the service purchase." H.F. 2496 § 67, codified at Iowa Code § 97B.74(2)(b). The amendment further provided that "the actuarial cost of the service purchase is an amount determined by the department in accordance with actuarial tables, as reported to the department by the system's actuary, which reflects the actuarial cost necessary to fund an increased retirement allowance resulting from the purchase of additional service." Id. Although Plaintiffs repeatedly state that the amendment required buy-back contributions to be 100 percent of actuarial costs or account for accumulated contributions and accumulated employer contributions, see e.g., Plaintiffs' Memorandum at 3, the law simply does not require that. Questions of law are for the Court. Properly understood, the amendment changed the cost of the buy-back for a member from repayment of accumulated contributions refunded to "actuarial cost" as "determined by the department."

Second, the same legislation also amended the provision regarding payment of contributions upon termination of employment prior to retirement. The amendment provided that "for a vested member, the accumulated employer contributions for the vested member" be paid on application. See H.F. 2496 § 57 codified at Iowa Code § 97B.53. Prior to this amendment, the law allowed only the refund of the employee's accumulated contributions and not both the accumulated contributions and the accumulated employer contributions.

The summary judgment record establishes that IPERS worked with its actuary, Milliman, to implement the actuarial cost formula as required. In anticipation of the amendment, Milliman and IPERS discussed amending their contract to provide for the calculation of individualized actuarial costs for service purchases. (Ex. 3.) In December 2008, IPERS finalized the amendment to the Milliman contract, and Milliman agreed to provide IPERS "twice a month in the individualized actuarial cost of service purchases." (Ex. 4.) Notably, the contract required that the cost of service purchases calculated by Milliman "shall be based on the applicable law, administrative rules, and any other written instructions provided by IPERS." (Ex. 4.) By February 1999, IPERS and Milliman had agreed upon the calculation methodology used to determine the "actuarial cost" of service purchases. Under the methodology, the contribution required for a buy-back would reflect a 60 percent actuarial credit to reflect that IPERS retained the accumulated employer contributions after the member received the refund of accumulated contributions. (Exs. 6, 7.) Under the methodology, buy-ins did not receive actuarial credit because no corresponding accumulated employer contributions reduced the actuarial cost of the service purchase. IPERS implemented the statutory changes by the effective date and began requiring members to pay the actuarial costs, as determined by IPERS and Milliman, for both buy-backs and buy-ins.

IPERS continued to distinguish between the contributions required for buy-backs and buy-ins through January 14, 2004, on the basis that, with respect to buy-backs, the accumulated employer's contributions remained with IPERS after the member received a refund of his or her accumulated contributions. Effective January 14, 2004, IPERS changed its actuarial cost formula for buy-backs by discontinuing the application of the actuarial credit. In January 2004, Cusack sent a memo to members explaining the change. Cusack explained that the actuarial credit applied to buy-backs was unsound insofar as it failed to reflect the 1999 amendment that allowed vested members to receive a portion of accumulated employer contributions plus interest. (Ex. 23.) He

explained that IPERS and "especially 'me,' Greg Cusack" "goofed in not catching the need for this change five years ago!" (Ex. 23.)

Ron Robinson, Fiscal Services Division, concluded that between the effective date of the law and the effective date of IPERS' January 2004 change, 3,523 employees purchased buy-backs. If those members had paid contributions in accord with IPERS' new actuarial cost methodology for buy-backs, IPERS would have collected an additional $29.2 million in contributions, assuming that the same number of members would have completed the buy-backs at the higher price. In addition, because IPERS honored price quotes through September 2004, IPERS would have collected an additional $8.6 million in contributions from an additional 600 employees who exercised their buy-back rights under the old formula. In total, viewing the facts in the light most favorable to Plaintiffs, IPERS admittedly incorrect actuarial cost methodology resulted in lost contributions in the amount of $37.8 million.

Brunkhorst was an active, regular member of IPERS from 1995 to 2006, inactive from 2007 through 2009, and then again an active member from 2010 to present. (Defendants' SOF ¶ 55.) Brunkhorst never received a refund of contributions, nor did he ever purchase a service credit via buy-back or buy-in. (Defendants' SOF ¶ 56.) Brunkhorst filed his claim on January 13, 2006. (Defendants' SOF ¶ 57.) He filed suit on February 7, 2007. At the time of filing, Brunkhorst was not an active member of IPERS, was not paying any contributions, and had not sought retirement benefits. (Defendants' SOF ¶ 60.)

Lewis was an active, special member of IPERS from 1991 to 2007. (Defendants' SOF ¶ 62.) Lewis applied for a service purchase on December 21, 2007, but he never completed the purchase. (Defendants' SOF ¶ 63.) Lewis began receiving IPERS benefits in January 2009. Lewis joined this suit on July 2, 2009.

The General Assembly passed a statutorily mandated increase in contribution rates effective July 1, 2007. (Defendants' SOF ¶ 53.) Every employee that maintains employment and continues to be a member of IPERS is deemed to consent and agree to any deductions from compensation required under Chapter 97B. See Iowa Code 97B.62. The General Assembly reserved the right to "alter, amend, or repeal any provision of this chapter or any application thereof . . ." Iowa Code § 97B.65.

IV. DISCUSSION

In its Ruling on Defendants' Motion to Dismiss, the court held that Plaintiffs' statutory claim failed as a matter of law because there was no private right of action arising out of any violation or violations of Chapter 97B. The court further held that Plaintiffs' common law claims, other than their common law claim for breach of fiduciary duty for "malicious or wanton misconduct," failed as a matter of law because of the statutory immunity relating to actions or omissions regarding the operation of IPERS set forth in Iowa Code 97B.4(7). These issues were not addressed on appeal, and Plaintiffs do not challenge the court's prior Ruling. As such, Plaintiffs' sole remaining claim is their common law claim for wanton or malicious misconduct.

A.

The Court first addresses Defendants' argument that Plaintiffs have failed to create a triable issue of fact on the issue of whether Defendants' actions or omissions rise to the level of wanton or malicious misconduct. Defendants argue that the summary judgment record, when viewed in the light most favorable to Plaintiffs, shows only that Defendants "goofed" in calculating the actuarial costs of the buybacks. Upon discovering the "goof," Defendants corrected the error. Plaintiffs appear to contend that the mere fact that Defendants continued to apply an actuarial credit for buy-

backs is sufficient evidence from which a jury could infer that Defendants engaged in wanton or malicious conduct. The Court disagrees.

The primary failing in Plaintiffs' resistance to summary judgment is that the undisputed summary judgment record shows that IPERS did, in fact, implement the actuarial cost method by the required effective date as required by the amendment. The amendment explicitly provided that the "actuarial cost of the service purchase is an amount determined by the department." H.F. 2496 § 67. While Cusack and IPERS acknowledged in 2004 that the methodology used between 1999 and 2004 to calculate the actuarial cost of buy-backs was unsound because, among other things, it failed to take into account the 1999 amendment allowing the refund of the accumulated employer's contributions to vested members, this simply means that IPERS and Milliman got the methodology wrong. It does not mean that IPERS refused or failed to act. These are very different things. The undisputed facts show that IPERS engaged Milliman in anticipation of the statutory changes. The undisputed facts show that IPERS entered into an amended contract with Milliman for Milliman to provide individualized actuarial cost analysis as required by statute. The undisputed facts show that this was done and implemented before the effective date of the amendment. When viewed in the light most favorable to Plaintiffs, the summary judgment record shows only that Defendants erred in calculating the actuarial cost of the service purchase, a duty specifically designated to them by statute. No reasonable inference can be drawn that Defendants simply ignored the law or failed to act.

Even assuming that Defendants' conduct could be construed as a failure to timely implement the 1999 amendments, there is no evidence in the summary judgment record supporting the inference that this conduct was done wantonly or maliciously. Wanton conduct has been described as follows:

> Similar to willful or reckless conduct, wanton conduct lies somewhere between the mere unreasonable risk of harm in ordinary negligence and intent to harm. . . .

> The usual meaning assigned to willful [sic], wanton or reckless, according to taste as to the word used, is that the actor has intentionally done an act of an unreasonable character in disregard of a risk known to or so obvious that he must be taken to have been aware of it, and so great as to make it highly probable that harm would follow.
>
> It is said that the concept involves the combination of attitudes: a realization of imminent danger, coupled with a reckless disregard or lack of concern for the probable consequences of the act. Another authority labels both wanton and willful [sic] misconduct as reckless disregard for the safety of another, and distinguishes it from intentional misconduct only in that it requires a realization of a strong probability of harm to another rather than the substantial certainty accompanying an intentional act.
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> Other authorities distinguish between willfulness [sic], characterized by intent to injure, and wantonness, which merely implies an indifference as to whether the act will injure another. The difference is illustrated by comparing the throwing of an object with intent to strike another and throwing it without such intent, but believing that it will, in fact, strike another, and proceeding with indifference as to whether it does not. Wantonness is said to be less blameworthy than an intentional wrong only in that instead of affirmatively wishing to injure another, the actor is merely willing to do so.

Thompson v. Bohiken, 312 N.W.2d 501, 504-05 (Iowa 1981) (internal citations and marks omitted). The Supreme Court of Iowa has also stated, more succinctly, that wanton means "the actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences." Kuta v. Newberg, 600 N.W.2d 280, 288 (Iowa 1999). In Hagenson v. United Tel. Co., 209 N.W.2d 76, 82 (Iowa 1973), the court explained that malice "may be established by showing wrongful or illegal conduct committed or continued with a willful or reckless disregard of another's rights. We have also defined legal malice as the intentional commission of a wrongful act without just cause or excuse."

Neither party has identified what constitutes wanton or malicious conduct in administering a benefits plan, and there is no controlling case. In the persuasive case of Awakuni v. Awana, 165 P.3d 1027 (Haw. 2007), the court affirmed a grant of summary judgment where plan administrators created a two-tiered rate structure for a welfare benefit plan. The plaintiffs contended that the plan

administrators violated clear duties of non-discrimination among plan participants and ignored clear warnings that the decision was having adverse impact on the plan and plan participants. While those facts were true, the court concluded that this did not create a triable issue of fact with respect to whether the trustees acted with wanton disregard or maliciously. See Awakuni, 165 P.3d at 1043. In that case, there was no evidence of fraud, self-dealing, ill-will, misrepresentation, or other wrongful conduct.

There is no evidence in this record from which a jury could find that the Advisors and Consultants Defendants engaged in wanton or malicious misconduct. First, Plaintiffs have not identified the specific Advisors and Consultants allegedly at fault. Second, Plaintiffs have not identified the specific conduct or omissions at issue. Third, Plaintiffs have not presented any evidence that any Advisors or Consultants intentionally engaged in the alleged wrongful conduct. Fourth, Plaintiffs have not presented any evidence that the Advisors and Consultants Defendants knew or should have known that the allegedly wrongful conduct would cause imminent harm. Fifth, there is no evidence that the Advisors and Consultants Defendants appreciated that the allegedly wrongful conduct was done in disregard for the rights of another. Indeed, the conduct at issue here allowed certain members to pay less to purchase service credits. There is no evidence that the statutory right of other members to purchase service credits at a particular price was increased. Nor is there any evidence that any member failed to receive any benefit. Finally, there is no evidence in this record of fraud, misrepresentation, self-dealing, hatred, ill-will, or other acts or omissions from which wanton or malicious misconduct could be inferred.

The same analysis can be applied to the Investment Board Defendants. Again, Plaintiffs have failed to identify the board members who allegedly engaged in wrongful conduct. Chapter 97B charges the Investment Board with retaining an actuary to set actuarial policy. The summary judgment record shows that this duty was discharged and IPERS engaged Milliman for the purpose

of establishing buy-back contributions on an individualized actuarial cost basis. Third, Plaintiffs have not introduced any evidence from which it could be inferred that the Investment Board intentionally engaged in the alleged wrongful conduct. Fourth, Plaintiffs have not presented any evidence that the still unidentified Investment Board Defendants knew or should have known that the allegedly wrongful conduct would cause imminent harm. Fifth, there is no evidence that the Investment Board Defendants knew that the allegedly wrongful conduct was done in disregard for the rights of another. Finally, there is no evidence in this record of fraud, misrepresentation, self-dealing, hatred, ill-will, or other conduct from which wanton or malicious misconduct could be inferred.

Finally, the same analysis can also be applied to Defendants IPERS, the State of Iowa, Cusack, and IPERS personnel.

The court views the summary judgment record in the light most favorable to the party resisting the motion for summary judgment and indulges in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a genuine issue of fact. See Crippen, 618 N.W.2d at 565. When a motion for summary judgment is made and properly supported, as is the case here, the opposing party may not rest upon the mere allegations or denials of the pleadings. See Iowa R. Civ. P. 1.981(5); Bitner, 549 N.W.2d at 299. This case has been pending for over five years. Plaintiffs have had ample opportunity to conduct discovery to support their claims. Plaintiffs may or may not have engaged in such discovery. Regardless, Plaintiffs have failed to identify specific material facts, supported by competent evidence, establishing a genuine issue for trial on the issue of whether Defendants engaged in wanton or malicious misconduct. Accordingly, Defendants' Motion for Summary Judgment should be granted.

B.

Defendants argue that Plaintiffs lack standing. As a general rule, standing is determined as of the lawsuit's commencement. See Bronner v. Exchange State Bank, 455 N.W.2d 289, 291 (Iowa 1990) (holding that plaintiff did not have standing to sue where plaintiff had no capacity to sue at time of filing and that bankruptcy abandonment order could not relate back to time of filing); see also Harley v. Zoesch, 413 F.3d 866, 872 (8th Cir. 2005); Qimonda AG v. LSI Corp., 857 F. Supp. 2d 570, 574 (E.D. Va. 2012) ("Whether a plaintiff has standing, however, is tested at the time the case is filed."). Plaintiffs must have standing in their respective individual capacities to be allowed to initiate a class action. See Greenfield v. City of Davenport, No. 09-0173, 2009 WL 2960622, at *2 (Iowa Ct. App. Sept. 2, 2009) (affirming grant of motion to dismiss where plaintiff lacked individual standing and concluding "therefore he is unable to initiate a class action lawsuit"); Hammond v. Florida Asset Financing Corp., 695 N.W.2d 1,8 (Iowa 2005) (explaining that prior to class certification only the claims of the individual plaintiffs are at issue); cf. Hammer v. Branstad, 463 N.W.2d 86, 91 (Iowa 1990) (explaining that, after class certification, when a class representative's claims are dismissed for lack of standing, plaintiffs should be afforded an opportunity to find an adequate class representative because the class itself has legal status separate and apart from the class representative).

Our Supreme Court has articulated the following formulation of the standing doctrine:

> First, the plaintiff must have suffered an injury in fact-an invasion of a legally protected interest which is (a) concrete and particularized, and (b) actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court. Third, it must be likely, as opposed to merely speculative, that the injury will be "redressed by a favorable decision.

Alons v. Iowa Dist. Ct., 698 N.W.2d 858, 867-68 (Iowa 2005) (quoting Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992)). Both parties cite to this decision and seem to agree that this is the controlling standard. The Court first addresses whether Plaintiffs have suffered injury in fact.

Defendants first argue that Plaintiffs have not suffered any injury because there is no showing that Plaintiffs' retirement benefits have been jeopardized. The Court agrees. IPERS is a defined benefit plan. See In re Marriage of Sullins, 715 N.W.2d 242, 249 (Iowa 2006). As such, Plaintiffs are entitled to the greater of their respective accumulated contributions to IPERS or their statutorily defined benefit. Plaintiffs have not suggested—or provided any evidence—that the Retirement Fund is underfunded to the extent that Plaintiffs may not receive the statutory benefits to which they are entitled.

Plaintiffs argue that they have established an injury in fact because IPERS failed to collect approximately $37.8 million in additional service purchase contributions over the relevant time period. If anything, this merely establishes an injury to the Retirement Fund. The Investment Board is the trustee of the Retirement Fund and can choose to pursue a claim for an injury to the Retirement Fund. There is no evidence that the foregone contributions in any way impair IPERS' ability to meet its future benefit obligations with respect to Plaintiffs, specifically, or members, generally. Indeed, it is undisputed that Lewis currently is receiving his statutory benefit. In the absence of any showing that Defendants' conduct impaired the ability of IPERS to meet its future benefit obligations, Plaintiffs lack standing to assert an injury to the Retirement Fund. See Hughes Aircraft Co. v. Jacobson, 525 U.S. 432, 439-40 (1999); David v. Alphin, 704 F.3d 327, 338 (4th Cir. 2013) (holding that beneficiaries of defined benefit plan lacked standing to assert breach of fiduciary duty claim for financial injury to plan where plaintiffs failed to establish plan could not meet future obligations); Harley v. Minn. Mining and Mfg. Co., 284 F.3d 901, 908 (8th Cir. 2002) (holding that it was plaintiffs' burden to establish that plan had inadequate assets to fund benefits as

an element of proving an injury in fact); Perelman v. Perelman, No. 10-5622, 2013 WL 271817, at *5 (E.D. Pa. Jan. 24, 2013) (holding that retirement plan participant lacked standing to challenge diminution to fund assets in the absence of a showing that the plan sponsor is unable to meet future obligations); McCullough v. Aegon USA, Inc., 521 F. Supp. 2d 879, 891 (N.D. Iowa 2007) (holding that beneficiary of defined benefit plan lacked standing where there was no showing that the plan would not meet its future benefit obligations).

Plaintiffs contend that the contribution rate increase effective July 1, 2007, is a sufficient, concrete, particularized, and actual injury to satisfy the injury-in-fact requirement. As previously stated by the Court, as a general rule, standing is determined at the time a suit is filed. There is no evidence that Brunkhorst paid the increased contribution rate at the time he filed suit. It appears that, after filing suit, Brunkhorst started paying the increased contribution rate since he is again an active member of IPERS. Further, it appears that Lewis paid contributions after the effective date of the rate increase. However, Plaintiffs have not established that Lewis paid the increased contribution rate at issue versus a different rate for special members. On this basis alone, the Court could grant Defendants' Motion for Summary Judgment. Even assuming, however, that Plaintiffs paid the increased contribution rates at issue and that payment of the increased contribution rate satisfies the injury-in-fact element, Plaintiffs have failed to satisfy that the injury is fairly traceable to Defendants' conduct and that the injury is capable of redress.

Plaintiffs must establish "a causal connection between the injury and the conduct complained of-the injury has to be fairly traceable to the challenged action of the defendant, and not ... the result of the independent action of some third party not before the court." Alons, 698 N.W.2d at 867-68. It is important to be precise in describing Plaintiffs' injury. The alleged injury asserted is the increase in contribution rates. IPERS, the Investment Board Defendants, IPERS' Personnel Defendants, and IPERS Advisors and Consultants Defendants did not increase the contribution

rates. Instead, the contribution rate increase lawfully was passed by the General Assembly pursuant to its statutory right to do so. See Iowa Code § 97B.65. Every employee that maintains employment and continues to be a member of IPERS is deemed to consent and agree to any deductions from compensation required under Chapter 97B. See Iowa Code 97B.62. Plaintiffs lack standing to challenge the lawful conduct of the General Assembly. See Godfrey v. State, 752 N.W.2d 413, 423 (Iowa 2008) (stating that an injury is not fairly traceable where a party is challenging lawful government conduct in response to or facilitating injurious conduct of others); Citizens for Responsible Choices v. City of Shenandoah, 686 N.W.2d 470, 475 (Iowa 2004) (holding that citizens lacked standing to challenge lawful governmental conduct where alleged harm was caused by independent actors).

In addition, and more concretely, Plaintiffs have failed to establish that the rate increase is fairly traceable to Defendants' conduct. The entirety of Plaintiffs' argument appears to be that the rate increase occurred after Defendants' conduct, therefore the rate increase is fairly traceable to Defendants' conduct. The argument is a logical fallacy: post hoc ergo propter hoc, Latin for "after this, therefore because of this." The mere fact that the rate increase occurred after Defendants' conduct (three years after Defendants corrected their actuarial formula), is insufficient to conclude that the rate increase is in any way traceable to Defendants' conduct. The only evidence Plaintiffs point to is a sentence in IPERS' Annual Summary for Fiscal Year 2006. (Ex. D.) The sentence states that "[r]ebalancing IPERS' long term funding required a contribution rate increase." (Ex. D. at 3.) Notably lacking from this document is any statement, indication, or implication that the alleged $38 million in lost contributions was in any way material to IPERS' unfunded actuarial liabilities. Indeed, the same document cited by Plaintiffs shows that IPERS received $547.5 million in contributions during fiscal year 2006. The document also shows IPERS' unfunded actuarial liability was $2.507 billion in fiscal year 2006. The document also shows IPERS' net assets held in

trust for benefits were $20.4 billion. In their resistance to summary judgment, Plaintiffs state that actuarial studies will be able to identify some connection between the relatively miniscule shortfall at issue here, IPERS' unfunded actuarial liability, and the contribution rate increase. However, in resisting summary judgment, Plaintiffs are required to identify specific facts supported by competent evidence establishing a genuine issue for trial. If Plaintiffs had such studies, they should have made such studies part of the summary judgment record. In the absence of some evidence that the rate increase resulted from this relatively minuscule shortfall, the court concludes that it is fallacious to infer that the rate increase is in any way traceable to Defendants' conduct.

Finally, and perhaps most important, Plaintiffs have not introduced any evidence regarding the legislature's considerations and motivations in passing the contribution rate increase. There is no evidence regarding when the legislature took up the issue, what information was presented in support of or opposed to the rate increase, and whether Defendants' conduct was at all an issue that was considered. In the absence of any such evidence linking Defendants' conduct to the rate increase, it cannot be said that the rate increase is fairly traceable to Defendants' conduct.

Plaintiffs' injury also cannot be redressed by a favorable decision from the courts. See Alons, 698 N.W.2d at 867-68. Plaintiffs claim that they can be awarded damages for the increased contribution rates they were and are forced to pay. Taking Plaintiffs' argument to its logical conclusion, they should also be awarded any damages for any future contribution rate increases because any such rate increases, using Plaintiffs' logic, could be traced in some way to the $38 million in foregone contributions. Clearly, this is untenable. In addition, by requesting that Defendants, including IPERS, refund the increased contributions collected back to IPERS' members, Plaintiffs are effectively asking that the court repeal a lawful act passed by the General Assembly to which Plaintiffs, by law, have consented. The Court is without authority to grant the requested relief.

There is no Iowa case directly on point. An analysis of persuasive authority, including the authorities cited above, shows that other courts have concluded that participants in defined benefit plans and welfare benefit plans do not have standing to challenge injuries based on misfeasance of malfeasance in the administration of the plan in the absence of evidence indicating that the challenged conduct impaired the ability of the plan to provide future benefits. See, e.g., Loren v. Blue Cross & Blue Shield, 505 F.3d 598, 608-609 (6th Cir. 2007) (holding that participants in welfare benefit plan lacked standing where alleged injury of increased contributions and deductible amounts was "too speculative" to establish standing); Glanton ex rel. Prescription Drug Plan v. AdvancePCS Inc., 465 F.3d 1123 (9th Cir. 2006) (holding that participants of welfare benefit plan lacked standing to challenge increase in contribution amounts allegedly caused by administrator misconduct); Harley, 284 F.3d at 908 (holding that beneficiaries of defined benefit plan failed to establish standing); Naswari v. Buck Consultants, LLC, No. 1:09-CV-02061, 2010 WL 2629071, at *6 (E.D. Cal. June 29, 2010) (dismissing retirement beneficiaries' claim for lack of standing); New Orleans ILA Pensioners Ass'n v. Board of Trustees, No. 07-6349, 2008 WL 215654, at * (E.D. La. Jan. 24, 2008) ("Alleging loss to the assets of a defined-benefit pension fund is quite different from alleging that a pensioner's income stream will be affected. . . . Based on this aspect of defined-benefit pension plans, courts of appeal that have considered the question of standing in these circumstances have held that participants do not have standing to sue on behalf of the Plan for losses caused by fiduciary breach, unless the participants can establish that the remaining pool of assets will be inadequate to pay for the plan's outstanding liabilities."); Aikens v. Alexander, 397 N.E.2d 319, 324 (Ind. Ct. App. 1979) (holding that plaintiffs lacked standing). Plaintiffs have not cited a single case standing for the contrary proposition.

The United States District Court for the District Court of New Mexico recently resolved a matter materially indistinguishable from this case. In Hill v. Vanderbilt Capital Advisors, LLC, 834

F. Supp. 2d 1228 (D.N.M. 2011), members in a state-sponsored defined benefit plan claimed that defendants' fraud on and mismanagement of the retirement fund caused increased member contributions and a risk that the fund would have insufficient assets to satisfy future obligations. As here, the New Mexico legislature made changes to the retirement plan, including contribution rate increases, after the defendants' allegedly unlawful conduct. The district court, applying the same standing factors as this Court, concluded that the plaintiffs lacked standing. Because the analysis of that court is equally applicable to this case, the Court quotes it at length:

> While these allegations may establish an injury, the Plaintiffs have not made sufficient allegations to infer that this increases in years worked before receiving full benefits or contribution levels is fairly traceable to the Defendants' acts and that the asked-for award will redress this injury. There must be a substantial likelihood that the defendant's conduct caused plaintiff's injury in fact. The Plaintiffs' Amended Complaint offers little to connect these legislative acts to the alleged conduct of the Defendants. The Plaintiffs make no allegations about when the Legislature began to consider these amendments or that the debate centered around the VFT investment. If the Fund had only invested in the VFT, perhaps then the Court could draw the causal line between the Defendants alleged actions in causing the loss and the actions of the Legislature. The Fund, however, is an $8.5 billion pool of assets, and this investment of forty-million dollars represents only .5% of the Fund's total capital. For the Court to say that such a relatively small loss caused the Legislature to respond with increased retirement eligibility requirements and contribution increases, the Court would have to engage in impermissible speculation about the Legislature's motivations.
>
> The Plaintiffs' Amended Complaint also undermines their contention that there is a direct causal link between the VFT investment and the Legislature's actions. The Plaintiffs assert only that the VFT investment loss "exacerbated" problems that have been ongoing in "recent years." That members of the Public Employees' Retirement Fund ("PERF") are experiencing these same age-of-retirement eligibility and contribution increases further undercuts any causal connection that might reasonably be inferred, because the PERF did not invest in the VFT. An allegation that the Defendants acted fraudulently and breached fiduciary duties, that the VFT investment happened, that the VFT investment was lost, and that the Legislature amended retirement eligibility and contribution provisions is not enough to fairly trace the alleged injury to the alleged wrong. A conclusory allegation, representing no more than a speculative inference as to why the Legislature changed retirement eligibility and contribution requirements is not sufficient to demonstrate causation.
>
> The Plaintiffs also encounter the same redressibility issue that arose with the alleged injury relating to tax increases and service decreases: the Legislature

> enacted the amendments. The Legislature passed amendments to the ERA, and the relief the Court could grant would not redress the Plaintiffs' alleged injury, because altering the retirement eligibility and contribution requirement provisions also requires the Legislature to act. Because redressing the Plaintiffs' alleged injury of increased retirement age and contribution requirements requires a third party's actions, the increase in retirement eligibility and contribution requirements cannot establish standing.

Id. at 1253-54. For these reasons, and the reasons discussed above, Defendants' Motion for Summary Judgment should be granted.

C.

Defendants also claim that Plaintiffs' claims are barred by the statute of limitations. Although the parties (and some decisions) have characterized the issue as a statute of limitations issue, it is more accurately described as a jurisdictional issue. The distinction is important: statute of limitations is an affirmative defense that can be waived; neither party can vest the Court with subject matter jurisdiction where it does not exist. The Iowa Tort Claims Act, Iowa Chapter 669, governs claims against the State of Iowa, state agencies, and all employees of the state acting on behalf of the State of Iowa. Iowa Code section 669.13 provides that a "claim or suit otherwise permitted under this chapter shall be forever barred, unless within two years after the claim accrued, the claim is made in writing and filed with the director of the department of management under this chapter." This provision means that the state appeal board has exclusive jurisdiction over all tort claims against the State. "Improper presentment of a claim, or not presenting one at all, has been considered a failure to exhaust one's administrative remedies, depriving the district court of subject matter jurisdiction. If a court lacks jurisdiction when a suit is filed, then the court must dismiss the suit." Minor v. State, 819 N.W.2d 383, 405 (Iowa 2012).

The discovery rule is applicable to claims governed by the ITCA. See Callahan v. State, 464 N.W.2d 268, 273 (Iowa 1990). Under the discovery rule, a claim accrues when the plaintiff "knows or in the exercise of reasonable care should have known both the fact of the injury and its cause."

See Callahan, 464 N.W.2d at 273. It is the plaintiff's burden to prove the exception to the limitations period. See Callahan, 464 N.W.2d at 273. Brunkhorst filed his claim on January 13, 2006. He contends that his claim did not accrue until the contribution rate increase was effective in 2007. Brunkhorst's argument is contrary to Brunkhorst's administrative claim. In that document, Brunkhorst identified his claim as the failure to implement the actuarial cost change required by the 1999 amendment. (Plaintiffs' Ex. B.) The claimed injuries include the shortfall to the fund, increased contributions now and into the future, and disparate contributions to the members. (Plaintiffs' Ex. B.) Based on Plaintiffs' theory of the case, the misconduct occurred upon the effective date of the amendment, July 1, 1999. At least some of the claimed harms—failure to collect full contributions and disparate contributions—occurred immediately after the effective date. Brunkhorst has failed to carry his burden of establishing an exception to the rule. He has thus failed to comply with the timely presentment requirements of the ITCA. The Court is thus without jurisdiction over Brunkhorst's claims governed by the ITCA.

The Court is also without jurisdiction over Lewis's claims. Plaintiffs' argue that Lewis's claim was timely filed because Rule 1.277 tolled the statute of limitations while the putative class action was pending. First, as previously stated, the Court lacks jurisdiction over Brunkhorst's claims. Second, even if the Court had jurisdiction over Brunkhorst's claims, Lewis's claims still fail for failure to exhaust his administrative remedies. Rule 1.277 provides that the "statute of limitations is tolled for all class members upon the commencement of an action asserting a class action." Iowa R. Civ. P. 1.277 (emphasis added). As previously stated, however, the ITCA is not a statute of limitations. Instead it vests exclusive jurisdiction over claims governed by the ITCA with the state appeal board. Until such a claim or claims has been properly presented pursuant to the ITCA, the district court is without jurisdiction to hear the claim. More important, until a claimant

has exhausted his or her administrative remedies under the ITCA, he or she cannot be a putative class member to whom Rule 1.277 applies.

In short, the Court concludes that the mere pendency of a putative class action suit does not relieve a claimant from independently meeting the jurisdictional requirements set forth in the ITCA. There is no controlling Iowa case on point. In reaching this conclusion, the Court relied heavily on the plain language of the ITCA and Rule 1.277. In addition, the Court relied on federal decisions interpreting the similar Federal Tort Claims Act. See Callahan, 464 N.W.2d at 271 (stating that because the ITCA "is similar to the federal tort claims act, we give considerable weight to cases interpreting that act." A recent decision is directly on point:

> First, the Government objects to the proposed class on the grounds that the FTCA does not permit a class action because each claimant must fulfill the FTCA's requirement of filing an administrative claim. Indeed, the Government is correct that the FTCA permits an individual claimant to file suit only if "the claimant shall have first presented the claim to the appropriate Federal agency and his claim shall have been finally denied by the agency in writing and sent by certified or registered mail." 28 U.S.C. § 2675(a). If the agency fails to make a final disposition of the claim within six months after it is filed, the claimant may construe such inaction as a denial of the claim at any time thereafter and file suit. Id. The requirement to file a administrative claim is deemed to be "jurisdictional in nature." Sierra Club v. Yeutter, 926 F.2d 429, 436 (5th Cir.1991).
>
> Case law supports the Government's assertion that a class action cannot be filed under the FTCA where all claimants have not fulfilled the statute's administrative claim requirement. A prime example cited by the Government is Lunsford v. United States, 570 F.2d 221, 222 (8th Cir.1977), in which the Eight Circuit addressed a class action brought under the FTCA for deaths and property losses due to a flood. The plaintiffs alleged that a government-sponsored cloud seeding program had caused excessive rain, resulting in the flood. Id. Plaintiff class representatives filed administrative claims with the U.S. Bureau of Reclamation as administrators of their relatives who lost their lives and/or property. The administrative claims further stated that they were filed "as a class claim and action" on behalf of all persons who lost a relative or sustained damage to property. Id. at 223. The district court dismissed the class action because the class representatives did not have the authority to file administrative claims on behalf of the unnamed class members, and the plaintiffs appealed.
>
> On appeal, the Eighth Circuit affirmed. It began by explaining that the FTCA's requirement that a plaintiff first file an administrative claim is "jurisdictional ..., and thus, it cannot be waived." Id. at 224. The court noted that the purpose of the

> administrative claim requirement was "to improve and expedite disposition of monetary claims against the Government by establishing a system of prelitigation settlement" by mandating the filing of a claim. Id. at 224. By failing to file a claim, the unnamed class members deprived the United States "of an identifiable claimant or claimants with whom the government can negotiate a settlement on the basis of the sum certain stated in the administrative claim." Id. at 225. The court explained further, "Neither the FTCA nor the regulations promulgated thereunder make provision for the filing of administrative claims against the United States on behalf of a class of similarly situated individuals." Id. at 225 (citations omitted). As such, the court concluded that dismissal was appropriate for lack of subject matter jurisdiction "since the administrative exhaustion requirement of the FTCA was not met with respect to the claims of the unnamed class members." Id. at 227.
>
> Consistent with the Eight Circuit, federal courts have held that administrative class actions are not permissible where each claimant does not file an administrative claim. See In re Agent Orange Prod. Liability Litig., 818 F.2d 194, 198 (2d Cir.1987) ("It is well established that neither the district court nor this Court has jurisdiction over a Federal Tort Claims class action where, as here, the administrative prerequisites of suit have not been satisfied by or on behalf of each individual claimant."); Caidin v. United States, 564 F.2d 284 (9th Cir.1977) (rejecting administrative claim class because class representatives did not present "evidence of authority to represent each purported class member"); Pennsylvania v. Nat'l Ass'n of Flood Insurers, 520 F.2d 11 (3d Cir.1975), overruled on other grounds by 659 F.2d 306, 317 (3d Cir.1981); Founding Church of Scientology of Washington, D. C., Inc. v. Director, Federal Bureau of Investigation, 459 F.Supp. 748, 754 (D.D.C.1978) ("All the courts that have considered this issue have concluded that every member of a class must exhaust his administrative remedies.").

In re Katrina Canal Breaches Consolidated Litigation, 2009 WL 1249501, at *2-3 (E.D. La. June 9, 2009). The Court agrees with and adopts this analysis.

In this case, by Plaintiffs' own admission, the latest possible date upon which their claims could have accrued was "in 2006 when the Iowa State Legislature approved a rate increase to rebalance IPERS' long-term funding." (Plaintiffs' Supp. Brief. At 3.) The Court disagrees and concludes that the claim accrued prior to that time. However, even assuming that to be true, Lewis did not file his claim until 2009. Because Lewis has not independently complied with the Iowa Tort Claims Act, the Court is without jurisdiction over Lewis's claims. Defendants' Motion for Summary Judgment should be granted.

D.

Defendants also contend that Plaintiffs' claims are barred by discretionary function immunity. Given the Court's resolution of the parties' other arguments, the Court need not address this argument in any great detail. The Court finds and concludes that Plaintiffs' claims are barred pursuant to Iowa Code § 669.14(1). The amendment at issue specifically vested IPERS with discretionary authority to determine the actuarial costs of service purchase. IPERS contracted with Milliman to perform this function. As discussed in more detail in the Statement of Disputed Facts, supra Part II., Plaintiffs' argument that the statute mandated a particular formula is predicated on a misstatement of the law and is not supported by the summary judgment record.

V. CONCLUSION

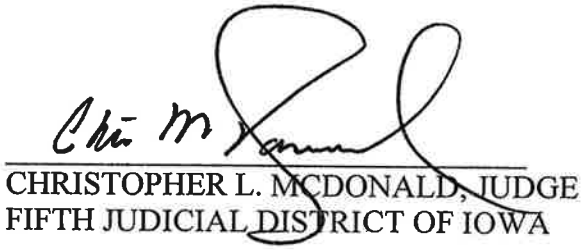
The Court has considered all arguments advanced by the parties, including those not specifically addressed above. The Court finds and concludes that Defendants' Motion to Dismiss and Motion for summary judgment should be granted.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendants' Motion to Dismiss should be and hereby is GRANTED. Plaintiffs' claims against Defendant Cusack, in his personal capacity and as a representative of all personnel of IPERS, should be and hereby are DISMISSED WITH PREJUDICE.

IT IS FURTHER ORDERED, ADJUDGED, AND DECREED that Defendants' Motion for summary judgment should be and hereby is GRANTED. Plaintiffs' claims against all Defendants, in their individual and representative capacities, should be and hereby are DISMISSED WITH PREJUDICE.

- Each party to bear their own costs and fees. mcd
4/2/2013

IT IS SO ORDERED THIS 26th DAY OF March, 2013.



CHRISTOPHER L. MCDONALD, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Copy to:

D. Brown
✓A. Wonio
520 Walnut St.
DSM IA 50309

✓T. Smith
130 E Walnut St.
DSM IA 50319

3/26/13 cg

IN THE IOWA DISTRICT COURT FOR POLK COUNTY

LINDSEY A. JENNEY, **Petitioner,** **vs.** **EMPLOYMENT APPEAL BOARD and HILLS BROTHERS,** **Respondents.**	**Case No. CV 9058** **RULING ON PETITION FOR JUDICIAL REVIEW**

FILED
POLK COUNTY, IA.
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CLERK DISTRICT COURT

Pending before the Court is Petitioner Lindsey A. Jenney's (hereinafter "Jenney") Petition for Judicial Review. Oral argument was held on July 6, 2012. Petitioner was represented by her counsel Michael J. Tulis. Respondent Employment Appeal Board (hereinafter "EAB") was represented by attorney Anita M. Garrison. Respondent Hills Brothers (hereinafter "Hills Brothers") was represented by attorney Leilani M. Harbeck. The matter is deemed submitted. After reviewing the court file and hearing the arguments of counsel, the Court denies the Petition and affirms the agency decision.

I.

Jenney is a former employee of Hills Brothers. (Certified Record at 13.) The brief but eventful term of her employment extended from August 25, 2011, through September 23, 2011. (Cert. Rec. at 13.) On September 23, 2011, Hills Brothers terminated Jenney's employment after Jenney used her personal cell phone while on company time to discuss other employment opportunities and then disrupted the office by discussing her other employment opportunities with her current coworkers. (Cert. Rec. at 18.)

Jenney applied for unemployment compensation benefits. The initial application for unemployment benefits was granted on October 21, 2011. (Cert. Rec. at 1.) Hills Brothers appealed the decision, alleging that Jenney was discharged for disqualifying misconduct. (Cert. Rec. at 1.) A hearing was held before Administrative Law Judge Bonny G. Hendricksmeyer on December 1, 2011. (Cert. Rec. at 11.) ALJ Hendricksmeyer found that Jenney engaged in wrongdoing and that her conduct was not in the best interests of Hills Brothers. (Cert. Rec. at 46.) ALJ Hendricksmeyer overturned the initial decision, denied benefits, and found in favor of the employer. (Cert. Rec. at 40–42.) ALJ Hendricksmeyer's decision was affirmed by operation of law in a split decision of the Employment Appeal Board. (Cert. Rec. at 62-63.) Jenney then filed this Petition for Judicial Review.

II.

The standard of review in this case is governed by the Iowa Administrative Procedure Act. See Iowa Code Chapter 17A. Under the IAPA, the Court's "review of agency action is severely circumscribed." Sellers v. Employment Appeal Bd., 531 N.W.2d 645, 646 (Iowa 1995). Under the IAPA, the Court may grant relief only if it determines that the "substantial rights of the person seeking judicial relief have been prejudiced . . . ." due to certain types of errors enumerated in the Iowa Code. Iowa Code § 17A.19(10). In this case, Jenney contends that the EAB's decision to deny unemployment compensation benefits was not supported by substantial evidence and/or was an unreasonable application of the facts to governing law. See Iowa Code §§ 17A.19(10)(c), (f), (i), (j), (l), (m), (n). When an agency decision is challenged on these bases, the court is bound by the agency's decision unless the decision is "affected by error of law, is unsupported by substantial evidence, or is characterized by an abuse of discretion."

Sellers, 531 N.W.2d at 646; see Freeland v. Emp. App. Bd., 492 N.W.2d at 193, 196 (Iowa 1992) (stating the same standard).

A.

The Court first addresses Jenney's argument that the agency's findings of fact are not supported by substantial evidence. Substantial evidence is "the quantity and quality of evidence that would be deemed sufficient by a neutral, detached, and reasonable person to establish the fact at issue when the consequences resulting from the establishment of that fact are understood to be serious and of great importance." Iowa Code § 17A.19(10)(f)(1). Alternatively stated, "[e]vidence is substantial when a reasonable mind could accept it as adequate to reach the same findings." Freeland, 492 N.W.2d at 196. The adequacy of the evidence in the record to support a particular finding of fact must be judged in light of all the relevant evidence in the record, including any determinations of veracity by the presiding officer who personally observed the demeanor of the witnesses and the agency's explanation of why the relevant evidence in the record supports its material findings of fact. Iowa Code § 17A.19(10)(f)(3). The Court finds and concludes that the record as a whole supports the agency's findings of fact.

Human Resource Administrator Deb Fury testified on behalf of Hills Brothers. She testified that, on the date in question, Jenney took personal calls about other employment opportunities while on company time and then proceeded to disrupt the office with reports on her other employment opportunities. (Cert. Rec. at 17-21.) Becky Graves, Jenney's supervisor, determined that Jenney's decision to spend company time pursuing other employment opportunities was the final straw in a lackluster month of employment and terminated her employment. (Cert. Rec. at 13.) Ms. Fury admitted that she did not witness this conduct herself

but instead was relying on reports from others. (Cert. Rec. at 19.) It was not unreasonable for the ALJ to rely on Ms. Fury's testimony given her position as Human Resource Administrator.

Jenney's job-hunting calls were not the first instance in which Jenney wholly ignored her job responsibilities. On August 31, 2011, Fury had to tell Jenney to put her telephone away during a meeting because Jenney spent the first several minutes of the meeting using her telephone to send and receive text messages. (Cert. Rec. at 17.) After being told to put her telephone away during this meeting, Jenney then ignored Fury during the remainder of the meeting and spent her time doodling. (Cert. Rec. at 17.) Jenney repeatedly ignored her supervisor, Graves, during other meetings. (Cert. Rec. at 17.) On another occasion, Jenney rejected a request from a company broker to make certain appointments for him, telling the broker that she needed to take some personal calls about another job. (Cert. Rec. at 19.) These past instances of misconduct provide color and context to the final decision to terminate employment. See Iowa Admin. Code § 871-24.32(8).

Jenney contends that Hills Brothers' evidence consisted of hearsay and is not sufficient to support the agency's findings. Administrative hearings are to proceed upon evidence "on which reasonably prudent persons are accustomed to rely for the conduct of their serious affairs, and may be based upon such evidence even if it would be inadmissible in a jury trial." McConnell v. Iowa Dept. of Job Service, 327 N.W.2d 234, 236–37 (Iowa 1982). Hearsay evidence is admissible at unemployment compensation hearings and may properly be relied upon in reaching legal conclusions therein. See Id.; see also 2 Am.Jur.2d Administrative Law § 382 (1962). The agency is allowed to admit and evaluate hearsay evidence in the same way it would any other evidence. See Cataldo v. Iowa Employment Appeal Board, No. 98-095, 98-0358, 1999 WL 956509, *3 (Iowa Ct. App. Oct. 15, 1999) (affirming agency decision based entirely upon

hearsay evidence). Here, the testimony was from a human resource professional based upon reports of Jenney's direct supervisor and others and was corroborated by an additional witness. The quality and quantity of evidence is sufficient to support the agency's findings.

Jenney also argues that the agency's findings are not supported by substantial evidence as a whole because she had explanations for each claim made by the employer. ALJ Hendricksmeyer specifically addressed this issue and found Jenney to not be credible. (Cert. Rec. at 46.) The ALJ specifically found that Jenney admitted to engaging in the conduct at issue but then tried to make excuses for her own conduct. (Cert. Rec. at 46.) In addition, the ALJ found that Jenney's "overall demeanor project[ed] a sense of entitlement that she was authorized to do or not do her work duties according to her priorities rather than those of the employer." (Cert. Rec. at 46.) The court will not reconsider issues of credibility. See Arndt v. City of Le Claire, 728 N.W.2d 389, 394–95 (Iowa 2007). Issues of credibility are exclusively reserved for the agency. Id. Nonetheless, even a cursory review of the cold transcript demonstrates that Jenney has significant credibility issues and that the agency was well within its discretion to credit the employer's representatives' testimony over Jenney's.

B.

The Court next addresses Jenney's argument that the agency committed errors of law in concluding that her employment was terminated for disqualifying misconduct. The employer has the burden to show that the former employee is disqualified from receiving benefits. See Bartelt v. Employment Appeal Bd., 494 N.W.2d 684, 686 (Iowa 1993). Disqualification is possible where the employee is found to have been discharged for misconduct. See Iowa Code § 96.5(2); Sellers, 531 N.W.2d at 646. Misconduct is "a deliberate act or omission by a worker which constitutes a material breach of the duties and obligations arising out of such worker's

contract of employment." Iowa Admin. Code § 871-24.32(1)(a). The complained of conduct must show "such willful or wanton disregard of an employer's interest as is found in deliberate violation or disregard of standards of behavior which the employer has the right to expect of employees . . . or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to the employer." Id.

It is not disputed that the agency applied the correct law—as set forth in the Iowa Code and the Iowa Administrative Code—regarding and defining "misconduct" in reaching its decision. "Our supreme court has repeatedly held this definition [of "misconduct"] accurately reflects the intent of the legislature." Sellers, 531 N.W.2d at 646. Thus, the only issue pending before the Court is whether the agency misapplied this controlling legal standard to the facts of the case in determining that Jenney engaged in "misconduct." The Court concludes that the agency did not so err and that there is substantial evidence supporting the agency's conclusion that Jenney engaged in disqualifying misconduct.

First, Jenney's repeated violation of Hills Brothers' policies regarding phone usage during work time is sufficient to support a finding of misconduct. This is particularly true in light of the fact that she repeatedly was instructed and warned to stop using the phone during work time. See Patterson v. Employment Appeal Bd., No. 05-0139, 2005 WL 3299181, at *2 (Iowa Ct. App. Dec. 7, 2005) (holding that employee's failure to follow manager's instruction was substantial evidence of misconduct); Anderson v. Winnebago Indus., Inc., No. 01-1289, 2002 WL 31425219, at *3 (Iowa Ct. App. Oct. 30, 2002) (holding that employee's failure to comply with company policy regarding complaints after prior warning constituted misconduct); Gilliam v. Atlantic Bottling Co., 453 N.W.2d 230, 232 (Iowa Ct. App. 1990) (holding that repeated failure to comply with company policy and procedure evidenced misconduct); Flesher

v. Iowa Dep't of Job Service, 372 N.W.2d 230, 234 (Iowa 1985) (holding that a reasonable person could find that repeated failure to adhere to company policy was intentional and thus disqualifying misconduct); see also Dzaba v. Commissioner of Labor, 774 N.Y.lS.2d 886 , 907 (N.Y. App. Div. 2004) (holding that excessive use of personal phone during work hours in violation of policy was disqualifying misconduct).

Jenney contends that her refusal to comply with company policy cannot be disqualifying misconduct because she was unaware of the company policy. Iowa law does not require an employee to have actual knowledge of the company's policies to support a finding of disqualifying misconduct. Even if that were the case, however, credible testimony established that Jenney was given a copy of the employee manual and that the conduct she engaged in was therein prohibited. (Cert. Rec. at 14–16.)

There is also substantial evidence in the record that Jenney willfully refused to perform her work as instructed. She sent and received text messages during meetings. She doodled during meetings. She ignored her supervisors during meetings. She refused to learn the basic functions of her position and repeatedly had to ask for instructions regarding the most elementary tasks. She rejected a request from a broker within the company to book certain appointments—a request that was part of her job description—because she needed to make calls regarding other employment. She spent work time contacting other employers to discuss other employment opportunities. She then disrupted the workplace by discussing these other employment opportunities with her current coworkers. The willful refusal to perform the functions of the job is disqualifying misconduct. See Sellers, 531 N.W.2d at 647.

Finally, "[e]ncompassed within the duties and obligations owed to an employer under [the unemployment compensation statute] is the common law duty of loyalty . . . ." Peterson v.

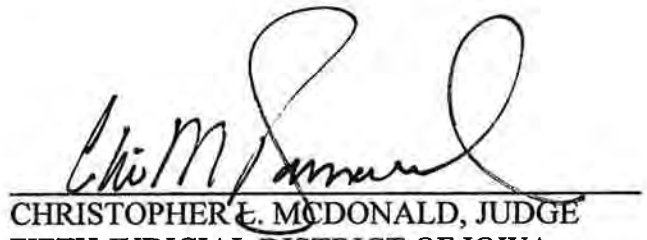
Ia. Workforce Dev., No. 00-1000, 2001 WL 710097, at *2 (Iowa Ct. App. Jun 13, 2001). "There is no more elemental cause for discharge of an employee than disloyalty to [her] employer." NLRB v. Electrical Workers Local 1229, 346 U.S. 464, 472 (1953). It is generally true that an at-will employee does not violate the duty of loyalty owed the employee's present employer by searching for or planning for alternate employment. See Porth v. Iowa Dep't of Job Service, 372 N.W.2d 269, 273 (Iowa 1985) (stating that employee did not breach duty by making arrangements to leave employer). An employee does breach that duty, however, when searching for other employment during paid work time for her present employer. See, e.g., Spieker v. Review Bd., 925 N.E.2d 376, 379 (Ind. Ct. App. 2010) (holding claimant engaged in disqualifying misconduct by using company computers during paid time to search for other work); Kohlhauff v. Fla. Unemployment Appeals Comm'n, 646 So. 2d 799, 800 (Fla. Ct. App. 1994) (holding that solicitation of coworkers to join competing company while on the job was disqualifying misconduct); LeBlang v. Office of Employment Sec., 425 So.2d 910 (La. Ct. App. 1983) (holding that planning competing business while on company time was breach of duty of loyalty and disqualifying misconduct). Jenney's search for employment on Hills Brothers' premises during paid work time constitutes a breach of the duty of loyalty owed her employer and constitutes disqualifying misconduct. See Peterson, 2001 WL 710097, at * 2.

IV.

For the reasons set forth above, the Court hereby finds and concludes that the agency's decision is supported by substantial evidence, is not affected by error of law, and does not constitute an abuse of agency discretion.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that the decision of the agency is **AFFIRMED** and that costs shall not be taxed against either party.

IT IS SO ORDERED THIS 25th day of July, 2012.



CHRISTOPHER L. MCDONALD, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Copy to:

Michael J. Tulis
532 1st Avenue #300
Council Bluffs, IA 51503
Phone: 712.328.3982
Fax: 712.328.3996
ATTORNEY FOR PETITIONER

Rick Autry
Anita M. Garrison
Lucas State Office Building
Fourth Floor
Des Moines, IA 50309
Phone: 515.281.3070
Fax: 515.281.7191
rick.autry@dia.ioa.gov
ATTORNEY FOR RESPONDENT

Richard D. Vroman
J. Daniel Weidner
Leilani M. Harbeck
1125 South 103d Street, Suite 800
Omaha, NE 68124
Phone: 402.390.9500
Fax: 402.390.9005
Daniel.Weidner@koleyjessen.com
Leilani.Harbeck@koleyjessen.com
ATTORNEYS FOR RESPONDENT

emailed 7/26/12

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

RAMON PRICE, **Applicant,** **vs.** **STATE OF IOWA,** **Respondent.**	**CASE NO. ~~EQCE~~ PCCE068831** **RULING ON APPLICATION FOR POST-CONVICTION RELIEF**

Pending before the Court is Ramon Price's Application for Post-Conviction Relief Pursuant to Iowa Code Chapter 822. At trial of this matter, Price appeared telephonically. Price's counsel, Paul Rosenberg, appeared in person. The State of Iowa (hereinafter "State") appeared through its counsel, Assistant Polk County Attorney Michael Hunter. At the conclusion of trial the record was left open for the purpose of deposing John Jellineck. The parties submitted the transcript of the deposition of Jellineck to the Court, and it has been marked as Court Exhibit 1. On December 11, 2012, the State submitted the relevant transcripts of proceedings in the underlying case. The transcripts have been marked as Court Exhibits. The matter is now deemed fully submitted. After reviewing the court file, evaluating the testimony and other proofs received, and otherwise being fully advised in the premises, the Court issues this Ruling on Application for Post-Conviction Relief.

I.

The parties requested that the Court take judicial notice of Price's underlying criminal case, Polk County Case No. FECR 208209, State of Iowa v. Ramon Lamont Price. In the underlying criminal case, the State charged Price by Trial Information filed January 18, 2007. In the Trial Information, the State accused Price of the following: (1) Count 1, robbery in the first degree, in violation of Iowa Code sections 711.1 and 711.2, occurring at a Family Dollar Store

on December 16, 2006; (2) Count 2, robbery in the first degree, occurring at a different Family Dollar Store on December 17, 2006; (3) Count 3, robbery in the second degree, in violation of Iowa Code sections 711.1 and 711.3, occurring at a Goodwill Store on December 11, 2006; and (4) Count 4, robbery in the second degree, occurring at a Dollar General Store on December 3, 2006.

Attorney John Jellineck was appointed to serve as Price's trial counsel. Jellineck is an extremely experienced criminal law practitioner. He graduated from the University of Iowa College of Law in 1988, served as a prosecutor for seven years, and then worked for the Office of the Public Defender, Adult Division. Mr. Jellineck has tried to verdict approximately fifty felony jury trials.

On May 1, 2007, Price filed his Motion to Sever Trial of Separate Offenses. In his Motion, Price argued that the charged offenses were not linked by time, place, and circumstance. On May 15, 2007, the district court, the Honorable Eliza J. Ovrom, granted in part and denied in part Price's motion. The district court ordered that Counts 1 and 2 remain joined for trial. The district court ordered that Counts 3 and 4 should be severed and each count tried separately.

Trial on Counts 1 and 2 commenced on May 21, 2007. The trial court, the Honorable Joel D. Novak, granted Price's motion for directed verdict with respect to Count 1. The trial court concluded that the evidence was insufficient to support a conviction of robbery in the first degree as to Count 1, but the trial court did submit the charge to the jury as robbery in the second degree. On May 23, 2007, the jury returned its verdict. As to Count 1, the jury found Price guilty of robbery in the second degree. As to Count 2, the jury found Price guilty of robbery in the first degree. Trial on Count 3 commenced on June 27, 2007. On June 29, 2007, the jury found Price guilty of robbery in the second degree. Count 4 ultimately was dismissed by the

State. On August 14, 2007, the district court, the Honorable Joel D. Novak, sentenced Price to incarceration for an indeterminate period not to exceed ten (10) years on Count 1, twenty five (25) years on Count 2, and ten (10) years on Count 3, with the sentences for Counts 1 and 2 to run concurrently but consecutive to the sentence for Count 3, for a total of 35 years.

Price timely appealed his conviction and sentence. On December 31, 2008, the Court of Appeals affirmed the convictions but vacated the sentence with respect to the imposition of a civil surcharge. Price filed his Application on June 23, 2011. In his Application, the only relief Price requested was that his conviction for robbery in the first degree be reduced to robbery in the second degree, that his sentence for his conviction on robbery in the first degree be vacated, and that he be resentenced on the conviction for the lesser included offense. In his Posthearing PCR Brief, Price does not request any additional relief. It thus appears that Price's claims relate only to his conviction and sentence on Count 2, and the Court will limit its analysis accordingly.

II.

Iowa Code Chapter 822 governs postconviction relief proceedings. Other than direct appeal, Chapter 822 replaces "all other common law, statutory, or other remedies formerly available for challenging the validity of the conviction or sentence. It shall be used exclusively in place of them." Iowa Code § 822.2(2). Generally, the rules of civil procedure apply to postconviction relief proceedings. See Iowa Code § 822.7. At trial of a postconviction relief proceeding, the Court may receive proof by affidavit, deposition, oral testimony, or other evidence. See Iowa Code § 822.7. "[T]he burden of proof in postconviction relief actions brought pursuant to Code Chapter 663A [transferred to Chapter 822] is on the petitioner who must establish the facts asserted by a preponderance of the evidence." Cleesen v. State, 258 N.W.2d 330, 332 (Iowa 1977).

III.

Price contends that his trial counsel was ineffective in several respects. Price did not raise these claims on direct appeal. The State contends that Price was required to raise these claims on direct appeal to preserve them for postconviction review. The Court disagrees. Price's claims of ineffective assistance of trial counsel are properly before the Court. See Iowa Code § 814.7 (providing that claims of ineffective assistance of counsel "need not be raised on direct appeal from the criminal proceedings in order to preserve the claim for postconviction relief purposes"); State v. Johnson, 784 N.W.2d 192, 198 (Iowa 2010) (recognizing that Iowa Code section 814.7 nullified the court's exhaustion requirement and stating that "section 814.7 allows a defendant to raise ineffective assistance of counsel claims for the first time in postconviction relief proceedings" (internal marks omitted) (quoting Hannan v. State, 732 N.W.2d 45, 50 (Iowa 2007))).

A.

An applicant for postconviction relief claiming ineffective assistance of trial counsel must establish that trial counsel failed to perform an essential duty and that this failure resulted in prejudice. See State v. Westeen, 591 N.W.2d 203, 207 (Iowa 1999). It is the applicant's burden to establish both parts of the claim by a preponderance of the evidence. See Ledezma v. State, 626 N.W.2d 134, 145 (Iowa 2001).

"To establish the first prong, the applicant must demonstrate the attorney performed below the standard demanded of a reasonably competent attorney." Ledezma, 626 N.W.2d at 142 (citing Strickland v. Washington, 466 U.S. 668, 688, (1984)). The attorney's performance is measured against "prevailing professional norms," and it is presumed that the attorney performed competently. Ledzema, 626 N.W.2d at 142. "Ineffective assistance is more likely to be

established when the alleged actions or inactions of counsel are attributed to a lack of diligence as opposed to the exercise of judgment." Id. Normally, counsel is not ineffective for mere miscalculations of strategies and mere mistakes in judgment. See id. In sum:

> [t]he ultimate test is whether under the entire record and totality of the circumstances counsel's performance was within the normal range of competency. Improvident trial strategy, miscalculated tactics, or mistakes in judgment do not necessarily amount to ineffective assistance of counsel. The petitioner must overcome a strong presumption of counsel's competence, and a postconviction applicant has the burden to prove by a preponderance of the evidence that counsel was ineffective.

Osborn v. State, 573 N.W.2d 917, 922 (Iowa 1998) (citations omitted).

To establish prejudice, an applicant must show the following:

> [t]here is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome of the defendant's trial. Our ultimate concern is with the fundamental fairness of the proceeding whose result is being challenged.

Collins v. State, 588 N.W.2d 399, 402 (Iowa 1998) (quotations and citations omitted). There is no need to address the issue of whether counsel breached an essential duty if no prejudice has been established. See State v. Pace, 602 N.W.2d 764, 774 (Iowa 1999).

B.

Price contends that his trial counsel was ineffective for failing to object to the prosecutor's conduct during voir dire. Specifically, Price alleges that the prosecutor asked the jury panel "wouldn't you all agree that people who are under the influence of drugs and alcohol still know what they are doing?" Price testified that he told Jellineck to object to the question but that Jellineck told Price the objection was spurious. Jellineck does not recall this question being asked. Voir dire was not reported. Given the nature of the case, the Court finds it likely that

during voir dire at least one question was asked relating to drug and alcohol even if the exact question is unknown.

Even if the prosecutor had asked the question exactly as Price contends, Price has not established that the failure to object is below the standard demanded of a reasonably competent attorney. Allowable voir dire questions are not limited to the for-cause challenges enumerated in Iowa Rule of Criminal Procedure 2.18(5). See State v. Tubbs, 690 N.W.2d 911, 915 (Iowa 2005). The attorneys are allowed wide latitude to ask questions to assist in exercising for-cause challenges and peremptory challenges. See id. Further, the trial court has wide discretion in governing the selection of jurors. See id. Because of the wide discretion afforded counsel and the court in matters of jury selection, there was not necessarily even a cognizable basis for Jellineck to object to the question purportedly asked. In any event, Price has not cited any authority for the proposition that the alleged question was improper.

Moreover, the decision not to object to a question during voir dire is a matter of strategy. See Nguyen v. Reynolds, 131 F.3d 1340, 1349 (10th Cir. 1997) (stating that "[a]n attorney's actions during voir dire are considered to be matters of trial strategy"). "A strategic decision cannot be the basis for a claim of ineffective assistance unless counsel's decision is shown to be so ill chosen that it permeates the entire trial with obvious unfairness." Id. Jellineck testified that, as a matter of strategy, if the question had been asked, he probably would not have objected to the initial question but may have objected if there were follow-up questions. There is no showing that the failure to object to the question permeated the entire trial with obvious unfairness.

Price also failed to establish he suffered any prejudice. The purpose of voir dire is to aid the attorneys in selecting a jury able to render a fair and impartial verdict based on the evidence

admitted. See Wedebrand v. State, No. 02-0568, 2003 WL 21543146, at *3 (Iowa Ct. App. Jul. 10, 2003); see also Commonwealth v. Wright, 961 A.2d 119, 153 (Pa. 2008) (stating that the purpose of voir dire is to impanel a fair and impartial jury capable of applying the law in accord with jury instructions). Price did not establish that Jellineck's failure to object prevented the jury from being able to render a verdict based on the evidence and instructions given. There is no evidence that any juror was biased because of the purported question. There is no evidence that any juror was unable to follow the trial court's instructions. The court file shows that the jury was given correct instructions regarding Price's intoxication defense, and the Court assumes that the jury followed the given instructions. Price's claim fails. See State v. Carter, No. 02-0261, 2003 WL 289425, at *2 (Iowa Ct. App. Feb. 12, 2003) (holding that claim of ineffective assistance of counsel failed where defendant alleged that trial counsel mishandled jury selection); Wright, 961 A.2d at 153 (holding that the defendant did not establish ineffective assistance where the prosecutor, during voir dire, misstated the law regarding the defense of diminished capacity based on alcohol consumption, the defense did not timely object, there was no evidence of jury confusion, and no argument regarding how the error prejudiced the defendant).

Finally, as discussed in Part V, infra, there is no reasonable probability that the result would have been different. There is overwhelming evidence of guilt.

C.

Price alleges that his trial counsel was ineffective in failing to move to exclude Price's in-custody statements made after Price invoked his right to counsel. At trial, Detective Halifax testified regarding the statements Price made during an in-custody interview Detective Halifax conducted with Price. A video recording of the in-custody interview was admitted into evidence and published to the jury. There is no record evidence before this Court that any statement Price

made after invoking his right to counsel was offered or admitted into evidence at trial. Indeed, the transcript of proceedings shows that the trial court and the attorneys made a substantial record regarding the redaction of Price's in-custody interview such that no part of the interview occurring after Price invoked his right to counsel was admitted into evidence or published to the jury. (Ct. Ex. 3, Tr. 129-134.) A claim can be summarily disposed of where it is clearly contradicted by the record. See Jackson v. State, No. 10-1407, 2011 WL 3688994, at *4 (Iowa Ct. App. Aug. 24, 2011) (summarily affirming denial of postconviction relief claim where claim clearly is contradicted by the record). Also, as discussed in Part V, infra, Price failed to establish prejudice. Price's claim is without merit.

D.

Price next contends that counsel was ineffective for failing to raise the defenses of diminished capacity and/or intoxication. The Court finds that the defense was raised at trial. (Ct. Ex. 3.) Price was asked numerous questions regarding his history of drug and alcohol use, his use at the time of the offenses, and the effect that his use had on his mental capacity at the time of the offenses. Price specifically testified that he was under the influence on December 16 and 17, 2006, and that he could not recall events. The trial court instructed the jury on intoxication as it relates to specific intent. (Statement of the Case and Jury Instruction, Instruction No. 18.) The jury simply rejected Price's intoxication defense. A claim can be summarily disposed of where it is clearly contradicted by the record. See Jackson, 2011 WL 3688994, at *4. The claim is without merit.

At his postconviction relief trial, Price testified that he wanted to have an expert testify about Price's intoxication on the day of the offenses. Jellineck made a strategic decision to not call an expert witness because the testimony on cross-examination would have been more

harmful than the testimony on direct examination. (Ct. Ex. 1, Tr. at 22-24; Ct. Ex. 4, Tr. at 12-13.) The Court will not second guess this strategic choice. See Heaton v. State, 420 N.W.2d 429, 432 (Iowa 1988) (holding that counsel was not ineffective in making a strategic choice not to call an expert witness regarding drug and alcohol consumption on defendant's state of mind). Also, as discussed in Part V, infra, Price failed to establish prejudice.

E.

Price contends that his trial counsel was ineffective for failing to raise the issue of Price's competency to stand trial. In Iowa, the relevant test is whether "the defendant is suffering from a mental disorder which prevents the defendant from appreciating the charge, understanding the proceedings, or assisting effectively in the defense." Iowa Code § 812.3(1); accord State v. Lyman, 776 N.W.2d 865, 873-74 (Iowa 2010). Here, Jellineck did request that Price undergo a mental evaluation prior to trial. (Ct. Ex. 1, Tr at 24-25.) The evaluation established that Price was competent to stand trial. (Ct. Ex. 1, Tr at 24-25.) Jellineck concluded that Price was competent to stand trial. The doctor and Jellenick's conclusion was borne out at trial. Price actively participated in his own trial. He urged an objection to a question during voir dire. He testified at great length. After trial, he filed his own motions and actively participated in colloquy with the trial court. Price offered no evidence supporting the proposition that he was not competent to stand trial. There is not a scintilla of evidence in the transcripts of proceedings that Price was unable to appreciate the charges against him, understand the proceedings against him, or assist effectively in the defense of his case.

The Court finds that Price was competent to stand trial. Jellineck had no duty to advance an argument without merit. Price's claim thus necessarily fails. See Thompson v. State, No. 05-1231, 2006 WL 2419128, at *5 (Iowa Ct. App. Aug. 23, 2006) (holding that applicant failed to

establish prejudice on competency issue where trial counsel conducted a reasonable investigation of competency by securing psychiatric examination); Forsyth v. State, No. 03-1378, 2004 WL 1161614, at * 3 (Iowa Ct. App. May 26, 2004) ("Whether he was suffering from amnesia or some other mental illness, the facts remain that Forsyth understood the proceedings, appreciated the charges, and was able to assist in his own defense. In the absence of some other indication Forsyth was incompetent to stand trial because of a mental illness, counsel breached no essential duty by failing to pursue that theory of incompetency."); Brown v. State, No. 1999-534, 2000 WL 204113, at * 2 (holding that counsel did not breach duty by failing to investigate competency where there was no indicia defendant was not competent to stand trial); State v. LeGear, 346 N.W.2d 21, 25 (Iowa 1984) (holding that counsel was not ineffective in failing to seek a continuance of trial due to defendant's alleged incompetence where defendant testified at trial and assisted in his own defense).

F.

Price next contends that counsel was ineffective for failing to call Price's alibi witness, his wife Theresa Price. As a general rule, counsel's decision to forego calling a potential alibi witnesses is a reasonable trial strategy than cannot serve as the basis for a claim of ineffective assistance of counsel where the witness's testimony may potentially be harmful. See Crawley v. State, No. 05-1666, 2007 WL 2376671, at * 2 (Iowa Ct. App. Aug. 22, 2007); Belken v. State, No. 05-0326, 2006 WL 1278730, at *5 (Iowa Ct. App. May 10, 2006) (holding that trial counsel's strategic decision to not call an alibi witness who vacillated did not amount to ineffective assistance of counsel); State v. Bloch, No. 01-0461, 2003 WL 553728, at *5 (Iowa Ct. App. Feb. 28, 2003) (holding that claim for ineffective assistance of counsel for failure to call an alibi witness failed where defendant admitted to being at scene of crime); State v. Fuller, No.

00-1872, 2002 WL 100425, at *3 (Iowa Ct. App. Jan. 28, 2002) (holding that claim of ineffective assistance for failure to call alibi witness failed and stating that the "[f]ailure to call a defense witness is a tactical decision we will not second-guess"); Frank v. State, 376 N.W.2d 637, 641 (Iowa Ct. App. 1985) (holding that claimant failed to show that decision not to call alibi witness was not unreasonable where trial counsel determined that weakness of alibi witness testimony would hurt claimant in front of jury). Jellineck made a wise strategic decision to not call Theresa as an alibi witness because she could not testify with any specificity regarding Price's whereabouts during the relevant time period and because her testimony ultimately would have been harmful given the facts of this case. Eyewitnesses identified Price as the perpetrator. The eyewitnesses told police officers the direction in which the perpetrator fled the scene. The responding officers were able to follow these leads and apprehend Price within minutes of the robbery. At the time the officers arrested him, Price was in possession of items taken from the Family Dollar Store and a weapon. Theresa's testimony that Price was with her at the time of the offense charged in Count 2 would not have been credible and would have only undermined Price's intoxication defense. Price's claim thus fails.

Using this same analysis, the Court finds and concludes that Price has failed to establish prejudice by a preponderance of the evidence. See Bonner v. State, No. 01-2006, 2002 WL 31761722, at *4 (Iowa Ct. App. Dec. 11, 2002) (holding that defendant could not establish prejudice arising out of the failure to call his girlfriend as an alibi witness where there was overwhelming evidence of guilt and the testimony would not have been credible); see also infra Part V.

IV.

As a general rule, to preserve a claim for postconviction review, an applicant must raise all grounds for relief, other than claims for ineffective assistance of counsel, on direct appeal from the underlying criminal conviction and/or sentence. The failure to raise a claim on direct appeal precludes postconviction review in the absence of a showing of good cause as to why the claim was not properly raised on direct appeal. See Osborn, 573 N.W.2d at 921 ("Thus any claim not properly raised on direct appeal may not be litigated in postconviction unless there is a showing of sufficient reason or cause for not properly raising it previously, and of actual prejudice resulting from the alleged error." (internal marks omitted)). Ineffective assistance of appellate counsel in failing to preserve the claim may provide sufficient reason or cause to permit the issue to be raised for the first time in a proceeding for postconviction relief. See Ledzema, 626 N.W.2d at 141.

Claims of ineffective assistance of appellate counsel are judged using the same two-pronged test used to review claims of ineffective assistance of trial counsel. See Ledzema, 626 N.W.2d at 141; Osborn, 573 N.W.2d at 922. To establish deficient performance, the applicant must establish that appellate counsel failed to raise an issue that reasonably competent counsel would have. However, "[s]electing assignments to assert as grounds for reversal is a professional judgment call [courts] are reluctant to second-guess." Osborn, 573 N.W.2d at 922. "A heavy professional responsibility devolves upon an appellate lawyer when it comes to assessing possible assignments of error. . . . [M]ost experienced appellate lawyers or judges will attest it is a tactical blunder, often devastating to an appellant, to assign every conceivable complaint. Highly competent appellate lawyers generally assign only the strongest points and rely on them for reversal . . . . Hindsight may show the judgment call was wrong. But this is a

far cry from qualifying as ineffective representation." Id. at 922-23. To prove appellate counsel's deficient performance resulted in prejudice, the applicant must show the underlying claim would have prevailed if it had been raised on direct appeal. See Ledzema, 626 N.W.2d at 141. Thus, in a postconviction relief proceeding the Court must review the merits of the underlying claim to determine whether appellate counsel was ineffective, see id. at 141-42, recognizing that counsel has no duty to raise an issue that has no merit. See State v. Dudley, 766 N.W.2d 606, 620 (Iowa 2009).

A.

Price claims that his appellate counsel was ineffective for failing to raise on direct appeal that the trial court erred in denying Price's application for substitute appointed counsel. "A defendant has a right to counsel at all critical stages of the criminal process. No defendant, however, has an absolute right to be represented by a particular counsel. The grounds to justify the appointment of substitute counsel include a conflict of interest, irreconcilable conflict, or a complete breakdown in communication between the defendant and counsel. The court must balance the defendant's right to counsel of his choice and the public's interest in the prompt and efficient administration of justice. The defendant must show the grounds to justify substitute counsel . . ." State v. Mott, 759 N.W.2d 140, 148-49 (Iowa Ct. App. 2008) (internal marks and citations omitted). The district court has broad discretion to grant or deny a request for substitute appointed counsel. See State v. Siharath, No. 09-0641, 2010 WL 446524, at *1 (Iowa Ct. App. Feb. 10, 2010). As such, denial of a request for substitute counsel will be reversed only if the "court exercised the discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." State v. Lopez, 633 N.W.2d 774, 778 (Iowa 2001) (internal citations omitted).

The Court finds that Price made his request for substituted counsel via letter mailed to the district court. In his letter, Price stated that Jellineck did not return Price's or Price's wife's phone calls, that Jellineck was not meeting with Price often enough, and that Jellineck had not presented Price's defense of diminished responsibility. The matter came on for hearing on March 16, 2007. (Ct. Ex. 2.) At the hearing, Price stated that "it's really nothing against Mr. Jellineck or anything, but I just believe he's kind of overloaded on cases . . ." (Ct. Ex. 2, Tr. at 2.) Price raised no other grounds in support of his request for substitution of counsel. At the hearing, Jellineck informed the court that he had met with Price on two occasions, that he had discussed with Price a psychiatric defense or diminished capacity defense, that he had obtained a release for medical records, and that he had noticed and was preparing to take thirteen witness depositions. (Ct. Ex. 2, Tr. at 3-4.) The court denied the request, finding that Jellineck was taking appropriate action and diligently defending the case. (Ct. Ex. 2, Tr. at 4.)

The Court finds and concludes that Price has not established prejudice or that his appellate counsel performed deficiently. Price has not established that he would have prevailed on the claim had it been raised on direct appeal. The district court did not abuse its discretion in denying Price's request given that Price failed to present sufficient grounds to warrant the substitution of trial counsel. See Mott, 759 N.W.2d at 148-49 (holding no abuse of discretion); Siharath, 2010 WL 446524, at *1 (stating that statements of dissatisfaction and frustration regarding communication with counsel does not render counsel unable to perform as a zealous advocate); Lopez, 633 N.W.2d at 781 (finding no abuse of discretion); State v. Kirchner, 600 N.W.2d 330, 333 (Iowa Ct. App. 1999) (finding no abuse of discretion); State v. Thompson, 597 N.W.2d 779, 782 (Iowa 1999) (holding no abuse of discretion in denying application where no conflict of interest existed). There was no evidence of a breakdown of the lawyer-client

relationship that would warrant substitution of counsel. Of note, prior to trial of Count 3, Price withdrew a subsequent request for new counsel, stating that he wanted to keep Jellineck as his counsel because Jellineck "did the best that he could with what we had." (Ct. Ex. 7, Tr. at 3.) Given that appellate counsel had no duty to raise an issue without merit, it cannot be said that appellate counsel performed deficiently in failing to raise this issue.

At trial in the postconviction relief proceeding, Price testified that Jellineck may have been biased against him because Price filed a bar complaint. Jellineck testified, and the Court finds, that Jellineck was unaware of any such complaint at the time of trial. Price also testified that he and Jellenick did not communicate effectively regarding plea negotiations. The Court finds and concludes that Price's complaints are without merit. At the time of trial, Price wanted the State to make a plea offer that would not result in sentences with statutory mandatory minimums. No such offer was made. Price knowingly rejected the most favorable plea offer made, and he continues to be upset that the State did not make a better offer. This does not cast doubt on Jellineck's effectiveness or cast doubt on the ruling denying Price's motion for substituted counsel.

B.

Price argues that his appellate counsel was ineffective for failing to raise on direct appeal that the court abused its discretion in failing to hold separate trials for Counts 1 and 2. Iowa Rule of Criminal Procedure 2.6(1) provides that two or more indictable public offenses that arise from the same transaction or occurrence or from two or more transactions or occurrences constituting parts of a common scheme or plan shall be prosecuted as separate counts of a single complaint. However, the district court, for "good cause shown," may sever trial on otherwise interrelated counts. Iowa R. Cr. P. 2.6(1). The trial court enjoys broad discretion in ruling on a motion to

sever. See State v. Thornton, 506 N.W.2d 777, 779 (Iowa 1993). As a general rule, a court cannot find ineffective assistance of counsel unless it can be shown that the district court abused its discretion in denying the motion to sever. See State v. Gant, No. 06-1447, 2008 WL 375226, at *5 (Iowa Ct. App. Feb. 13, 2008). Abuse of discretion can be shown where prejudice from joinder of the charges outweighed the State's interest in judicial economy. See State v. Elston, 735 N.W.2d 196, 198 (Iowa 2007).

Price's Motion to Sever was filed on May 1, 2007. If hearing on the Motion to Sever was reported, the transcript has not been provided to the Court. It is clear that Counts 1 and 2 could be properly joined under the Rules of Criminal Procedure. The two occurrences are linked temporally, geographically, by modus operandi, by similar motive, and by Price's own defense to each. The robberies occurred one day apart from each other. The robberies occurred in the same general area on the south side of Des Moines. One of the crime victims in both robberies was Family Dollar Stores. The robberies were transacted in the same fashion. Specifically, Price entered the store, shopped for items, and then assaulted the cashier at the time of checkout, demanding that money from the register be placed in a Family Dollar Store bag. Price was motivated to steal on both occasions because of financial problems created by his drug use. Finally, Price himself linked the robberies together by testifying that both occurred during a single drug and alcohol-induced fugue triggered by an argument with his family.

Price contends that even if joinder of the counts was allowable, the court abused its discretion in refusing to sever them because the potential prejudice outweighed the state's interest in judicial economy. Price does not identify the alleged prejudice. In a remarkably similar case, the Supreme Court of Iowa concluded that no prejudice existed. The relevant language is worth quoting at length:

A common scheme or plan requires more than the commission of two similar transgressions by a single person. The offenses must have a common link. In short, they must be the products of a single or continuing motive. In making this determination we have found it helpful to consider factors such as intent, modus operandi, and the temporal and geographic proximity of the crimes.

Oetken asserts the crimes with which he was charged were perpetrated on different days and by different means, and should not, therefore, have been deemed products of a single or continuing motive. Defendant's position is not supported by Iowa case law. In Lam, for example, we held that two burglaries committed on the same day, in the same general location, using the same means of entry and transportation, were parts of a common scheme or plan to burglarize apartments during normal working hours. We readily inferred both offenses were products of a single and continuing motive for obtaining small portable objects from apartments for money.

We have held similarly in other cases. See State v. Thornton, 506 N.W.2d 777, 779 (Iowa 1993) (no severance required when crimes took place on two consecutive days); State v. Houston, 439 N.W.2d 173, 178 (Iowa 1989) (no severance required where offenses of burglary and possession of burglar's tools were products of a single, continuing motive in a series of planned thefts); State v. Delaney, 526 N.W.2d 170, 174-75 (Iowa App.1994) (no severance required where money from eight loan transactions over an eleven-month period was obtained by similar methods accompanied by a continuing self-indulgent motive).

Oetken committed two burglaries, on two consecutive days, using similar methods of operation- i.e., he traveled through the rural countryside in search of homes that were unoccupied during traditional work hours, he knocked to ascertain the abodes were indeed vacant, broke and entered the premises through the rear doors, and proceeded to steal small portable objects such as TVs, VCRs, and guns. This constitutes sufficient evidence of a common scheme or plan with a single continuing motive.

Notwithstanding, defendant avers there was insufficient evidence to convict him of either crime. He asserts the jury ascertained his guilt on the basis of the evidence as a whole, rather than compartmentalizing the facts with respect to each charge. Oetken maintains he would have been insulated from this prejudice had the offenses been tried separately.

Generally, we must balance any unfair prejudice that could result from a joint trial against the State's interest in judicial economy. Here, evidence was adduced manifesting defendant's guilt on both counts. Robby Inghram confessed to having committed the crimes with Oetken. Natalie Inghram attested to having seen Oetken carry guns and other stolen goods into her basement subsequent to each burglary. She further swore the two men admitted the items had been obtained illicitly and cautioned her to be calm. Jason Blunk testified he accompanied

> Oetken when defendant fenced two of the stolen TVs. Oetken had also apparently warned Inghram to discard the shoes he wore during commission of the offenses. Although Inghram neglected to do so, and as a result was later tied to both crime scenes, Corey Coleman revealed he had in fact been asked to dispose of Oetken's shoes. In addition, rebuttal testimony was elicited to impugn defendant's testimony and his alibi for the mornings in question.
>
> The jury was presented with evidence which it could reason sufficiently linked defendant to both crimes. It was also admonished to consider Oetken's guilt or innocence on each count separately. Defendant cannot point to a specific error on the part of the jury, nor has he proven prejudice by a preponderance of the evidence.

State v. Oetken, 613 N.W.2d 679, 688-89 (Iowa 2000).

The Court finds Oetken to be materially indistinguishable. As discussed in Part V, the evidence relevant to Count 2 was overwhelming. The trial court issued a cautionary instruction to the jury: "The defendant has been charged with two (2) counts. This is just a method for bringing each of the charges to trial. If you find the defendant innocent or guilty on any one of the two (2) counts, you may not conclude guilt or innocence on the other(s). The defendant's innocence or guilt must be determined separately on each count." (Statement of the Case and Jury Instruction, Instruction No. 13.) The Court presumes that the jury followed the instruction given. Thus, in the absence of some specific showing of prejudice, the Court finds and concludes that no prejudice existed. See State v. Gant, No. 06-1447, 2008 WL 375226, at *5 (Iowa Ct. App. Feb. 13, 2008) (holding that claim failed where jury was instructed that each count stood alone); State v. Owens, 635 N.W.2d 478, 482-83 (Iowa 2001) (holding that ineffective assistance of counsel claim failed and stating "[w]hen the State charges crimes separately and the court gives a limiting instruction, we presume the jury follows the instruction, thereby minimizing any possible prejudice."); see also Part V infra.

C.

Price contends that his appellate counsel was ineffective for failing to claim on direct appeal that the evidence was insufficient to prove the pocket knife found on Price's person at the time of his apprehension was used in the December 17th robbery. The Court of Appeals decision notes that, in the district court, Price challenged whether a weapon was used. On appeal, Price challenged whether the knife was a "dangerous weapon" within the meaning of Iowa Code section 702.7. The Court of Appeals concluded that the issue of whether the knife was a "dangerous weapon" was not preserved for appeal. The court nonetheless concluded that, had error been preserved, "the pocket knife Price used to threaten an employee of a Family Dollar Store in order to secure the contents of the store's cash register[] was a dangerous weapon." It seems implicit in the appellate court's statement that there was also sufficient evidence to conclude that the pocket knife was used in the robbery. Iowa Code section 822.8 provides that "[a]ny ground finally adjudicated . . . may not be the basis for a subsequent application." In other words, "[a] post-conviction proceeding is not intended as a vehicle for relitigation, on the same factual basis, of issues previously adjudicated, and the principle of res judicata bars additional litigation on this point." Holmes v. State, 775 N.W.2d 733, 735 (Iowa Ct. App. 2009). The decision of the Court of Appeals on this issue is thus dispositive. See id. ("Our decision on direct appeal is thus final as to all issues decided therein, and is binding upon both the postconviction court and this court in subsequent appeals.").

Even if the Court of Appeals had not implicitly decided this issue, the Court concludes that Price suffered no prejudice and that appellate counsel was thus not ineffective. See infra Part V.

V.

Having addressed each of Price's claims individually, see Iowa Code § 822.7 ("The court shall make specific findings of fact, and state expressly its conclusions of law, relating to each issue presented."), the Court now addresses an issue relevant to the resolution of each of Price's claims—whether Price has established Strickland prejudice by a preponderance of the evidence. "The most important factor under the test for prejudice is the strength of the State's case." State v. Armstrong, No. 11-1052, 2012 WL 3026863, at *3 (Iowa Ct. App. Jul. 25, 2012) (holding that defendant did not establish prejudice where there was overwhelming evidence of guilt); see also State v. Parker, 747 N.W.2d 196, 211 (Iowa 2008) (finding that defendant failed to establish prejudice because outcome of trial would not be affected due to overwhelming evidence of guilt). "Where the evidence of guilt is overwhelming, [the court] will find no prejudice." Armstrong, 2012 WL 3026863, at *3.

The evidence supporting Price's conviction of robbery in the first degree is overwhelming. Kim Johnson, a customer in the Family Dollar Store on the morning of December 17, 2006, witnessed the robbery. (Ct. Ex. 3, Tr. 42-52.) She was five to seven feet from the perpetrator. She identified Price as the perpetrator outside the trial of this matter, and she also identified Price as the perpetrator during trial. Ruth Ann Klingensmith, the cashier on duty at the Family Dollar Store on the morning of the robbery, testified that Price was the person who robbed the store. (Ct. Ex. 3, Tr. at 65-79.) She testified in great detail about how Price pretended to shop, presented his items for payment, and then moved behind her while brandishing a weapon and demanding that she give him the money from the register. She testified that she gave Price approximately $288, including two rolls of pennies.

Price's sister-in-law, Peggy Kimmel, testified at trial. (Ct. Ex. 3, Tr. 79-88.) Kimmel lives near the Family Dollar Store robbed on the morning of December 17, 2006. She testified that on that morning, Price showed up at her house unannounced. At about the same time Price arrived, Kimmell noticed police officers outside her house. Fearing for her children's safety, Kimmell went outside to meet the police offers to determine if there was any cause for concern. She testified that Price, upon seeing the police officers, stated "I'm not here," and ran in to one of the bedrooms. Kimmell discussed the situation with the police officers, and she then gave them permission to search her home for Price.

Several Des Moines Police Department employees testified at trial. Officers Roger Rowley and Harley Sickles testified at trial. (Ex. 3, Tr. At 90-116.) Officer Rowley testified that he responded to a call regarding the robbery on the morning of December 17, 2006. Rowley tracked the perpetrator of the robbery from the Family Dollar Store to Kimmel's residence. With Kimmel's permission, Rowley and the other officers present at the scene entered the residence. The officers found Price hiding in the upstairs bedroom closet. Lying at Price's feet was a Family Dollar Store bag. Another Family Dollar Store bag was also found in the room. Identification Technician Nancy Lamasters testified that the contents of the Family Dollar Store bags found near Price at the time of his apprehension matched items taken from the Family Dollar Store robbery only a few minutes prior, including the two rolls of pennies Klingensmith gave to the perpetrator. (Ct. Ex. 3, Tr. 116-128.) Officer Charles Brookhart testified that, upon searching Price's person at the time of arrest, Brookhart found a pocket knife in Price's left front pocket. (Ct. Ex. 3, Tr. At 113.)

In addition to the testimony of several eyewitnesses who clearly saw Price commit the robbery and the testimony of the officers who arrested Price only a few minutes after the robbery

in possession of the money and a pocket knife, Price also admitted his involvement. After arrest, Detective Jason Halifax and Denise Schnafnitz interviewed Price. (Ct. Ex. 3, Tr. At 142-151.) During that interview, Price admitted he was in the Family Dollar Store on the morning of December 17, 2006, and he admitted that he took property without paying for it. At trial, Price admitted that he stole merchandise from the Family Dollar Store on December 17, 2006. (Ct. Ex. 3, Tr. at 171-72.) He also admitted at trial that he used the knife and scared Klingensmith by brandishing it during the robbery. (Ct. Ex. 3, Tr. at 177-78.)

The determination of whether an applicant established prejudice is necessarily case and fact specific. It is instructive to note, however, that other courts have concluded, under similar circumstances, that a defendant failed to establish Strickland prejudice. See, e.g., Simmons v. State, No. 08-1156, 2009 WL 1492823, at *6 (Iowa Ct. App. May 29, 2009) (finding that no prejudice existed where there was overwhelming evidence of guilt on robbery conviction, including eyewitness testimony); State v. Parker, 747 N.W.2d 196, 210 (Iowa 2008) (holding that defendant failed to establish Strickland prejudice where eyewitnesses identified defendant as the robber, fruits of the robbery were found in defendant's possession, and the defendant admitted that he committed the robbery); State v. Bonner, No. 98-0509, 2000 WL 203924, at *4 (Iowa Ct. App. Feb. 23, 2000) (holding that the defendant failed to establish Strickland prejudice where the evidence showed that the victim of robbery identified defendant, the defendant was arrested with the weapon used during robbery, and the defendant tried to run and hide when police officers attempted to arrest him). The Court thus finds and concludes that there is no reasonable probability that, but for counsel's alleged errors, the result of the proceeding with respect to Price's conviction for robbery in the first degree would have been different. In reaching this conclusion, the Court has considered the cumulative effect of the alleged errors.

See State v. Clay, ___ N.W.2d ___, 2012 WL 6217017, at *1 (Iowa Dec. 14, 2012) (setting forth "proper practice when dealing with multiple ineffective assistance claims" and requiring cumulative prejudice analysis). Price has thus not carried his burden of establishing prejudice.

VI.

The Court has considered each of the items raised in Price's Application for Post-Conviction Relief Pursuant to Iowa Code Chapter 822. The Court finds and concludes that Price has failed to establish any entitlement to relief on any claim. The Application is hereby DISMISSED.

IT IS SO ORDERED THIS 17th DAY OF December, 2012.

CHRISTOPHER L. MCDONALD, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

KN 12-17-12 Copy to:

Michael Hunter
Paul Rosenberg

DL

IN THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY

NICOLE M. YOUNG, **Plaintiff,** **vs.** AMERICAN FAMILY MUTUAL INSURANCE COMPANY, **Defendant.**	**CASE NO. CVCV008848** **RULING ON DEFENDANT'S MOTION FOR PARTIAL SUMMARY JUDGMENT**

FILED
POLK COUNTY, IA
2012 NOV 14 PM 4:58
CLERK DISTRICT COURT

Pending before the Court is Defendant American Family Mutual Insurance Company's (hereinafter "American Family") Motion for Partial Summary Judgment. The Motion came on for hearing on October 17, 2012. American Family appeared through its counsel Ted Wallace. Plaintiff Nicole Young appeared through her counsel Jim Larew. The Motion is deemed submitted. After reviewing the court file, hearing the arguments of counsel, and being fully advised in the premises, the Court hereby enters its Ruling on Defendant's Motion for Partial Summary Judgment.

I.

Young filed her Petition at Law and Jury Demand on October 5, 2011. In her Petition, Young alleged that American Family issued to her a homeowner's insurance policy (hereinafter "the Policy"). She further alleged that the Policy covered losses incurred as a result of a fire at her residence occurring on March 31, 2011. Young alleged that she provided prompt notice of her loss to American Family. Young alleged that American Family failed to make payment in full for all amounts due and owing under the Policy. She asserted the following claims: (1) breach of contract; (2) promissory estoppel; (3) unjust enrichment; (4) reasonable expectations;

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(5) bad faith; and (6) punitive damages. On October 25, 2011, American Family filed its Answer.

On August 7, 2012, Plaintiff sought leave to amend her Petition. In her First Amended Petition, Young alleged that the Policy contained a provision requiring arbitration of disputes arising under the Policy instead of a statutorily prescribed dispute resolution process known as appraisal. The First Amended Petition did not add any additional counts. It did contain new allegations regarding the alleged statutory violation. The Court granted leave to amend the Petition, and American Family filed its Answer to First Amended Petition at Law on September 5, 2012.

On September 26, 2012, American Family filed its Motion for Partial Summary Judgment. In its Motion, American Family contends that Young is not entitled to replacement cost coverage under the Policy. American Family further contends that it is entitled to summary judgment with respect to Young's claim for bad faith.

II.

Summary judgment should be granted "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 matter of law." Iowa R. Civ. P. 1.981(3). The party seeking summary judgment has the burden of establishing that the facts are undisputed and that the party is entitled to judgment as a matter of law. See Estate of Harris v. Papa John's Pizza, 679 N.W.2d 673, 677 (Iowa 2004). When a motion for summary judgment is made and properly supported, however, the opposing party may not rest upon the mere allegations or denials of the pleadings. See Iowa R. Civ. P. 1.981(5); Bitner v. Ottumwa Cmty. Sch. Dist., 549 N.W.2d 295, 299 (Iowa 1996). Instead, the resisting

party must set forth specific, material facts, supported by competent evidence, establishing the existence of a genuine issue for trial. See Iowa R. Civ. P. 1.981(5); Bitner, 549 N.W.2d at 299.

The court views the summary judgment record in the light most favorable to the party resisting the motion for summary judgment and indulges in every legitimate inference that the evidence will bear in an effort to ascertain the existence of a genuine issue of fact. See Crippen v. City of Cedar Rapids, 618 N.W.2d 562, 565 (Iowa 2000). "A fact is material if it will affect the outcome of the suit, given the applicable law." Parish v. Jumpking, Inc., 719 N.W.2d 540, 543 (Iowa 2006). An issue of fact is "genuine" if the evidence would allow a reasonable jury to return a verdict for the nonmoving party. See Fees v. Mutual Fire & Auto. Ins. Co., 490 N.W.2d 55, 57 (Iowa 1992). If the summary judgment record shows that the "resisting party has no evidence to factually support an outcome determinative element of that party's claim, the moving party will prevail on summary judgment." Robinson v. Poured Walls of Iowa, Inc., 553 N.W.2d 873, 875 (Iowa 1996); Iowa R. Civ. P. 1.981(3). In addition, summary judgment is correctly granted where the only issue to be decided is what legal consequences follow from otherwise undisputed facts. See Emmett County State Bank v. Reutter, 439 N.W.2d 651, 653 (Iowa 1989).

III.

The summary judgment record shows that the following facts are undisputed. Young resided at 1414 East 32nd Street, Des Moines. (Statement of Undisputed Facts (hereinafter "SUF") at ¶ 1; Plaintiff's Response to Statement of Undisputed Facts (hereinafter "PRSUF") at ¶ 1.) A fire occurred at Young's residence during the morning hours of March 31, 2011. (PRSUF at ¶ 2.) At the time of the fire, Young had in force a homeowner's insurance policy issued by American Family. (PRSUF at ¶¶ 3, 5, 6.) Young contacted American Family the morning of the fire to report the loss. (PRSUF at ¶ 7.)

As relevant here, the Policy provides accidental fire coverage for the following: damage to the dwelling (Policy, Coverage A); damage or loss of personal property (Policy, Coverage B); and additional living expenses incurred for loss of use of the dwelling (Policy, Coverage C). (Policy at 2-3.) With respect to dwelling coverage and personal property coverage, the Policy provides that American Family can pay an actual cash value settlement to its insured. (Policy at 8.) With respect to use of loss coverage, the Policy provides that American Family will pay additional living expenses "incurred." (Policy at 3.) The Policy provides for arbitration if the parties cannot agree as to the amount of liability. (Policy at 7-8.)

On the same day of the fire, public adjustor Joe Hope arrived at Young's residence. (PRSUF at ¶ 8.) Young did not contact Joe Hope, and she had no idea how he came to be at the residence. (PRSUF at ¶ 8.) Nonetheless, Young hired Joe Hope to act on her behalf with respect to this claim. (PRSUF at ¶ 9; Statement of Supplemental Facts (hereinafter "SSF") at ¶ 50.) On March 31, 2011, Joe Hope sent to American Family correspondence directing all communications regarding the claim be directed to him. (Def. Ex. A.) In the same letter, Joe Hope stated that Young was working to create a "complete detailed contents inventory," which would "take a number of weeks." (Def. Ex. A.)

American Family's adjustor, Brian Storm, came to Young's residence on the day of the fire—March 31, 2011. (SUF at ¶ 11.) Storm spoke with Joe Hope on that day. (PRSUF at ¶ 11; SSF at ¶ 54.) The next day, Storm appeared at the residence with several individuals from area businesses to begin assessing the loss and estimating repair costs. (PRSUF at ¶ 12; SSF at ¶55.) The businesses included United Services, First Call, First General, ServePro, and ServiceMaster.

On April 12, 2011, Storm mailed a letter to Joe Hope requesting certain information to process Young's claim. (PRSUF at ¶ 26; Def. Ex. H.) Among other things, Storm enclosed a

form that Young needed to complete to support her claim for additional living expenses. (PRSUF at ¶ 26; Def. Ex. H.) Storm reiterated his prior oral request for an interview with Young. (Def. Ex. H.) Storm requested that Young provide an inventory of contents so that American Family could process the claim. (Def. Ex. H.) In that same letter, Storm also requested an opportunity to clean items in the residence that might be salvaged. (PRSUF at ¶ 26.)

Joe Hope and Young responded to Storm's letter. On April 21, 2011, Joe Hope sent to Storm a contents inventory. (Def. Resp. Ex. D.) On April 22, 2011, Young signed an Information and Access Authorization Form. (PRSUF at ¶ 13.) On April 25, 2011, Young engaged legal counsel Andrew Hope to represent her with respect to this claim. (PRSUF at ¶ 16.) Andrew Hope is one of Young's attorneys of record in this case. On April 29, 2011, Young gave a statement to American Family. (PRSUF at ¶ 14.)

Shortly after Young gave her statement to American Family, Storm sent repeated requests to Andrew Hope for information relevant to processing Young's claim. (PRSUF at ¶¶ 18, 19, 28, 29, 31.) Specifically, on May 3rd, Storm sent to Andrew Hope an email requesting that Andrew Hope re-submit the contents inventory, including the ages of the items listed. (PRSUF at ¶ 18; Def. Ex. F; Def. Resp. Ex. E.) In the email, Storm also noted that he was advancing payment for a portion of the contents. (Def. Resp. Ex. E.) On May 4th, Storm sent a letter to Andrew Hope. Storm requested that Andrew Hope submit the documentation required to support Young's claim for additional living expenses and again requested a contents inventory with the ages of the items on the list. (PRSUF at ¶¶ 18, 19; Def. Ex. G; Def. Resp. Ex. F.) On May 6, 2011, Storm again sent an email to Andrew Hope requesting an updated contents inventory containing the ages of the personal property. (Def. Resp. Ex. G.) That same day,

Andrew Hope replied that the "contents inventory is being revised to provide ages per your request." (Def. Resp. Ex. H.)

On May 18, 2011, Storm mailed to Andrew Hope a settlement check for the actual cash value of the structure. The actual cash value settlement to Young was $65,836.45 for dwelling coverage under Part A of the Policy. (SSF at ¶ 59; Ex. 105; Def. Resp. at ¶ 12; PRSUF at ¶ 27; Def. Ex. I.) The actual cash value payment was determined by Storm, and it was greater than the estimates provided by independent estimators First Call and United Services. The May 18, 2011, letter specifically instructed Andrew Hope that, if Young was going to make a claim for repair/replacement costs, notice must be provided of Young's intent to repair within 180 days of loss, the repair must be completed within one year from date of loss, and a final bill must be submitted in support of the claim. (Def. Ex. I.)

On June 1, 2011, Storm sent a detailed letter to Andrew Hope specifying exactly what additional documentation and information Young needed to submit to substantiate her claims. (SUF at ¶¶ 28; Def. Ex. J.) With respect to Young's claim for damages to the dwelling, Storm reiterated his statement from the May 18th letter: Andrew Hope needed to provide additional information if Young was going to request more than an actual cash value settlement. (Def. Ex. J.) With respect to Young's claim for contents coverage, Storm again reiterated that Andrew Hope had not provided the requested information: "On May 3, 2001, I requested that you submit the ages of the personal property items listed. I sent a second request on May 6, 2011. As of today's date, I have not received the requested information. I cannot proceed with the contents portion of the claim, until you provide this to us." (Def. Ex. J.)

On June 2, 2011, American Family sent to Young an advance of $6750.14 representing compensation for cleaning of contents in the house and cleaning of the structure. (SUF at ¶ 32.)

On August 8, 2011, Storm sent another letter to Andrew Hope requesting information about the claim. (SUF at ¶¶ 28, 29.) The letter set forth the repeated attempts American Family had made to obtain the information to adjust the claim without any response from the Hope Law Firm. (Def. Ex. K.)

On August 17, 2011, Andrew Hope sent a response to Storm's letter dated August 8, 2011. (PRSUF at ¶ 30; Def. Ex. L; Def. Resp. Ex. I.) In that letter, Andrew Hope enclosed an estimate for structural repair created by Sennioer & Fischer dated May 3, 2011. (Def. Resp. at ¶ 16; Def. Resp. Ex. I.) On August 19, 2011, Storm sent correspondence to Andrew Hope regarding Andrew Hope's letter. (PRSUF at ¶ 31; Def. Ex. M.) Storm's letter stated that American Family was unable to process the claim for contents coverage because Andrew Hope had not provided the completed contents inventory requested on May 3, May 6, and August 8, 2011. (Def. Ex. M.) Storm further explained that Young needed to provide receipts to support her claim for additional living expenses coverage. (Def. Ex. M.) Young provided American Family with the requested inventory in September 2012, approximately 18 months after the loss. (SSF ¶ 57; Ex. 122.)

In September 2011, Young's grandfather made sufficient repairs to Young's residence such that she was able to move back into the residence. (PRSUF at ¶ 22.) Young's grandfather was acting as the general contractor in completing these repairs. (PRSUF at ¶ 22.) Young admits the repairs were made and that she moved back into the residence; she clarifies, however, that the repairs were only temporary to make the home habitable pending final adjustment. (PRSUF at ¶ 22.) Young admits that she provided no receipts for these "temporary" repairs to American Family. (SUF at ¶ 22.)

IV.

A.

The Court first addresses American Family's argument that payment on a replacement cost basis is no longer available Young. The terms upon which replacement cost coverage is available are set forth in the Policy. With respect to dwelling coverage, the Policy provides that if the insured receives an actual cash value settlement under policy limits, then the insured can "make a further claim under this condition for replacement cost, provided repairs to the damaged portion or replacement of the damaged building are completed within one year of the date of loss." (Policy Endorsement at 2.) With respect to personal property coverage, the Policy provides that if the insured receives an actual cash value settlement under policy limits, then the insured "may make a further claim under this condition for any additional payment on a replacement cost basis provided: (1) you notify us within 180 days after the loss of your decision to repair or replace the damaged or stolen property; and (2) repair or replacement is completed within one year of the date of loss." (Policy at 16.) American Family contends that replacement coverage is now precluded because it is undisputed that Young did not complete repair or replacement within one year of the date of loss.

"Interpreting the meaning of insurance policy words is also an issue of law for the court to decide unless the interpretation depends on extrinsic evidence or on a choice among reasonable inferences from extrinsic evidence. Extrinsic evidence refers to evidence other than the words of the policy." Jensen v. Jefferson County Mut. Ins. Ass'n, 510 N.W.2d 870, 871 (Iowa 1994) (internal citations and marks omitted). "In the construction of insurance policies, the cardinal principle is that the intent of the parties must control; and except in cases of ambiguity this is determined by what the policy itself says." A.Y. McDonald Indus., Inc. v. Ins.

Co. of N. Am., 475 N.W.2d 607, 618 (Iowa 1991). "The test for ambiguity is an objective one: Is the language fairly susceptible to two interpretations?" Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents, 471 N.W.2d 859, 863 (Iowa 1991) (internal marks omitted). "Only when the policy language is susceptible to two reasonable interpretations do we find an ambiguity." Kibbee v. State Farm Fire & Cas. Co., 525 N.W.2d 866, 868 (Iowa 1994). The Court finds and concludes that the relevant provisions are not ambiguous.

Both the dwelling coverage and personal property coverage provisions state that additional claims on a replacement cost basis are available "provided" that repair and/or replacement are "completed within one year of the loss date." "Provided" means "on the condition or understanding (that)." Black's Law Dictionary 1240 (7th ed. 1999). Here, then, the completion of repair and/or replacement within one year of the date of loss is a condition precedent that must occur prior to payment on a cost replacement basis becoming available to the insured. See Gildea v. Kapenis, 402 N.W.2d 457, 459 (Iowa Ct. App. 1987) ("Conditions precedent are . . . those facts and events, occurring subsequently to the making of a valid contract, that must exist or occur before there is a right to immediate performance, before there is a breach of contract duty, before the usual judicial remedies are available." (quoting Mosebach v. Blythe, 282 N.W.2d 755, 759 (Iowa Ct. App. 1979)).

Young does not dispute that the repair and/or replacement provision is a condition precedent to coverage. Instead, she contends that the unambiguous policy language requiring repair and/or replacement "within one year of the date of loss" actually means "within one year of the date the insured agrees with the insurer's calculation of and payment of the actual cash value settlement." Young begins her argument by noting that both replacement cost provisions begin with the phrase "[i]f you receive an actual cash value settlement." She argues that this

conditional language should be interpreted as a condition precedent to commencement of the time in which repairs must be completed. She further argues that "settlement" does not mean payment of money but rather means a formal compromise or agreement on the amount paid. She thus concludes that the repair and replacement provision is not triggered until these two events occur. Young's proposed interpretation is implausible and disallowed.

First, her interpretation of the Policy is contrary to the plain and unambiguous language in the Policy. See Thomas v. Progressive Cas. Ins. Co., 749 N.W.2d 678, 681-82 (Iowa 2008) (stating that the court reads the contract as a whole and will avoid strained readings where the language is plain and unambiguous). Second, even assuming that Young's interpretation of "settlement" is correct, it does not follow that the condition requiring completion of the repair and/or replacement within one year of the "date of loss" is thus transformed to mean within one year of the "date of settlement." Young's interpretation renders the phrase "within one year of date of loss" without any force or effect. Quite simply, the date of loss deadline is an absolute condition precedent that must occur without regard to when any "settlement," however defined, is made. Third, Young's construction of the actual cash value settlement clause as a condition that must occur prior to the repair and replacement provision is strained. In this case, the word "if" is merely used to mean "in the event that" rather than as a word connoting strict conditionality. This makes the most sense given that the Policy provides different payment options. Finally, Young's interpretation has been rejected by other courts that have looked at the same issue. See, e.g., Miller v. Farm Bureau Town & Country Ins. Co., 6 S.W.3d 432, 438 (Mo. Ct. App. 1999) (holding that it was error to fail to give meaning to plain language of contract requiring repair or replacement of property within specified time period).

Having concluded that the repair and/or replacement provision is a condition precedent to replacement cost coverage, the Court must determine the legal effect of the failure to satisfy the condition. As a general rule, the insured's failure to complete a condition precedent precludes coverage under an insurance policy. See Watson v. Nat'l Sur. Corp., 468 N.W.2d 448, 451 (Iowa 1991) (holding that requirement that insured submit to examination under oath was condition precedent to coverage); Bruns v. Hartford Acc. And Indem. Co., 407 N.W.2d 576, 579-580 (Iowa 1987) (holding that notice conditions were conditions precedent to coverage); Western Mut. Ins. Co. v. Baldwin, 137 N.W.2d 918, 927 (Iowa 1965) (reversing district court and remanding for entry of judgment in favor of insurer where notice provision not met); Henderson v. Hawkeye-Security Ins. Co., 106 N.W.2d 86, 90-91 (Iowa 1960) ("Definite, basic, specific and reasonable provisions made conditions precedent to action on the policy cannot be ignored, and an unexcused breach of these conditions cannot be viewed in any other light than a breach of contract which will defeat recovery upon claim made thereunder."). More specifically, the condition that the insured complete repair and/or replacement within a specified time period is commonly enforced. See Pierce v. Farm Bureau Mut. Ins. Co., 548 N.W.2d 551, 555 (Iowa 1996) (interpreting replacement cost provision); Kolls v. Aetna Cas. & Sur. Co., 378 F. Supp. 392, 403 (S.D. Iowa 1974) (interpreting replacement cost provision and granting summary judgment to insurer); Bratcher v. State Farm Fire and Cas. Co., 961 P.2d 828, 831 (Okla. 1998) (holding that replacement cost provision was "clear and unambiguous" and that failure to complete repairs within one-year period precluded payment on replacement cost basis); Kastiendieck v. Millers Mut. Ins. Co., 946 S.W.2d 35, 40 (Mo. Ct. App. 1997) (holding that replacement cost provision was unambiguous and that failure to meet condition precluded recovery on replacement cost basis); Hilley v. Allstate Ins. Co., 562 So.2d 184, 190 (Ala. 1990)

("Insurance policies which allow recovery of replacement costs often contain a provision requiring the insured to repair or replace the property within a specified or reasonable time. The policy issued to plaintiffs contained such language and courts have generally construed such a provision according to its plain meaning." (internal marks omitted)).

The failure to satisfy a condition precedent is not an absolute bar to coverage; an insured may obtain coverage by establishing substantial compliance with the terms of the policy. It is Young's burden of showing that she substantially complied with the conditions precedent of the insurance policy. See Watson, 468 N.W.2d at 451 ("We have placed the burden to prove compliance with a condition precedent of an insurance policy on the insured. However, proof of strict compliance is not required. Previously, we adopted a standard of substantial compliance with conditions precedent of an insurance policy." (internal citations omitted)). In this case, there is no evidence in the summary judgment record establishing substantial compliance with the replacement cost provisions. Young did not provide timely notice of her intent to replace personal property to obtain replacement cost coverage under the policy. In addition, it is undisputed that the repairs and replacements for the dwelling and personal property are not completed.

B.

Plaintiff next contends that American Family cannot rely on the condition precedent because American Family repudiated the contract. "Where one party to a contract repudiates the contract before the time for performance has arrived, the other party is relieved from its performance." Conrad Bros. v. John Deere Ins. Co., 640 N.W.2d 231, 241 (Iowa 2001). Likewise, "once a party repudiates a contractual duty before performance is due, the other party may enforce the obligation by filing a claim for damages without fulfilling any conditions

precedent." Id. "Repudiation consists of a statement that the repudiating party cannot or will not perform. The statement must be sufficiently positive to be reasonably understood that the breach will actually occur." Id. (quoting Farnsworth on Contract § 8.21, at 535 (2d ed. 1998)). There is no evidence in this record supporting Young's argument.

Plaintiff first argues that American Family effectively repudiated the Policy by failing to consider Young's structural loss estimate when determining the actual cash value settlement amount. It is undisputed, however, that Young's counsel failed to provide the estimate to American Family until August 17, 2011, more than three months after American Family already had tendered the actual cash value settlement. Moreover, an insurer is entitled to rely on its own estimators.

Plaintiff argues that American Family repudiated the Policy by failing to consider her contents inventory. It is undisputed, however, that American Family repeatedly requested that Young provide a completed contents inventory. Young did not provide the requested inventory until September 2012. It cannot be said that American Family repudiated the Policy when Young and/or her counsel undisputedly failed to timely provide the information American Family requested.

Finally, there is no statement, none, that American Family could not or would not perform under the terms and conditions of the Policy. All the evidence and all the inferences to be drawn from the evidence are to the contrary. The only inference that can be drawn from the undisputed facts is that American Family repeatedly sent requests to Andrew Hope for information to more quickly process Young's claim, and Young and/or her counsel simply failed to provide the requested information. American Family even instructed Andrew Hope how to assist his client in timely submitting information to make a claim for payment on a replacement

cost basis—the remedy Young now seeks—only to have nothing done. In a letter dated May 18, Storm specifically instructed Andrew Hope how to seek replacement cost coverage. (Def. Ex. N ("If you wish to make a claim for the replacement of your damaged property under the coverage, you must do three things . . .).) The letter then invited Andrew Hope to contact Storm if he had further questions. The letter also invited Hope to send contractor's estimates. No timely action was taken.

Young also contends that American Family repudiated the contract by failing to agree to appraisal. The Court is unsure how a party can repudiate a contract by not performing a term not contained in the contract. The Court finds the argument without merit.

C.

Young's contention that she was unable to complete the repairs without additional funds is without merit. The intention to replace without actually completing the repairs within the required time precludes recovery under the contract. See Hilley, 562 So. 2d at 190 ("Furthermore, a mere intention to replace does not trigger the insurer's replacement cost payment obligations. Consequently, even though the Hilleys allegedly intended to replace their house, but claim that they could not afford to effectuate that rebuilding, they cannot overcome the clear and unambiguous terms of their Allstate policy that precluded any replacement cost payment prior to the completion of rebuilding." (internal citations omitted)).

V.

The Court addresses Young's claim for bad faith. "[T]he tort of bad faith . . . arises when the insurance company intentionally denies or fails to process a claim without a reasonable basis for such action." Deters v. USF Ins. Co., No. 10-0442, 2011 WL 222533, at *11 (Iowa Ct. App. Jan. 20, 2011) (internal marks omitted). "To establish a claim for first-party bad faith . . . , a

plaintiff must prove (1) that the insurer had no reasonable basis for denying benefits under the policy [and] (2) the insurer knew, or had reason to know, that its denial was without basis." Rodda v. Vermeer Mfg., 734 N.W.2d 480, 483 (Iowa 2007). There is a reasonable basis to deny benefits if the claim is fairly debatable. See Bellville v. Farm Bureau Mut. Ins. Co., 702 N.W.2d 468, 473 (Iowa 2005). "A reasonable basis exists for denial of [coverage] if the insured's claim is fairly debatable either on a matter of fact or law." Amling v. State Farm Ins. Co., No. 10-1130, 2011 WL 1584215, at * 4 (Iowa Ct. App. Apr. 27, 2011). "A claim is 'fairly debatable' when it is open to dispute on any logical basis." Id. Generally, whether a claim is fairly debatable may be determined as a matter of law by the court." Id.; see also Bellville, 702 N.W.2d at 473-74 ("[A] court can almost always decide that the claim was fairly debatable as a matter of law."). The Court finds and concludes that there is no genuine issue of disputed fact and that American Family is entitled to judgment as a matter of law with respect to Young's claim for bad faith.

A.

Young first alleges that American Family acted in bad faith by delaying processing and/or payment of her claim:

> Q: So you have an issue with how long it took?
> A: Yes.
> Q: Anything else?
> A: No.
> . . . .
> Q: Is there anything from the perspective of American Family, whether it be the agent or anyone else other than Mr. Storm, that you believe was done inappropriately or believe shouldn't have been done in the handling of the claim?
> A: No.
> Q: So the only complaint you have about the way this was handled, as I understand it, is simply that it took longer than you would have liked?
> A: Yes.

(Young Dep. at 56, 57.) A claim for bad faith delay in processing or payment of insurance benefits is cognizable. See Rodda, 734 N.W.2d at 483. Where the insured's claim is for bad faith delay, as opposed to outright denial of payment, the plaintiff must establish that the insurer had no reasonable basis for delaying benefits under the policy and the insurer knew, or had reason to know, that its delay was without basis. See Calvert v. Am. Family Ins. Group, No. 04-1074, 2006 WL 126635, at *3 (Iowa Ct. App. Jan. 19, 2006). The Court finds and concludes that there is no genuine issue of material fact and that American Family is entitled to summary judgment with respect to Young's claim for bad faith delay of payment.

First, there is no evidence that American Family delayed processing Young's claim or payment on the claim. The Policy provides that loss shall be payable 60 days after American Family received Young's properly completed proof of loss. The summary judgment record shows that American Family paid an actual cash value settlement for dwelling coverage on May 19, 2011, or within 60 days of the date of the loss. There is no evidence that American Family failed to pay any other claimed loss within 60 days of receiving a properly completed proof of loss. See Penford Corp. v. Nat'l Union Fire Ins. Co., 662 F.3d 497, 504 (8th Cir. 2001) (affirming grant of judgment as a matter of law to insurer where evidence showed all claims were timely paid).

Second, any delay in processing or providing additional payment(s) for dwelling coverage, payment(s) for contents coverage, or payment(s) for use of loss coverage, arises out of Young's failure to abide by the terms of the Policy and cooperate with American Family's repeated requests to provide the requested information and documentation. The Policy provides that Young would cooperate in processing any claim. (Policy at 13.) The Policy provides that Young also was required to provide American Family with "records and documents" American

Family requested. (Policy at p. 9 at ¶ 19.) She was required to provide "detailed estimates for repair of the damage." (Policy at p. 9 at ¶ 19.) She was also required to provide "receipts for any increased costs to maintain your standard of living while you reside elsewhere . . ." (Policy at p. 9 at ¶ 19.) It is undisputed that Young failed to timely provide the requested information.

Young submitted a contents inventory to American Family in April 2011. On May 3, 2011, Storm sent to Andrew Hope an email requesting that Andrew Hope re-submit the contents inventory and include the ages of the items listed. (PRSUF at ¶ 18; Def. Ex. F; Def. Resp. Ex. E.) Storm's request was permissible under the terms of the Policy, which required Young to "give a detailed list of the damaged property, showing the quantities, when and where acquired, [and] original cost . . ." (Policy at p. 9 at ¶ 19 (emphasis added).) On May 4th and 6th, Storm sent letters to Andrew Hope in which Storm requested that Andrew Hope submit the documentation required to support Young's claim for additional living expenses and again requesting a contents inventory with the ages of the items on the list. (PRSUF at ¶¶ 18, 19; Def. Ex. G; Def. Resp. Ex. F.) On May 19th, Storm sent Andrew Hope a letter explicitly instructing Hope how Young could seek replacement cost coverage. Storm sent additional letters on June 1, 2011, and August 8, 2011, requesting the same information. (SUF at ¶¶ 28, 29; Def. Ex. J.)

After at least six different contacts from Storm, on August 17, 2011, Andrew Hope sent a response to Storm's letter dated August 8, 2011. (PRSUF at ¶ 30; Def. Ex. L; Def. Resp. Ex. I.) In that letter, Andrew Hope enclosed an estimate for structural repair created by Sennioer & Fischer. (Def. Resp. at ¶ 16; Def. Resp. Ex. I.) American Family already had paid actual cash value for structural repair in mid-May. On August 19, 2011, Storm sent correspondence to Andrew Hope regarding Andrew Hope's letter. (PRSUF at ¶ 31; Def. Ex. M.) Storm's letter stated that American Family still was unable to process the claim for contents coverage because

Andrew Hope had not provided the updated contents inventory requested on May 3, May 6, and August 8, 2011. (Def. Ex. M.) Storm further explained that Young needed to provide receipts to support her claim for additional living expenses coverage. (Def. Ex. M.) Young did not provide the requested inventory information until September 2012, more than sixteen months after American Family asked for this information and more than sixteen months after Andrew Hope stated that he would provide it.

Under these facts and circumstances, it cannot be said that American Family acted objectively unreasonably for whatever delay may have occurred with respect to payment of any claim for additional dwelling coverage, contents coverage, or additional living expense coverage. See Calvert, 2006 WL 126635, at *4 (affirming dismissal of bad faith claim and stating that an insured's failure to provide requested records "can give rise to an objectively reasonable basis for delay in payment"); AMCO Mut Ins. Co. v. Lamphere, 541 N.W.2d 910, 914 (Iowa Ct. App. 1995) (affirming directed verdict in favor of insurer on bad faith claim where insured failed to cooperate in processing of claim); see also Jackson v. Allstate Ins. Co., 780 F. Supp. 2d 781, 793 (S.D. Ind. 2011) (holding that insured's claim for bad faith failed as a matter of law where insured and insured's counsel failed to provide requested documents in support of claim and stating that "[t]he fault of this delay clearly lies at the feet of Plaintiff and Plaintiff's counsel"); Piser v. State Farm Mut. Auto Ins. Co., 938 N.E.2d 640, 653 (Ill. Ct. App. 2010) (affirming dismissal of bad faith claim where insured failed to comply with cooperation clause by failing to provide requested financial documents in support of claim).

Third, not only was American Family's processing of Young's claim objectively reasonable, Young has not produced any evidence that American Family knew or should have known that it had no basis for processing Young's claim in the manner it did. Summary

judgment is proper where a party fails to produce evidence in support of an essential element of her claim. Iowa R. Civ. P. 1.981(3); Robinson, 553 N.W.2d at 875 (stating that summary judgment is proper where the record shows that the "resisting party has no evidence to factually support an outcome determinative element of that party's claim"); AMCO Mut Ins. Co., 541 N.W.2d at 914 (affirming directed verdict in favor of insurer where there was no evidence that insurer knew its conduct was without basis).

B.

Young also contends that American Family, per se, acted in bad faith by issuing a policy that did not contain a right to appraisal. (PRSUF at ¶ 23.) Iowa Code section 515.109 makes it "unlawful for any insurance company to issue any policy of fire insurance upon any property in this state . . . other or different from the standard form of fire insurance policy herein set forth." Iowa Code § 515.109(2). Included in the standard form of fire insurance policy is a requirement that the policy allow for an appraisal process "[i]n case the insured and this company shall fail to agree as to the actual cash value or the amount of loss . . ." Iowa Code § 515.109(6). Under the required standard form, the appraisal process is initiated "on the written demand of either" upon which "each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand." Iowa Code § 515.109(6). In this case, the Policy did not contain the required appraisal provision. Instead, it contained a binding arbitration provision in lieu of the appraisal provision. (Policy at 7-8.)

Although the Policy did not contain an appraisal provision, more than one year after the loss, on June 4, 2012, Young requested appraisal. (SSF at ¶ 63; Ex. 112.) On June 14, 2012, American Family denied the request for appraisal. (SSF at ¶ 64; Ex. 113.) Young notified the Iowa Insurance Division that American Family had an arbitration provision in the Policy versus

an appraisal provision. (SSF at ¶ 65.) The Insurance Division instructed American Family to remove the provision. (SSF at ¶ 67.) American Family then agreed to engage in the appraisal process. (SSF at ¶ 66.) In October 2012, an appraisal panel awarded damages to Young for her loss: Part A, Dwelling, $85,587 Actual Cash Value; Part B, Contents, $14,800.80 Actual Cash Value; and Part C, Additional Living Expenses from March 3, 2011, through September 27, 2011, plus four additional months. (SSF at ¶ 68; Ex. 106.) American Family paid the difference between the appraisal award and the actual cash value payments previously made. (SSF ¶ 69.)

American Family contends that adding the arbitration provision in lieu of appraisal was allowable. In support of their argument, American Family contends that an insurer may "include[] provisions with respect to the peril of fire which are the substantial equivalent of the minimum provisions of such standard policy, provided further the policy is complete as to all its terms of coverage without reference to any other document and is approved in accordance with section 515.102, subsections 1 and 2." Iowa Code § 515.109(5). Iowa Code section 515.102 provides that any change to the standard form can be made upon the examination and approval of the commissioner of insurance or by an order exempting the insurer from such compliance. See Iowa Code § 515.102(1) and (2). American Family contends that its arbitration provision is the "substantial equivalent" of the appraisal process and is thus allowable. See Sager v. Farm Bureau Mut. Ins. Co., 680 N.W.2d 8, 13 (Iowa 2004) (stating that Iowa's statute contains a "somewhat peculiar" provision that allows an insurer to deviate from the statutorily required provisions if a substantially equivalent provision is inserted).

The term "substantial equivalent" is not defined. Plaintiff contends that arbitration and appraisal are not substantially equivalent, the arbitration provision is thus unlawful, and American Family has acted, per se, in bad faith. In support of its argument, Young submitted an

affidavit from an expert stating that arbitration is more time consuming and more expensive to a policy holder when compared to appraisal. (Statement of Supplemental Facts (hereinafter "SSF") at ¶¶ 39, 40; Ex. 109.) American Family contends that the provisions are substantially equivalent because both arbitration and appraisal allow for the speedy and efficient resolution of claims in lieu of judicial proceedings. See Hirt v. Hervey, 578 P.2d 624, 626 (Az. Ct. App. 1978) (concluding that appraisal and arbitration are similar). American Family goes further and contends that arbitration is actually superior to appraisal because it allows all claims to be addressed in one proceeding, precludes appraiser bias, and results in an enforceable judgment. The parties' disagreement about whether arbitration and appraisal are substantially equivalent is not material.

The material question is not whether arbitration and appraisal are substantially equivalent. The material question is whether there is evidence from which a jury could infer that American Family acted in bad in concluding that arbitration and appraisal are substantially equivalent. This requires a showing that American Family's insertion of the arbitration provision into the Policy in lieu of the appraisal provision was both objectively and subjectively unreasonable. See Rodda, 734 N.W.2d at 483; Bellville, 702 N.W.2d at 473; Amling, 2011 WL 1584215, at * 4. Here, it is at least fairly debatable whether arbitration and appraisal are equivalent—both processes seek to resolve a dispute through the use of independent third parties through a process less formal, expensive, and time consuming than court proceedings. See Taylor v. Farm Bureau, No. 07-1580, 2008 WL 4525496, at *4 (Iowa Ct. App. Oct. 1, 2008) (stating that "both proceedings are designed to effect speedy and efficient resolutions in lieu of judicial proceedings"); Deters, 2011 WL 222533, at *11 ("The most reliable method of establishing that the insurer's legal position is reasonable is to show that some judge in the

relevant jurisdiction has accepted it as correct." (internal marks omitted)). On this record, as a matter of law, whether arbitration is the "substantial equivalent" of Iowa's appraisal provision is at least fairly debatable.

More important, there is no record evidence that American Family knew, or should have known, that its insertion of the arbitration provision into its fire policy was objectively unreasonable. In other words, there is no evidence supporting the subjective component of the two-part bad faith test. The policy form containing the arbitration language was submitted to the Commissioner of Insurance on March 31, 1994, in accord with Iowa Code section 515.102. (Def. Ex. O.) The Insurance Department, Property Casualty Bureau, approved the policy form on April 14, 1994. (Def. Ex. O.) The policy form was reapproved on October 27, 1994. (Def. Ex. P.) American Family specifically identified the arbitration provision in its Summary Explanation of the Significant Changes provided to the Insurance Department. (Def Ex. Q at 9.) American Family has used this policy form in the State of Iowa since that time. After being contacted by Young, the Insurance Division has now notified American Family that it must remove the arbitration provision. The Insurance Division's change of mind—eighteen years after approving the policy form—does not change the Court's analysis.

The Insurance Department's approval of the policy form, and arbitration provision contained therein, establishes an objectively reasonable basis upon which American Family could have believed that its arbitration provision was lawful. See Elston v. Shell Oil Co., 376 F. Supp. 968, 976 (D. La. 1973) ("It appears to the Court that approval by the insurance commissioner constitutes an administrative ruling that the policy and its endorsements conforms to the requirements of the law . . ."), aff'd by 495 F.2d 1371 (5th Cir. 1974); Cage v. Litchfield Mut. Ins. Co., 713 A.2d 281, 287 (Conn. Sup. 1997) (concluding that department's prior

approval of policy exclusion militates against finding that exclusion is not enforceable); Hansen v. State Farm Mut. Auto. Ins. Co., 735 P.2d 974, 979 (Idaho 1987) (stating that "the Director's approval of an insurance policy form is an administrative determination that the policy form is in the public interest" and holding that arbitration provision in auto policy was enforceable); Manhattan Life Ins. Co. v. Wilson Motor Co., 75 S.W.2d 721, 723 (Tex. Ct. App. 1934) ("The policy form used in this case had prior to such use been submitted to and approved by the Department of Insurance of this state. . . . Necessarily, his approval of the policy form used in this case involved an administrative ruling that the same met affirmatively every requirement of said article."); Corpus Juris Secundum Insurance § 479 ("The approval of the insurance commissioner constitutes an administrative ruling that the policy conforms to the requirements of the law, and that the form is in the public interest."). This is not to say that the relevant agency or court cannot subsequently conclude that the provision did not, in fact, comply with the law. It is merely to state that the insurer cannot be held to act in bad faith by issuing a fire insurance policy approved for use by the governing regulator in the absence of any evidence showing the insurer knew or had reason to know that the provision was unlawful. There is no such evidence here.

VI.

The Court has considered all other arguments of the parties not specifically addressed in this Ruling, and concludes that they are without merit or otherwise immaterial to the resolution of this Motion. The Court concludes that replacement cost coverage is no longer available under the terms and conditions of the Policy. The Court concludes that Young's claim for bad faith insurance practices fails as a matter of law. The Court further finds and concludes that there is

no disputed material fact and that American Family is entitled to judgment as a matter of law as requested.

IT IS THEREFORE ORDERED, ADJUDGED, AND DECREED that Defendant American Family's Motion for Partial Summary Judgment should be and hereby is GRANTED.

IT IS SO ORDERED ON THIS 14th DAY OF November, 2012.

CHRISTOPHER L. MCDONALD, JUDGE
FIFTH JUDICIAL DISTRICT OF IOWA

Copy to: email 11/16/12 DL.

Ted Wallace - twallace@amfam.com
Jim Larew - larewlaw@aol.com
Andrew Hope - andrew@hopelaw.com