

IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-0195

**DANIELLE PUTMAN,
Plaintiff-Appellant,**

vs.

**SHAWN J. WALTHER and
AMY M. WALTHER,
Defendants-Appellees.**

COURT OF APPEALS DECISION FILED DECEMBER 16, 2020

**APPELLEES' RESISTANCE TO APPELLANT'S APPLICATION FOR
FURTHER REVIEW**

**MATTHEW M. CRAFT
DUTTON, DANIELS, HINES,
KALKHOFF, COOK & SWANSON, P.L.C.**
3151 Brockway Rd.
PO Box 810
Waterloo, IA 50704
Ph: (319) 234-4471
Fax: (319) 234-8029
Email: mcraft@duttonfirm.com

**ATTORNEY FOR APPELLEES
SHAWN J. WALTHER AND AMY M. WALTHER**

QUESTIONS PRESENTED FOR REVIEW

1. Should this Court grant further review regarding the expert witness designation issues at issue here when the Court of Appeals relied upon and correctly applied this Court's past precedent?
2. Should this Court grant further review when the Court of Appeals relied upon and correctly applied this Court's past precedent and correctly determined that Summary Judgment was proper for failure to designate an expert witness in the case?

TABLE OF CONTENTS

QUESTIONS PRESENTED FOR REVIEW 2

TABLE OF CONTENTS 3

TABLE OF AUTHORITIES 4

STATEMENT REGARDING FURTHER REVIEW 5

ARGUMENT 9

I. The Court of Appeals correctly held Putman failed to preserve error. 9

II. Even if considered, the Magee Construction documents do not create a genuine issue of material fact 15

CONCLUSION 16

CERTIFICATE OF COMPLIANCE 18

CERTIFICATE OF FILING 18

CERTIFICATE OF SERVICE 19

TABLE OF AUTHORITIES

| <u>Cases</u> | <u>Page(s)</u> |
|--|-----------------------|
| <i>State v. Pickett</i> , 671 N.W.2d 866, 869 (Iowa 2003) | 10 |
| <i>DeVoss v. State</i> , 648 N.W.2d 56, 60 (Iowa 2002) | 10 |
| <i>Weltzin v. Nail</i> , 618 N.W.2d 293, 296 (Iowa 2000) | 11 |
| <i>Marriage of Hitchcock</i> , 265 N.W.2d 599, 606 (Iowa 1978) | 11 |
| <i>Hansen v. Central Iowa Hospital Corporation, d/b/a Iowa Methodist Medical Center</i> , 686 N.W.2d 476 (Iowa 2004) | 12 |
| <i>City of Riverside v. Metro Pavers, Inc.</i> , 2017 WL 2875687 *2-3 (Iowa Ct. App. July 6, 2017) | 13 |
| <u>Statutes</u> | |
| Iowa Code §558A | 8 |
| Iowa Code §688.11 | 12 |
| <u>Rules</u> | |
| Iowa R. App. P. 6.903(2)(g)(3) | 8 |
| Iowa R. Civ. P. 1.904 | 8, 9 |
| Iowa R. Civ. P. 1.500(2) | 10 |

STATEMENT REGARDING FURTHER REVIEW

Danielle Putman (“Putman”) has not asserted that further review is necessary because this case presents a substantial question of constitutional law or changing legal principles. Indeed it does not. Putman, during previous briefing, conceded that the case should be transferred to the Court of Appeals because the case involved interpretation of existing legal principals. Putman was correct the first time and the case was properly transferred.

The Court of Appeals did not issue a decision in conflict with this Court’s or the Court of Appeals’ precedent. While the failure to preserve error and property designate an expert witness in compliance with laws and rules of the State of Iowa does present an important issue, this Court’s precedent is clear and unambiguous on the issue-the Court of Appeals correctly relied upon and applied a precedent which may not be revisited based on the facts at issue here. Both the District Court and the Court of Appeals correctly applied this Court’s past precedent to the facts of the matter and Putman’s attempted third bite of the proverbial apple should be denied.

STATEMENT REGARDING FURTHER REVIEW

On or about March 5, 2018 a residential purchase agreement was entered into by Putman and Shawn and Amy Walther (“Walthers”), purchasing the Walthers residence at 2502 W. 8th St. in Waterloo. (App at 4-12). The parties

closed on the purchase on or about April 27, 2018 and Putman moved into the residence. (App at 1-3). Along with the purchase agreement, the Walthers completed the residential sales disclosure form required by Iowa Code Chapter 558A. (App at 8-11). The disclosure form contained the following disclosure: “2010 sewer backup and SW wall seepage a few times.” (App at 10).

In the summer of 2018, Putman experienced water in her basement and contacted Magee Construction to assist her with that problem. (App at 13-21). Putman later filed suit against the Walthers, alleging misrepresentation regarding the previous presence of a sump pump in the backyard and alleging that this misrepresentation was a proximate cause of her damages. (App at 1-3; 41-43). Magee Construction prepared a one page letter and estimate, both of which were attached to Putman’s petition at law. (App at 13-21). The Magee documents were silent as to the cause of any damages to Putman and do not mention a sump pump pit or anything that the estimate is related to. (App at 13-21). Putman later amended her petition and did not attach any documents to the amended petition. (App at 41-43).

In response to discovery served upon Putman, she failed to name any expert witness in the interrogatory responses and failed to designate any expert witness throughout the duration of the proceedings. (App at 104-105). Walthers and other defendants filed a motion for summary judgment, in part, based on the failure to

name an expert witness and the inability of Putman to prove that the presence or non-presence of a sump pump pit in the backyard caused the damages claimed. (App at 58-110).

In response to the summary judgment filings, Putman filed a brief resistance that generally, and without citation to any facts, affidavits, testimony or documents, resisted the motion. (App at 111-112). Filed contemporaneously with the resistance was an affidavit by Putman, individually, that did not reference Magee Construction and provided no facts to connect the alleged damages with the presence or non-presence of the sump pump pit. (App at 113-120).

The Honorable Judge Kellyann Lekar granted summary judgment as to the Walthers, holding that expert testimony was required on the issues of causation and damages, because the cause of the water damage to the house and corresponding repair are not common knowledge to a lay person. (App at 149-153). The Court further held that while Putman may be able to testify with regard to damages to personal property, that element of damages can not be reached without first provide the issue of causation. (App at 152).

Finally, the Court held:

Further, Plaintiff makes summary allegations that representatives were disclosed in the Resistances to the motions for summary judgment but provides no actual interrogatory responses to support these allegations. Thus, on the summary judgment record made before the Court, no expert was designated or disclosed by Plaintiff on the issues of causation or damages. In sum, all claim made by the Plaintiff, including negligent misrepresentation,

fraudulent misrepresentation or violation of Chapter 558A to the extent that cause of action could be considered plead by Plaintiff, are subject to summary disposition for failure to designate or disclose experts on causation and damages.

(App at 152)¹.

The Court did not make a ruling on whether or not the failure to designate or disclose an expert witness was harmless error and did not make a ruling on whether or not the attachment of the Magee Construction estimate to the original petition was a sufficient disclosure to comply with Iowa law. (App at 152). No motion to amend and enlarge findings pursuant to Iowa Rule of Civil Procedure 1.904 was filed.

Putman then raised these new issues on appeal – that adequate disclosure of the expert was made and that substantial compliance was made. The Court of Appeals correctly ruled that these arguments were not ruled on by the District Court and were not preserved. Additionally, the Court of Appeals correctly ruled that because Putman failed to cite authority in support of the latter position, the argument was waived on appeal. See Iowa R. App. P. 6.903(2)(g)(3).

Finally, Putman raises another argument – that there was a genuine issue of material fact on the issues of causation and damages. As the Court of Appeals correctly noted, Putman did not dispute on appeal that she needed to present expert

¹ Plaintiff did not ever plead Chapter 558A violation, naming only negligent misrepresentation and fraudulent misrepresentation in the amended petition.

testimony to establish her claims of causation and damages. Because expert witness testimony was unanimously agreed to be needed and because Putman failed to preserve error on the issues surrounding her claimed disclosure, the Court of Appeals properly affirmed the District Court on all issues.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD PUTMAN FAILED TO PRESERVE ERROR.

The Court of Appeals correctly ruled that Putman failed to preserve error on either of her points. In her response to the motion for summary judgment she did not make an argument that Magee Construction was adequately disclosed or that any failure to disclose was harmless error.

Additionally, Putman failed to file a motion pursuant to Iowa R. Civ. P. 1.904 seeking amendment or enlargement of the ruling. It is well established that an appellate court may not consider issues not raised in the court below.

Error preservation is important for two reasons: (1) affording the district court an “ ‘opportunity to avoid or correct error’ ”; and (2) providing the appellate court “ ‘with an adequate record in reviewing errors purportedly committed’ ” by the district court. These principles of error preservation are based on fairness: “[I]t is fundamentally unfair to fault the trial court for failing to rule correctly on an issue it was never given the opportunity to consider. Furthermore, it is unfair to allow a party to choose to remain silent in the trial court in the face of error, taking a chance on a favorable outcome, and subsequently assert error on appeal if the outcome in the trial court is unfavorable.”

State v. Pickett, 671 N.W.2d 866, 869 (Iowa 2003) (citation omitted) (quoting *DeVoss v. State*, 648 N.W.2d 56, 60 (Iowa 2002)).

There is no record from which to show that either the adequate disclosure by way of Petition attachment was made, much less ruled upon.

Putman also failed to include in the resistance to summary judgment any of the facts or documents claimed in her appellate brief, with the exception of the affidavit of Putman herself. Other than the information contained in that affidavit, the Court should not consider claimed facts or evidence on appeal, which Putman has attempted to insert into her brief, without citation.

In the event that this Court finds that error was preserved, the District Court was correct in refusing to acknowledge the Magee Construction attachment to the Petition as a designation of an expert witness.

It is undisputed Putman failed to designate an expert within the timeline established by the Trial Scheduling and Discovery Plan approved by the Court which required disclosure on or before May 20, 2019. (App at 46-52). It is further undisputed that Putman failed to provide any disclosures of information of expert witnesses pursuant to Iowa Rule of Civ. P. 1.500(2). (App at 152). As the district court noted, Putman failed to timely designate or disclose any expert on causation or damages. (App at 152). The claimed experts were not formally designated as experts nor were these individuals disclosed as experts in the Plaintiff's discovery responses. (App at 104-105). No expert witness of any kind was mentioned in the

discovery responses. (App at 104-105). No interrogatory response or disclosure of what the expert would be testifying to was ever provided, much less provided in the resistance to summary judgment. (App at 111-112).

Putman now argues on appeal that formal disclosure was not needed of Magee's opinions. This argument, however, ignores the fact that Magee's opinions were not included in the summary judgment resistance in any way. (App at 111-112). It is impossible to claim the benefit of these potential arguments when they are even argued in the underlying resistance. "We will not review issues on appeal unless they were properly preserved below." *Weltzin v. Nail*, 618 N.W.2d 293, 296 (Iowa 2000) (citing *In re Marriage of Hitchcock*, 265 N.W.2d 599, 606 (Iowa 1978)).

Even if the Court decides to consider the one page letter and corresponding estimate, the district court properly exercised its discretion in excluding Magee Construction from providing an expert opinion. It is undisputed that no expert designation was made, that expert testimony was needed and that no response to interrogatories seeking expert information was provided. Without this information and failure to comply with the trial scheduling order and corresponding rules on expert witness disclosure, the court was right to exclude Magee from providing expert opinions.

Putman's argument that non-disclosure is warranted because Magee served as analogous to a treating physician is similarly misplaced. In the *Hansen* case cited, the Plaintiff complied with designation requirements and named her treating physician as an expert that will provide an opinion on causation. See generally, *Hansen v. Central Iowa Hospital Corporation, d/b/a Iowa Methodist Medical Center*, 686 N.W.2d 476 (Iowa 2004). The issue in *Hansen* was whether or not a treating physician could provide causation testimony pursuant to Iowa Code Section 668.11. *Id.* It was not decided whether or not an undesignated person could provide causation or other expert testimony. *Id.*

Finally, Putman concedes in her appellate brief that Magee was contacted "in order to diagnose and treat her first water infiltration problem, not to obtain a causation or damages opinion to use in anticipation of litigation. In addition, there was no evidence that Magee was ever retained to provide such an opinion." (Putman Court of Appeals Brief p. 18). Given this statement it is hard to understand what Putnam is attempting to appeal. There is no statement in the Magee Construction documents that mentions the sump pump pit or ties it to any of the claimed damage. If Magee cannot provide an opinion on causation, the remainder of the appeal is moot and the district court's summary judgment ruling should stand.

Without an expert, Putman has no witness that will testify to the causation and/or fair and reasonable cost of repair or replacement to support the damages element for any of their causes of action. Without this expert testimony, the Plaintiff's cannot establish any damages. *See City of Riverside v. Metro Pavers, Inc.*, 2017 WL 2875687 *2-3 (Iowa Ct. App. July 6, 2017) (affirming trial court's entry of summary judgment for failure by Plaintiff to have expert witness testimony to support the damages element of its claim). As noted by the Iowa Court of Appeals, "[w]ithout expert testimony, its cause of action fails." *** "We agree with the district court that an expert was necessary in this case and that the failure to designate one was appropriate grounds for summary judgment in favor of the defendants." *Id.*

There is simply no record from which to appeal from in order to determine what information Magee Construction would have testified to, even if the court wants to consider the attachment to the petition and expert witness disclosure. The Magee Construction estimate, even if allowed, does not show a genuine issue of material fact on the issues of causation and damages for a violation of Iowa Code Section 558A, Iowa's Real Estate Disclosure Act, even if that had been plead. This court should affirm the district court's ruling.

Even if this Court believes that the attachment to the petition should have been considered by the Court in the resistance to summary judgment, despite no

reference to it by Putman, it still fails to generate a genuine issue of material fact. It contains no information about the causation of any alleged non-disclosure to the damages now claimed by Putman. As the District Court and Court of Appeals correctly noted, there is no witness, disclosed or otherwise, that can connect the issue of causation. (App at 149-153). There is no reference as to Magee Construction's opinion on causation anywhere – even in Putman's appellate brief – with any sort of specific opinion. There are only conclusory statements discussing causation that directly contradict Putman's statement on page 18 of their brief that "... Putman contacted Magee in order to diagnose and treat her first water infiltration problem, not to obtain a causation and damages opinion to use in anticipation of litigation. In addition, there was no evidence that Magee was ever retained to provide such an opinion." Finally, Putman argues that "the purpose of the estimate was to treat and diagnose Putman's first water infiltration problem, much like that of a treating physician who diagnoses and treats an injury for the first time prior to litigation being filed and who forms a causation opinion in the course of that treatment." Putman Court of Appeals Brief at p. 20. The problem here is that there is no such latter causation opinion that was ever formulated, much less disclosed. As such, summary judgment was properly granted.

Because Plaintiff concedes that they do not have an expert witness to testify to causation, the district court correctly granted the summary judgment motion.

II. EVEN IF CONSIDERED, THE MAGEE CONSTRUCTION DOCUMENTS DO NOT CREATE A GENUINE ISSUE OF MATERIAL FACT.

The Magee Construction documents, if considered, do not create a genuine issue of material fact.

Nowhere on the Magee Construction documents does it note any sort of reason as to why and how the water got in, nor is it connected to any alleged non-disclosure. Neither the resistance to summary judgment or the appellate brief identify any facts that, if proven, would allow a jury to conclude that a non-disclosure occurred. The brief itself only contains conclusory allegations. For example:

The Magee estimate states the cause of the water infiltration in the SW corner of the basement on June 29, 2018 was obvious and caused more than eleven thousand in damage.

Putman Court of Appeals Brief at p. 28.

That statement does not tell us anything that would indicate a causal connection between a removal of a sump pump pit and the June 29, 2018 water infiltration. Nor was it produced and argued in the summary judgment resistance.

Putman experience similar water infiltration in her basement on August 6, 2018, September 4, 2018, September 19, 2018 and October 1, 2018. *Id.*

This statement does not reference any disclosure or non-disclosure by the Walthers and does not show any causation between a disclosure or omission and the claimed damages.

Putman was advised by neighbors that the Walthers had a sump pit and pump in the backyard and removed it prior to her purchase of the home. *Id* at 29.

In addition to this argument not being preserved, it is inadmissible hearsay. There is no affidavit or evidence from any neighbors that support this statement. Further, there is no witness who could connect the presence or non-presence of the sump pump pit to the alleged damages. There is simply no proof in the record of what knowledge Putman claims the Walthers to have kept from her and how that caused any of the now claimed damages.

CONCLUSION

Appellants failed to preserve error on either of their appeal points. To the extent that they did preserve error, their points should fail due to the lack of supporting evidence in the record and the lack of any ability to prove that non-disclosure of the previous presence of a sump pump pit caused any of the claimed damages.

Matthew M. Craft

MATTHEW M. CRAFT, AT0001713
DUTTON, DANIELS, HINES,
KALKHOFF, COOK & SWANSON, P.L.C.
3151 Brockway Rd.
PO Box 810
Waterloo, IA 50704
Ph: (319) 234-4471
Fax: (319) 234-8029
Email: mcraft@duttonfirm.com

CERTIFICATE OF COMPLIANCE

This resistance complies with the typeface requirements and type-volume limitations of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because:

This resistance has been prepared in a proportionally spaced typeface using Times New Roman in size 14 and contains 2,842 words, excluding the parts of the resistance exempted by Iowa R. App. P. 6.903(1)(g)(1).

Dated: January 15, 2021



MATTHEW M. CRAFT, AT0001713
**DUTTON, DANIELS, HINES,
KALKHOFF, COOK & SWANSON, P.L.C.**
3151 Brockway Rd.
PO Box 810
Waterloo, IA 50704
Ph: (319) 234-4471
Fax: (319) 234-8029
Email: mcraft@duttonfirm.com

CERTIFICATE OF FILING

The undersigned certifies that on the 15th day of January, 2021, the undersigned electronically filed this document pursuant to the Chapter 16 Rules pertaining to the use of the Electronic Document Management System.



Matthew M. Craft

CERTIFICATE OF SERVICE

On this 15th day of January, 2021, Shawn J. Walther and Amy M. Walther served Appellees' Resistance on all other parties to this appeal by e-filing the document on the Iowa Appellate EDMS.

Matthew M. Craft

MATTHEW M. CRAFT, AT0001713
**DUTTON, DANIELS, HINES,
KALKHOFF, COOK & SWANSON, P.L.C.**
3151 Brockway Rd.
PO Box 810
Waterloo, IA 50704
Ph: (319) 234-4471
Fax: (319) 234-8029
Email: mcraft@duttonfirm.com