IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0195

DANIELLE PUTMAN,

Appellant,

vs.

SHAWN J. WALTHER and AMY M. WALTHER

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE KELLY ANN LEKAR, JUDGE

APPELLANT'S FINAL BRIEF

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CERTIFICATE OF SERVICE

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II. Did the District Court err in finding the sellers were entitled to summary judgment on a buyer's claim for a violation of Iowa Code § 558A, Iowa's Real Estate Disclosure Act?

ROUTING STATEMENT

Danielle Putman recommends transfer of this case to court of appeals because it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

On October 25, 2018, Plaintiff/Appellant Danielle Putman (hereinafter "Putman") sued Shawn J. Walther and Amy M. Walther (hereinafter "the Walthers"), Sandy Stuber, individually and as real estate agent for REMAX Home Group, (hereinafter "Stuber") Michael Meany, individually as real estate agent for Sulentic Fischels (hereinafter "Meany") and Mike Bartlett Home Inspections (hereinafter "Bartlett") for violations of Iowa Code 558A, Iowa's Real Estate Disclosure Act, intentional and negligent misrepresentation. See Petition (App. 1-3). On November 30, 2018, Putman filed an Amended Petition in order to correctly name REMAX Home Group and Sulentic Fischels. See Amended Petition (App. 41-43). On March 15, 2019, a Trial Scheduling Order and Discovery Plan was filed. (App. 46-52). On March 22, 2019, an Order Setting Trial was filed that incorporated the Trial Scheduling Order and Discovery Plan setting Trial for January 7, 2020. (App. 53-57). The case proceeded through the discovery phase. Putman

responded to the Walthers' interrogatory requests and specifically named "representative from Magee Construction" as a potential expert witness.[1]

On November 1, 2019 and November 4, 2019, Meany and Stuber each moved for summary judgment arguing that Putman's failure to disclose a professional liability expert required summary judgment as to each of them. See Meany and Stuber Motions for Summary Judgment. On November 8, 2019, the Walthers moved for summary judgment arguing that Putman's failure to designate an expert witness concerning causation and damages entitled them to dismissal of all of Putman's claims as well. See the Walthers Motion for Summary Judgment. (App. 106-108). The Walthers adopted Meany and Stuber's Statement of Undisputed Material Facts as their own. (See the Walthers Statement of Undisputed Material Facts (App. 109-110). On November 22, 2019, Ms. Putman resisted each motion. See Resistance to Motion for Summary Judgment. (App. 111-120). On December 9, 2019, a hearing was held telephonically, but not reported.

[1] Although the interrogatory answer naming Magee Construction as a potential expert is not in the summary judgment record, Putman specifically named Magee Construction as a potential expert witness in her interrogatory answer to the Walthers and Meany acknowledged Magee was disclosed in discovery in the hearing on January 3, 2020, ***before the summary judgment ruling***. (App. 132-133). In addition, Putman referenced the Magee Construction estimate in her Resistance to Summary Judgment.

On January 3, 2020 a reported pretrial conference occurred. (App. 121). On the same day, the district court granted the motion for summary judgment as to all Defendants, finding that an expert opinion was required on the issues of causation and damages and because Putman did not timely designate or disclose any expert as to those issues, all claims made by her, including negligent misrepresentation, fraudulent misrepresentation, and violations of Chapter 558A were dismissed. See January 3, 2020 Order (App. 149-153). Putman timely filed her Notice of Appeal. On May 18, 2020, Putman moved to voluntarily dismiss Meany and Stuber from this appeal and proceed against the Walthers on her Iowa Code §558A claim only.

STATEMENT OF FACTS

On or about April 27, 2018, Putman purchased a house at 2502 West 8th Street, Waterloo, Iowa, from the Walthers. (App. 1). The real estate transaction involved two real estate agents, namely Stuber on behalf of the Walthers, and Meany on behalf of Putman. (App. 1). On February 8, 2018, as part of the real estate transaction, the Walthers provided Putman a Sellers Disclosure of Property Condition (hereinafter "Seller Disclosure Statement"). (App. 8-12).

The disclosure statement asked:

1. Basement/ Crawl Space/ Slab: Any known water, seepage or other problems? [The Walthers checked the box "**Yes**"].

> Describe: [The Walthers wrote, "**2010 sewer back up [&] SW wall seepage a few times**"]. (Emphasis Added)

22. Other items: Are you aware of any of the following:

> (5) Any known physical problems? (Example: settling, flooding, drainage or grading problems, ect.) [The Walthers checked the box "**No**"]. (Emphasis Added)

On or about June 29, 2018, Putman experienced water infiltration in the basement for the first time. (App. 13, 113). On July 16, 2018, a contractor from Magee Construction Company inspected Putman's home and authored an estimate dated July 19, 2018 (hereinafter "Magee estimate"). (App. 13-37). The Magee estimate included pictures of water damage and noted the following: (1) previous water infiltration in the SW corner which indicates a previous water infiltration ; (2) the floor of the SW corner bedroom raised off the concrete floor 2 ½ inches; (3) an existing basement window visible from the exterior in the SW corner behind mulch/dirt which showed a wall was built to channel water flow on the south side of the home; (4) an old drain line capped off and a clean out which were under the carpet and pad of the family room in the basement. (App. 13-37). The estimate further stated, "Water came in through the wall at the SW corner of the basement," and "I do not know what the south wall looks like behind the drywall, but it is obvious the infiltration of water/rain on June 29, 2018 which was over 2" according to the US Weather Service came through this wall." *Id.* Finally, Magee provided a

detailed estimated repair cost of $11,571.48 dollars does dollars need to be here. *Id.*

Putman again experienced water infiltration in the basement on August 6, 2018, September 4, 2018, September 19, 2018, and October 1, 2018. (App. 113). After the flooring and sheetrock were removed from the basement walls, Putman reported there were watermarks on the wall indicating water infiltration throughout the basement. (App. 114). Putman also was advised by neighbors that the Walthers had a sump pit and pump in the backyard which was removed prior to her purchase. (App. 113). On August 18, 2018, Putman obtained a "list of known complaints from the 2500 blk of W. 8th Street and the intersection of 8th St. W and Locke Street from the City of Waterloo (hereinafter "City of Waterloo report"). (App. 40). The City of Waterloo report showed the Walthers complained to city officials in 2010, 2012 and 2014 about street flooding and/or storm sewer back up. *Id.* In 2008, before the Walthers purchased the home, a complaint was made about "Basement backup. Main was surcharged, street flooded." *Id.*

On October 25, 2018, Putman sued the Walthers, Stuber, Meany and Bartlett for negligent misrepresentation, fraudulent misrepresentation and violations of Iowa Code § 558A. (App. 1-40). Putman alleged the Walthers failed to disclose the true condition of water infiltration in the SW corner wall

of the basement in good faith. In addition, Putman alleged the Walthers had a sump pit and pump in the backyard which they removed prior to the sale of the home to her and failed to disclose it. (App. 1-40). Attached to the original petition filed by Putman was the Magee estimate, a demand letter, the Seller Disclosure of Property Condition form, and the City of Waterloo report. (App. 4-40). On November 30, 2018, by amended petition, Putman corrected the names of Defendant Stuber and Meany, but did not change any substantive allegations against the Defendants. (App. 41-43). All Defendants answered and denied the allegations in the amended petition. (App. 44-45).

ARGUMENT

I. The District Court abused its discretion in excluding the Magee Construction estimate on the issue of causation and damages in its summary judgment analysis.

Preservation of Error

Putman preserved error by resisting the Walthers' motion for summary judgment. *See* Resistance to Motion for Summary Judgment (App. 111-120). The district court ruled on the Walthers' motion, adopting the Walthers' assertions. *See Young v. Iowa City Cmty. Sch. Dist*., 934 N.W.2d 595, 602 (Iowa 2019) (concluding error was preserved when issues were presented to and passed upon by the district court before they can be raised and decided on appeal).

Standard of Review

An appellate court probes a summary judgment ruling for legal error. *Seneca Waste Solutions, Inc. v. Sheafter Mfg. Co*., 791 N.W. 2d 407, 410-11 (Iowa 2010). It views the record in the light most favorable to the non-moving party. *Robinson v. Allied Prop. & Cas. Ins. Co*., 816 N.W.2d 398, 401 (Iowa 2012). To the extent this matter is a discovery dispute, a review of a district court's discovery ruling is for abuse of discretion. See *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009).

Merits

Iowa R. Civ. P. 1.500(2) provides:

(a) "In addition to the disclosures required by rule 1.500(1), a party must disclose to the other parties the identity of any witness the party may use at trial to present evidence under Iowa Rules of Evidence 5.702, 5.703, and 5.705."

The rules additionally provide:

(b) "Unless otherwise stipulated or ordered by the court, this disclosure must be accompanied by a written report – prepared and signed by the witness – ***if the witness is one retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony***." (Emphasis Added)

(c) "Unless otherwise stipulated or ordered by this court, if the witness is not required to provide a written report, this disclosure must state:

(1) The subject matter on which the witness is expected to present evidence under Iowa Rules of Evidence 5.702, 5.703, or 5.705.

(2) A summary of the facts and opinions to which the witness is expected to testify."

Iowa R. Civ. P. 1.500(2)(a)(b)(c).

Iowa R. Civ. P. 1.517(3)(a) provides:

> "If a party fails to provide information or identity of a witness as as required by rule 1.500, 1.503(4), or 1.508(3), the party is not allowed to use that information or witness to supply the evidence on a motion, at a hearing, or at a trial, unless the failure was ***substantially justified, or is harmless."*** (Emphasis Added).

The district court correctly found "expert testimony was required on the issues of causation and damages, because the cause of water damage to the house and the cost of repair are not common knowledge to a lay person." (App. 152) citing *Intlekofer v. Reitberry Rental Prop*., LLC, No. 18-2086m 2019 WL 3714835, at *3 (Iowa App. Aug. 7, 2019); *Doe v. Cent. Iowa Health Sys*., 766 N.W. 2d 787, 793 (Iowa 2009). Putman argued in her resistance to summary judgment that she disclosed witnesses and evidence in response to discovery requests which included the following: "***Magee Construction's report and estimate on cost to repair and observations about water filtration***; neighbors who can testify as to water in the basement; Putman who can testify about her experiences with water in the basement and; City of Waterloo employees." (Emphasis Added) (App. 152). The district court found, after

reviewing the record, the preceding witnesses mentioned in the resistance were not formally designated as an expert opinion or disclosed as experts in Plaintiff's discovery responses. *Id.*

The district court abused its discretion when it failed to consider the Magee estimate on the issue of causation and damages because it was clearly disclosed and did not require formal designation under Iowa R. Civ. P. 1.500(2)(b) or 1.508. To the extent Putman did not formally disclose the Magee estimate under Iowa R. Civ. P. 1.500(c), the error was harmless. Finally, the district court abused its discretion because it failed to find whether the failure to designate an expert was substantially justified or harmless. See Iowa R. Civ. P. 1.517(3).

A. The Magee Construction estimate was disclosed and did not require formal designation under Iowa R. Civ. P. 1.500(2)(b) or Iowa R. Civ. P. 1.508.

The district court's decision to disallow the Magee estimate and grant the Walthers' motion for summary judgment was an abuse of discretion, when the facts viewed in the light most favorable to Putman, shows the estimate was from an expert who was not retained and whose opinion was not acquired or developed in anticipation of litigation.

On October 25, 2018, over a year before trial, it is undisputed that Putman attached the Magee estimate to her original petition. (App. 13-37).

There was no evidence in the record that Magee was specifically retained as an expert nor did the facts, when viewed in the light most favorable to Putman, show that Magee's opinion was acquired or developed in anticipation of litigation.

Instead, the record reflects that on July 16, 2018, three months before Putman sued the Walthers, she contacted Magee Construction after experiencing water infiltration in her basement on June 29, 2018, *for the first time*. (App. 13, 113). A reasonable inference from this fact is that Putman contacted Magee 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. (App. at 13-37). In addition, there was no evidence that Magee was ever retained to provide such an opinion. Under this record, a formal designation with a written report under Iowa R. Civ. P. 1.500(2)(b)(1)-(6) was clearly not required.

In *Hansen v. Cent. Iowa Hosp. Corp*., 686 N.W.2d 476 (Iowa 2004), the Iowa Supreme Court reversed a district court decision to exclude evidence from a treating physician on the issue of causation because the plaintiff did not designate him as expert in accordance with Iowa Code § 668.11 or Iowa R. Civ. P. 1.508 in a professional liability case. The Iowa Supreme Court found that the district court erred in concluding that plaintiff's failure to

disclose her treating physician in interrogatory answers required exclusion of all opinion evidence that could not be the subject of lay testimony. *Id.* at 482.

In so holding, the Court found the "paramount criterion" in determining whether an expert opinion requires designation is whether the causation evidence, irrespective of whether technically expert opinion testimony, relates to facts and opinions arrived at by a physician in treating a patient or whether it represents expert opinion testimony formulated for purposes of issues in pending or anticipated litigation." *Id.*

The Court then more fully explored this "paramount criterion" in the context of Rule 125 in *Morris -Rosdail v. Schechinger*, 576 N.W.2d 609 (Iowa Ct. App. 1998) and found:

> "In *Morris-Rosdail*, a personal injury action, the district court granted a defense motion to exclude the testimony from two treating doctors regarding the plaintiff's need for future surgery and permanent impairment. The district court granted the motion because the plaintiff had failed to disclose the doctors' opinions in response to the defendant's interrogatory. The court of appeals first noted that rule 125 distinguishes between facts and opinions of doctors of experts derived prior to being retained as experts and those acquired or developed in anticipation of litigation or for trial. The court also noted that the rule does not preclude on expert from testifying to facts and opinions derived prior to being retained as an expert and for this reason treating physicians are generally not subject to rule 125. The court then recognized, that "the threshold question [is] whether the facts and opinions were formulated by a physician in treating a patient or whether they were formulated by a physician for purposes of the issues in pending or anticipated litigation." (internal citations omitted).

Hansen at 482-483.

In finding the treating physician testimony in *Hansen* was not subject to an Iowa Code §668.11 or Iowa R. Civ. P. 1.508 designation and disclosure, the Court found the application of the rule "does not necessarily depend on the label or role of the physician and hinges on the reason and time frame in which the underlying facts and opinions were acquired by the physician. *Id.* at 483 (quoting *Morris -Rosdail v. Schechinger*, 576 N.W.2d at 610. The Court further found that "a treating physician ordinarily focuses, while treating a patient, on purely medical questions rather than on the sorts of partially legal questions (such as causation or percentage of disability), which may become paramount in the context of a lawsuit." *Id.* at 481.

Similar to *Hansen*, the evidence viewed in the light most favorable to Putman, shows that the Magee estimate was not formulated for purposes of issues in pending or anticipated litigation. Rather, 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. Under these facts, the Magee estimate did not require formal designation under Iowa R. Civ. P. 1.500(2)(b) or Iowa Code §1.508. The *Hansen* decision makes clear that under these facts the district court abused its discretion in disallowing this evidence.

B. Putman complied with the substance of Iowa R. Civ. 1.500(2)(c) in disclosing the Magee Construction estimate one year before trial and to the extent it was not formally supplemented, the error was harmless.

The Magee estimate that was attached to Putman's original petition contained all of the information required in Iowa R. Civ. P. 1.500(2)(c). (App. 13-37). Specifically, the estimate attached to Putman's original petition contained the contractor's full name, address, telephone number, fax number, e-mail address, a detailed summary of his observations, photographs, and a reasonable repair cost. *Id.* Iowa R. Civ. P. 1.500(2)(d) states that a party must make a 1.500(2) disclosure in the sequence set in the trial scheduling order, which in this case was 210 days before trial. Putman more than complied with this mandate in providing the disclosure more than one year before trial and naming Magee Construction as a potential expert in responding to discovery requests propounded by the Walthers. To the extent, Putman did not provide a formal designation which provided the estimate and this same information again 210 days before trial, the Walthers were not prejudiced and the error was harmless.

Stuber's Memorandum in Support of Summary Judgment argued Putman was precluded from offering any expert opinion regarding causation and the reasonable cost of repairs, without acknowledging Putman had disclosed the Magee estimate one year before trial. In support of that

argument, Stuber referred the district court to *City of Riverside v. Metro Pavers, Inc.*, 2017 WL 2875687 *2-3 (Iowa Ct. App. July 6, 2017) (affirming a court's entry of summary judgment for failure by Plaintiff to have expert witness testimony to support the damage element of its claim).[2] *City of Riverside* is distinguishable from the facts of this case.

In *City of Riverside*, Riverside alleged Metro Pavers breached the parties' contract by improperly constructing a street. *Id.* at *2. The district court found that in order meet its burden of proof, Riverside was required to present evidence establishing Metro Pavers noncompliance with the design specifications called for by the contract. *Id.* The parties' discovery plan required Riverside to designate all expert witnesses by a date certain, prior to the trial date. *Id.* Riverside made no initial disclosure as required by Iowa R. Civ. P. 1.500 and did not designate any expert by the court-imposed deadline. *Id.* at *3. The only expert disclosure made by Riverside occurred one day prior to the hearing and well past the discovery deadline. The district court disallowed the expert testimony, refused to continue the case because it would prejudice the defendant and found Riverside could not provide a justifiable excuse for the delay. Id. at *4-5. Because Riverside's inability to provide

[2] The Walthers incorporated by reference Stuber's argument. See Walther's Memorandum in support of Summary Judgment. (App. 109-110).

expert testimony was fatal to its cause of action as a matter of law, the district granted summary judgment.

The Iowa Court of Appeals agreed with the court's ruling. *Id.* at *6. In reaching this decision the court found Riverside did not take any meaningful steps to prosecute the cause of action by (1) failing to make initial disclosures, (2) not designating an expert witness within the ample time provided by the discovery plan and did not request an extension of the deadline. The court found based on the summary judgment ruling the district court considered Riverside's request for a continuance and determine that alternative would be improper.

In determining the district court did not abuse its discretion in disallowing the late disclosure of an expert witness, the court found the district court in compliance with Rule 1.517(3)(a) because it provided Riverside an opportunity to be heard and determined Riverside had no justifiable excuse for waiting until one day before the summary judgment hearing to designate an expert and disallowed its expert-witness designation. Under these facts, the court did not find the district court abused its discretion. Id. at *8-9.

Unlike *City of Riverside*, Putman made an Iowa R. Civ. P. 1.500(2)(c) disclosure more than one year before trial and disclosed Magee as a potential expert in discovery responses. Unlike *City of Riverside*, in which Riverside

made no argument its expert opinion did not require a formal disclosure, Putman contends hers does not.

Any claim of surprise or prejudice by the Walthers that Magee may be called as an expert witness even though not formally designated as such under these facts is misleading. On January 3, 2019 2020, during the pre-trial conference which *was reported*, Meany acknowledged the Magee estimate was produced in discovery and did not argue it that it should be excluded at trial. (App. 132-133). Instead, Meany argued it should be limited to what was produced. (App. 132-133). At the hearing, the Walthers made no specific mention of excluding the Magee estimate.

Unlike *City of Riverside*, where the defendant was clearly prejudiced by the failure to disclose or designate an expert until one day prior the summary judgment hearing, no such prejudice occurred here. There is no evidence in the record that the Walthers ever sought a more complete discovery answer than what was disclosed in the interrogatory Putman provided on experts which named Magee, they never requested to take a deposition, nor did they ever file a motion to compel. Instead, the Walthers waited until after the expert disclosure deadline passed and argued in summary judgment that Putman failed to disclose any expert on causation and

damages when they were clearly aware of the Magee estimate and that Magee may be called as a potential expert.

Also, unlike *City of Riverside*, there is no record to suggest the district court allowed Putman the opportunity to be heard on any argument she did not comply with the discovery plan or that the district court considered other alternatives in compliance with Iowa R. Civ. 1.517(3)(a) for a failure to comply with the discovery plan. Instead, the district court's short paragraph on sanctions focused on whether Putman's claim ever had a basis in law or in fact when she filed it, not any analysis of whether an alleged failure to formally designate an expert witness by the court-imposed deadline was substantially justified or harmless.

Under the facts and record in this case, the district court clearly abused its discretion in disallowing the Magee estimate in its causation and damages summary judgment analysis and granting the Walthers' motion for summary judgment.

II. The Magee Construction estimate shows a genuine issue of material fact on the issues of causation and damages for a violation of Iowa Code § 558A, Iowa's Real Estate Disclosure Act.

Preservation of Error

Putman preserved error by resisting the Walthers' motion for summary

judgment. *See* Resistance to Motion for Summary Judgment (App. 111-120). The district court ruled on the Walthers' motion, adopting the Walthers' assertions. *See Young v. Iowa City Cmty. Sch. Dist*., 934 N.W.2d 595, 602 (Iowa 2019) (concluding error was preserved when issues were presented to and passed upon by the district court before they can be raised and decided on appeal).

Standard of Review

An appellate court probes a summary judgment ruling for legal error. *Seneca Waste Solutions, Inc. v. Sheafter Mfg. Co*., 791 N.W. 2d 407, 410-11 (Iowa 2010). It views the record in the light most favorable to the non-moving party. *Robinson v. Allied Prop. & Cas. Ins. Co*., 816 N.W.2d 398, 401 (Iowa 2012).

Merits

Summary Judgment is appropriate if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, show that there is no genuine issue as to any material fact that the moving party is entitled to a judgment as a matter of law. *K & W Elec., Inc. v. State*, 712 N.W.2d 107, 112 (Iowa 2006). The Court must view the record in the light most favorable to the nonmoving party, and must afford the nonmoving party every legitimate inference reasonably deduced from the record.

Slaughter v. Des Moines Univ. Coll. of Osteopathic Med., 925 N.W.2d 793, 819 (Iowa 2019).

In order to successfully resist a motion for summary judgment, the nonmoving party may not rest upon mere allegations or denials in his pleading, but must set forth specific facts showing there is a genuine issue by affidavits or otherwise. Iowa R. Civ. P. 1.981(5); *see also Slaughter* at 808, *quoting Bauer v. Stern Fin. Co*., 169 N.W.2d 850, 853 (Iowa 1969).

Summary judgment is appropriate "when the party can demonstrate that the proof of the other party is deficient as to a material element of that party's case." *Thompson v. Embassy Rehab. and Care Center*, 604 N.W.2d 643, 646 (Iowa 2000). See also *Welte v. Bello*, 482 N.W.2d 437, 440 (Iowa 1992) (finding summary judgment is appropriate if expert testimony is required to establish general negligence or foundational facts and such testimony is unavailable).

A. The Walthers failed to disclose the condition of the water infiltration problem in the Southwest corner wall of the basement in good faith in violation of Iowa Code 558A, Iowa's Real Estate Disclosure Act.

Iowa's Real Estate Disclosure Act requires persons interested in transferring real estate to deliver a written disclosure statement to prospective buyers. See Iowa Code § 558A.2. The disclosure must include "information relating to the condition and important characteristics of the property and

structures located on the property." Iowa Code § 558A.4(1)(a). The seller has a duty to comply with this requirement in good faith. Iowa Code § 558A.3(1). "A person who violates this chapter shall be liable to a transferee for the amount of actual damages suffered by the transferee." Iowa Code § 558A.6.

The Walthers' disclosure statement asked the following:

> 2. Basement/ Crawl Space/ Slab: Any known water, seepage or other problems? [The Walthers checked the box "**Yes**"].
> Describe: [The Walthers wrote, "**2010 sewer back up [&] SW wall seepage a few times**"]. (Emphasis Added)
>
> 22. Other items: Are you aware of any of the following:
>
> (5) Any known physical problems? (Example: settling, flooding, drainage or grading problems, ect.) [The Walthers checked the box "**No**"]. (Emphasis Added)

(App. 8-12).

While the Walthers denied any actual knowledge of water infiltration in the SW corner of the basement other than "seepage a few times," the facts, when viewed in the light most favorable to Putman do not support this view.

The record evidence reveals the following:

1. 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 dollars in damage*. (App. 13-37).

2. Putman experienced similar water infiltration in her basement on August 6, 2018, September 4, 2018, September 19, 2018, and October 1, 2018. (App. 113).

3. 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. (App. 113).

These facts reveal direct and circumstantial evidence that the Walthers' disclosure of seepage a few times in the SW was misleading and not in good faith. Based on this evidence, certainly a reasonable factfinder could conclude the problem in the SW corner wall was not limited to seepage and the Walthers were aware of a far more serious problem and failed to disclose the basement wall's true condition.

In *Lowe v. Myers*, 2010 LEXIS 1120 *1-2 (Iowa Ct. App. March 26, 2010), an unpublished decision by the Iowa Court of Appeals, the buyers made a similar argument regarding the failure of a seller to disclose the "true condition" of a water infiltration in a basement as required by Iowa Code § 558A. The Iowa Court of Appeals found the argument unpersuasive and affirmed the district court which denied the buyers claim for a violation of Iowa Code §558A. *Lowe* is distinguishable from the facts of this case.

In *Lowe*, the district court found that substantial evidence supported the denial of the claim for recovery of water problems in the basement because substantial evidence showed that when the sellers lived in the home the water problem was limited to the NE corner, *which was disclosed to the buyers*.

Lowe, 2010 LEXIS 1120, at *1. (Emphasis Added). In *Lowe*, the seller disclosure form stated the following:

> "1. BASEMENT/FOUNDATION: Has there been known water or other problems? Yes (X**). . . NE corner. There was no gutter. Have wtr proof walls and put up gutter**.
>
> 21. Other items: Are you the Seller aware of any of the following?
> 4. Physical problems such as: Settling, flooding, drainage or grading problems? **Yes (X). See No. 1 above and 21(4). Some settling of N. wall. Reinforced N. wall with new wall & bracing**."

Lowe, 2010 LEXIS 1120 at *7-8. (Emphasis Added).

The buyers in *Lowe* argued the disclosure statement was not accurate because the sellers had actual knowledge of water problems elsewhere in the basement, not just the NE corner. *Id.* Notably, the sellers in *Lowe*, did not use any language to minimize the water problem such as it occurring only "a few times," and provided additional information to the buyers about efforts by them to resolve the problem through structural improvements both in the disclosure and in response to e-mail correspondence. *Id.*

Unlike *Lowe*, the facts viewed in the light most favorable to Putman, show the Walthers had actual knowledge of a far more serious water infiltration problem by making alterations in order to reduce and/or prevent damage to the basement. Unlike *Lowe*, the Walthers did not disclose any efforts to prevent and/or reduce the water infiltration problem, even if it was

limited to seepage, including any structural improvements or efforts to direct water away from the foundation which Magee Construction clearly found.

After inspecting Putman's home on June 29th, Magee found the floor of the SW corner bedroom raised off the concrete floor 2 ½ inches which indicated a previous water infiltration from the exterior; (3) an existing basement window visible from the exterior in the SW corner behind mulch/dirt which showed a wall was built to channel water flow on the south side of the home; (4) an old drain line capped off and a clean out which were under the carpet pad of the family room in the basement. These facts undoubtedly show an effort by the Walthers to reduce and/or prevent water infiltration. This evidence when viewed in the light most favorable to Putman, shows a water infiltration problem in the SW corner wall and alterations to prevent damage that is not consistent with water seepage. In viewing these facts in the light most favorable to Putman, there is clearly a genuine issue of material fact as to whether the disclosure of seepage a few times in the SW corner of the basement was in good faith.

B. In the alternative, the Walthers failed to exercise ordinary care in obtaining information about the scope of the water infiltration problem in the SW corner wall of the basement in violation of Iowa Code 558A, Iowa's Real Estate Disclosure Act.

Even if sellers disclose information relating to the condition and important characteristics of the property and structures in good faith, a seller

may be held liable if an error, inaccuracy or omission occurred and a seller fails to exercise ordinary care in obtaining the information. Iowa Code § 558A.6(1). If the district court accepts the Walthers' contention they had no actual knowledge of a more serious water infiltration problem in the SW corner than seepage a few times in its summary judgment analysis, Putman may still prevail in summary judgment if the facts, when viewed in the light most favorable to Putman, show the Walthers failed to exercise ordinary care in obtaining the information disclosed.[3]

In *Jensen v. Sattler*, 696 N.W.2d 582, 586 (Iowa 2005), the Iowa Supreme Court found the absence of actual knowledge by a seller in an Iowa Code § 558A claim was not dispositive. In *Sattler*, two problems were disclosed by the seller in the disclosure form: "[A] crack in the front wall that caused water to leak into the basement 'ONE TIME ONLY!' and (2) a faulty master shower valve." *Id.* Approximately four years later, the buyer discovered problems with the crack in the basement which the sellers had disclosed. The crack had widened and caused water to seep in the basement. The buyer then excavated around the crack and found the drainage tile around

[3] The Court of Appeals noted in *Lowe*, that the buyers did not argue the sellers had failed to exercise ordinary care in disclosing the condition of the basement in the disclosure statement so it did not decide the issue. *Lowe*, 2010 LEXIS 1120 at *8-9, footnote 1.

the foundation was clogged with dirt, was only three inches in diameter and not surrounded by gravel. *Id.* at 584. The buyer sued the seller arguing the seller failed to disclose defects pursuant to Iowa Code § 558A. The district court held proof of fraud was required for a buyer to recover under Iowa Code § 558A and the Iowa Supreme Court reversed holding that it was sufficient if the buyer shows the seller failed to exercise ordinary care in obtaining the information sought. *Id*. at 586. The case was remanded for a trial on the buyers 558A claim under this theory.

The facts when viewed in the light most favorable to Putman show that even if the Walthers' knowledge of water infiltration was limited to seepage, they failed to exercise ordinary care in obtaining information relevant to a seepage problem. First, after moving in, Putman almost immediately discovered a much graver problem than what was disclosed. In addition, as was discussed above, the Magee estimate showed the cause of the water infiltration in the SW corner wall of the basement was *obvious*, and significant alterations were made to the condition and important characteristics of the property to reduce and/or prevent the defect. Magee observed the following: (1) the floor of the SW corner bedroom raised off the concrete floor 2 ½ inches which indicated a previous water infiltration from the exteriors; (2) an existing basement window visible from the exterior in the SW corner behind

mulch/dirt which showed a wall was built to channel water flow on the south side of the home; (3) and an old drain line capped off and a clean out which were under the carpet pad of the family room in the basement.

These facts when viewed in the light most favorable to Putman show that even if the Walthers did not have actual knowledge of a more serious water infiltration in the SW corner wall or knowledge of the alterations to the exterior and interior to prevent and/or reduce the problem, they clearly failed to exercise ordinary care in obtaining information to put in the disclosure when Magee opined the water problem was obvious and found the interior and exterior alterations so easily.

If the Walthers had exercised ordinary care in obtaining information to disclose about seepage in the SW corner wall, they would have discovered the structural improvements and alterations made to direct water flow away from the foundation, the hidden window and the floor being raised 2 ½ inches of the ground which indicated a previous water infiltration from the exterior. If the Walthers had discovered these material alterations to the basement, they would clearly be under a duty to disclose them. See *Stone v. Ford*, 2018 WL 2084849 *9 (Iowa Ct. App. May 2, 2018). (holding that Iowa requires the transferor to disclose information material to the condition of the property). They failed to do so.

The case against the Walthers on the failure to exercise ordinary care is even more robust with Putman's own observations on water infiltration, the numerous instances of flooding that occurred subsequent to the purchase of home after Magee inspected, the City of Waterloo complaint report on flooding in the neighborhood, including complaints made by the Walthers, and testimony from a neighbor about a sump pump and pit and removal in the backyard. A reasonable inference from this evidence is that the Walthers were generally aware of a more serious water infiltration problem and made improvements to attempt to reduce it by installing a sump pump and bit in the back yard. It is simply unfathomable that the Walthers would have taken this extreme step and not discovered the alterations in the basement to prevent and/or reduce the water problem. A reasonable reasonable inference from this evidence is the Walthers failed to exercise ordinary care in obtaining the information about water infiltration that the Magee estimate so readily discovered and Putman experienced almost immediately after the purchase of the home.

C. There is a probability or likelihood of a causal connection between the Walthers nondisclosure of the true condition of water infiltration in the SW corner wall of the basement and Putman's damages.

"The rule is that expert testimony indicating a probability or likelihood of a causal connection is sufficient to generate a question on causation."

Hansen v. Cent. Iowa Hosp. Corp. 686 N.W.2d 476, 484 (Iowa 2004) quoting, *Winter v. Honeggers' & Co*, 215 N.W. 2d 316, 323 (Iowa 1974). In this case, the Magee estimate clearly states, "Water came in through the wall at the SW corner of the basement," and "I do not know what the south wall looks like behind the drywall, *but it is obvious the infiltration of water /rain on June 29, 2018* which was over 2" according to the US Weather Service came through this wall." (App. 13). Likewise, the Magee estimate provided a damage estimate to repair the basement from the water which infiltrated from the SW corner. *Id.* This evidence and the physical alterations to the basement to raise the basement floor and the hidden wall which directed water away from the south side of the property, when viewed in the light most favorable to Putman, reveals more than a likelihood or probability that water infiltration in the basement on June 29th came from the SW corner as did subsequent water infiltration that occurred. All of this evidence, when viewed in the light most favorable to Putman, shows a significant water infiltration problem in the SW corner wall of the basement that was not limited to "seepage a few times."

In addition, these facts when viewed in the light most favorable to Putman, show the evidence of water infiltration in the SW corner as reported by Putman and diagnosed by Magee was the proximate cause of the $11,571.48 dollars of damage from the rain event on June 29, 2018. In

addition, the district court correctly found that other personal property damage evidence as a result of water infiltration from the SW corner could be generated by Putman herself. (App. 152).

CONCLUSION

The district court abused its discretion in excluding the Magee estimate in its summary judgment analysis by (1) finding it was not timely disclosed and designated; (2) not providing any opportunity for Putman to be heard on the failure of her alleged untimely disclosure in compliance with Iowa R. Civ. P. 1.517(3)(a); (3) not finding whether the alleged failure to disclose was substantially justified or harmless. To the extent the Magee estimate was not formally designated, the error was harmless.

As a result, the district court erred in finding Putman's Iowa Code § 558A claim was subject to summary disposition for failure to designate or disclose experts on causation and damages. The facts when reviewed in the light most favorable to Putman, show the Walthers nondisclosure of the true condition of the SW corner wall of the basement and/or the failure to exercise ordinary care in obtaining information about the true condition of SW corner wall was the proximate cause of Putman's damages and are violations of Iowa Code § 558A, Iowa's Real Estate Disclosure Act.

The decision of the district court granting summary judgment to the Walthers should be reversed.

REQUEST FOR ORAL ARGUMENT

Putman requests oral argument.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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