IN THE SUPREME COURT OF IOWA

NO. 19-1724
Pottawattamie County No. CVCV115108

DAVID BUBOLTZ and DONA REECE,
Plaintiffs-Appellants/Cross-Appellees,

v.

PATRICIA BIRUSINGH, Individually and in her capacity as Co-Executor of The Estate of Cletis C. Ireland, and KUMARI DURICK,
Defendants-Appellees'/Cross-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR POTTAWATTAMIE COUNTY ORDERS DATED AUGUST 7 AND DURING TRIAL ENDING SEPTEMBER 13, 2019
Honorable Craig Dresimeier, Judge

APPELLANTS' BRIEF

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TABLE OF CONTENTS

PAGE

TABLE OF AUTHORITIES

Cases — Pages

OTHER AUTHORITIES

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. DID THE DISTRICT COURT ERR FAILING TO SUBMIT PLAINTIFFS' CLAIM FOR INTENTIONAL INTERFERENCE WITH INHERITANCE?

Bronner v. Randall, 867 N.W.2d 195 (Iowa App. 2015)

Frohwein v. Haesemeyer, 264 N.W.2d 792, 795 (Iowa 1978)

Huffey v. Lea, 491 N.W.2d 518 (Iowa 1992)

Matter of Estate of Workman, 903 N.W.2d 170, 175 (Iowa 2017)

Meylor v. Brown, 281 N.W.2d 632, 634 (Iowa 1979)

Restatement (Second) of Torts, §774B (1979)

Restatement (Second) of Torts, §766B (1979)

Restatement (Second) of Torts, §8A (1979)

Restatement (Second) of Torts § 766 (1979)

Lindberg v. U.S., 164 F.3d 1312, 99-1 U.S. Tax Cas. (CCH) P 60334, 83 A.F.T.R.2d 99-444 (10th Cir. 1999)

Sull v. Kaim, 172 Ohio App. 3d 297, 2007-Ohio-3269, 874 N.E.2d 865 (8th Dist. Cuyahoga County 2007)

In re Marshall, 275 B.R. 5 (C.D. Cal. 2002)

Wickert v. Burggraf, 214 Wis. 2d 426, 570 N.W.2d 889 (Ct. App. 1997)

30 Real Prop. Probate & Trust Journal, 325

Hoskinson v. City of Iowa City, 621 N.W.2d 425, 430 (Iowa 2001)

Poulson v. Russell, 300 N.W.2d 289, 294 (Iowa 1981)

In re Estate of Bowman, 898 N.W.2d 202 (Iowa App. 2017)

Matter of Estate of Erickson, 922 N.W.2d 105 (Iowa App. 2018)

Cich v. McLeish, 928 N.W.2d 152 (Iowa App. 2019)

Estate of Arnold v. Arnold, 938 N.W.2d 720, *4 (Iowa App. 2019)

Matter of Estate of Kline, 2019 WL 6358421 (Iowa App. 2019)

Plimpton v. Gerrard, 668 A.2d 882, 885–86 (Me. 1995)

Cont'l Research, Inc. v. Cruttenden, Podesta & Miller, 222 F. Supp. 190, 199 (D. Minn. 1963)

Randol v. Roe Enterprises, Inc., 524 N.W.2d 414, 415–16 (Iowa 1994)

ROUTING STATEMENT

The Appellants strongly urge the Supreme Court of Iowa to retain this case pursuant to Iowa R. App. P. 6.1101(2)(b), (c), (d), and (f). As detailed in the Brief below, this case involves application of the specific elements of claims for intentional interference with inheritance. Because of a mistaken reliance on dicta from an aberrational Iowa Court of Appeals' decision, Iowa law is currently at odds with the Restatement and outside the accepted mainstream of American law on this issue. After the *Frohwein* decision, Iowa had an opportunity to lead the nation as the Supreme Court of Iowa was a pioneering legal body recognizing an essential legal issue in American tort law that many others subsequently followed. Unfortunately, as a result of the aberrational case, Iowa has veered off the path of established law in this area. A path no other state has elected to follow. This Court has the opportunity to right that course and secure Iowa's well-deserved position as a leader in this area of the law. The Supreme Court of Iowa has not weighed in on the analysis for almost three decades and fundamental justice demands it do so now.

More specifically, this case presents the Iowa Supreme Court with the opportunity to clarify the controlling law on claims for intentional interference with inheritance. Unfortunately, through a single misapplied Iowa Court of

Appeals' decision, Trial Courts and litigants have been improperly instructing juries, and have imposed a "knowledge" element in this area of law that is erroneous and prejudicial. The Restatement is clear and direct, and does **not** contemplate a "knowledge" element:

> *One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability for the loss of the inheritance or gift.*

Restatement (Second) of Torts, §774B (1979).

In applying/evaluating claims of intentional interference with inheritance, Trial Courts consistently rely on a five-element test that was introduced by the Iowa Court of Appeals in the unpublished case of *Bronner v. Randall*, 867 N.W.2d 195 (Iowa App. 2015). Specifically, this test mandates a plaintiff prove, as an element of damage, that a defendant had actual knowledge of the plaintiff's expected inheritance. That five-element test was not relevant to the issues in that appeal and, as the "law of the case" inadvertently became the "law of the state." The problem: this five-element test was an inaccurate and inconsistent amalgamation of several different Restatement (Second) of Torts sections.

Requiring proof of a defendant's express knowledge of a plaintiff's expected inheritance has never been endorsed by the Supreme Court of Iowa,

is at odds with Restatement, has not been adopted by a single other state, and has harmed litigants (including the Plaintiffs in this case). Despite these issues, the five-element test has been followed by District Courts and in subsequent dicta in several Court of Appeals' Opinions, although the elements of the claims were not the direct focus of any. Iowa currently does not have a uniform instruction on claims for intentional interference with inheritance and would greatly benefit from the Iowa Supreme Court's guidance and direction. Reformation of the current process by the Supreme Court of Iowa is required.

STATEMENT OF THE CASE

Nature of the Case. The Defendants, in a Machiavellian plot, advantageously ingratiated themselves into the life of Cletis Ireland, a 90-year-old elderly and socially isolated woman who owned significant farmland in Griswold, Iowa. In determining Ms. Ireland, who had never been married, was a perfect "mark," the Defendant made several promises, preying on her vulnerabilities, in an effort to get her agree to a quid-pro-quo whereby they would receive her legacy family farm, money, and personal property upon her death. This resulted in the disinheritance of the farm's long-time tenant farmer and Ms. Ireland's closest relative. As a result, the Plaintiffs filed this

lawsuit to set aside the Will obtained via the Defendants' undue influence as well as claim for intentional interference with inheritance. (Petition)

The issue in this appeal challenges the burden of proof required in an intentional interference with inheritance case in Iowa. The current burden, relied on by District Courts and litigants, is a five-part test that is unfortunately **inaccurate**.

In 1978, the Supreme Court of Iowa first recognized the existence of an independent cause of action for the wrongful interference with the bequest. *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795 (Iowa 1978). Later, the Supreme Court of Iowa decided the seminal case *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992) and expressly adopted the corresponding Restatement section. The Supreme Court of Iowa has not been heard on this cause of action in the subsequent eighteen (28) years. The Court did not detail the specific elements of proof in either case.

In 2015, the Court of Appeals, in an unpublished decision, considered the case of *Bronner v. Randall* that involved several areas of claimed error associated with a claim for interference with investment account beneficiary designations. *Bronner*, 867 N.W.2d 195 (Iowa App. 2015). It did **not** involve a challenge to the elements of the claim, nor seek announcement of the same.

Therein, the Court of Appeals, recited the **uncontested** jury instructions (and thus the "law of the case") that were submitted to the jury on tortious interference with expectation. *Id.* At *9. One of these required elements was proof "The defendant or defendants knew of the expectation [of inheritance of the investment account upon death of account holder]." *Id.* More simply put, the plaintiff, under the jury instructions of that case was required to prove the defendant knew of the plaintiff's expected inheritance in order to have interfered with it under the law.

Regrettably, the ratio decidendi of *Bronner* became the law of the State of Iowa by complete accident. The Court of Appeals did not cite any attendant legal authority in support of the given jury instructions, it merely recited them as they were given in the underlying case. The Restatement governing interference with inheritance does not require specific knowledge:

> *One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability for the loss of the inheritance or gift.*

Restatement (Second) of Torts, §774B (1979).

Moreover, not a single other state recognizing this cause of action has required actual knowledge as a specific element upon which to instruct the jury.

The Pottawattamie District Court in this case applied these legally unsupported and flawed elements and decided that Defendants were entitled to partial summary judgment, thus eliminating Plaintiffs' claim for intentional interference with inheritance. (Order Re: Summary Judgment) This decision was based solely on the District Court's conclusion that Plaintiffs' failed to present sufficient evidence that Defendants' knew of their expected inheritance. (Order Re: Summary Judgment)

Relevant Events of Prior Proceedings. On August 29, 2016, the Plaintiffs filed this lawsuit claiming, inter alia, Intentional Interference with Inheritance against the Defendants. (App. 11)

Approximately one month before the start of trial, the Court entered an Order Re: Summary Judgment granting partial summary judgment against Plaintiffs' claim for intentional interference with inheritance. (App. 240) Therein, the Court relied solely on the "knowledge" requirement, the second element of the *Bronner* test in deciding that there is no "evidence to support the idea that Defendants knew of any prior will existing, let alone the Plaintiffs were both named in the will." (App. 243)

At the pretrial conference, the Plaintiffs made it clear to the Court and litigants that they intended to pursue the claim of intentional interference with

inheritance and ask the Court to ultimately reconsider its partial summary judgment ruling. (App. 434, 450) At and during trial, the Plaintiffs did just that. (App. 434-452)

On the final day of trial, the parties made an extensive record on this issue. (App. 434-452) The Plaintiffs filed a specific proposed jury instruction on this claim (mirroring the elements as outlined by the Restatement) and filed a detailed Brief with the District Court. (App. 245-259) The Court denied the Plaintiffs' request, and never submitted the Plaintiffs' claim for intentional interference with inheritance to the jury. (App. 451-452) In support thereof, the Court again asserted that it believed the "knowledge" element was a mandatory part of intentional interference with inheritance claims. (App. 451-452)("This Court does believe there has to be some knowledge by the Defendants of an inheritance…I'm not changing my decision in regards to the ruling in regards to summary judgment")

Disposition of the Case in the District Court. The District Court ultimately declined to present the Plaintiffs' claim for intentional interference with inheritance to the jury for its consideration. (App. 452) The Plaintiffs' claim for undue influence regarding Cletis Ireland's 2015 Will was submitted

to the jury and, after an abbreviated deliberations, the jury returned a unanimous verdict in Plaintiffs' favor. (Form of Verdict)

STATEMENT OF THE FACTS

Cletis Ireland was the owner of a legacy family farm in Cass County, Iowa. (App. 8) On April 9, 2001, Cletis executed a Will naming Plaintiffs as beneficiaries of that farm. (App. 280-281) This was not received as a surprise because Cletis had, on multiple occasions, told Plaintiffs they were going to inherit the farm. Dona (Maertens) Reece was the eldest daughter of Cletis' closest relative, Edith Mae Maertens, who unfortunately passed prior to Cletis. (App. 427, 429; Tr. 393-395, 407-408) David had been farming Cletis' family farm for almost two decades and was as personally close to Cletis as anyone. (Tr. 404-407)

Things all started to change in or around 2013 when the Defendants inserted themselves into Cletis' life. (Tr. 113) Sometime in 2013, well after he had retired and without an active/valid license to practice medicine, Defendant Birusingh's husband, Kris Birusingh, went to Cletis' home and provided her with medical care. (Tr. 113-114) Over the course of the next several years, Defendants started to get more and more involved in Cletis'

life, and spent significant time assisting her and at her home. (Tr. 115-116, 137)

In and around that time, Cletis lost her driver's license and was very worried and upset about it. (App. 367, Tr. 313) The Defendants made certain promises to Cletis, including that they would help her get her license back. (Tr. 313) More, the Defendants promised to take care of Cletis after she lost her license, and that she would never have to leave her farm, and that she would never have to go into a nursing home-all if she would give them her farm. (App. 413-14, 415, 421, 425, 431) In very compelling testimony, Cletis' long time neighbor, Kent Pierson, confirmed the promises the Defendants made in exchange for Cletis' commitment to leave them the farm when she died. (App. 421, 425)

Beginning sometime in 2014, a process was initiated whereby Cletis would ultimately sign a new Will on June 3, 2015. (App. 278-279) The record on the details of this process, including when it took place, where it took place, and who all was involved is intentionally muddled by Defendants. (App. 352-363) The various stories told by the lawyer, James Sulhoff, and the Defendants, were fluid up to, and throughout, the trial. (App. 352-363)

While the details of the process remain cryptic, it does appear that on November 25, 2014, lawyer James Sulhoff sent an estate planning document to Cletis Ireland at her **home**. (App. 286, 352, 358) In the letter accompanying the unknown "Will," Mr. Sulhoff writes:

> *Enclosed find a copy of the Will I prepared for you. I apologize for not getting this to you much sooner but it was among some papers and overlooked.*
>
> *Let us know if this is what you want. If it is satisfactory, you will need to sign the original and, if necessary, I will bring it down to you to sign.*

(App. 286)

The remainder of Sulhoff's client file includes multiple versions of amended Wills, several versions of the 2001 Will with handwriting on them, and a document designated "signed copy" that Mr. Sulhoff indicated would be a photocopy of the actual Will that was signed on June 3, 2015. (App. 317-320; Ex. G, pp. 297-298) The problem is that the "signed copy" of the 2015 Will allegedly retained and housed by Attorney Sulhoff in his office is **not** the same as the 2015 Will that was ultimately admitted to probate. (App. 353-354) Attorney Sulhoff's only explanation for the disparity and his inaccurate testimony was to blame his staff members. (App. 354)

These documents raise many more questions than they do provide answers, and suggest, at the least, that Cletis was consulting with someone in

reviewing these documents and making notes on them. (App. 352-360) Mr. Sulhoff was unable to properly account for the various versions, but denied being the person with whom Cletis was consulting and denied being present when the handwriting took place. (App. 319-320, 358)

Mr. Sulhoff further testified that on February 13, 2015 he "dropped off a Will for her to put some writing on," and then on the 14th he picked it up. (App. 325) Mr. Sulhoff was unable to identify what document was dropped off, what handwriting was put on the document, and what document he picked up. (App. 325)

Mr. Sulhoff also testified that, on June 3, 2015, he went out and saw Cletis in the Griswold Nursing Home, and she executed the final version of the Will that was submitted to probate. (App. 325, Tr. 81) That June 3, 2015 Will provided that Defendant Kumari Durick would inherit Cletis' family legacy farm; Defendant Patricia Birusingh would inherit the vast majority of her money and personal assets. (App. 278=279)

To Plaintiffs' amazement, Mr. Sulhoff testified that he garnered a "clear understanding" of what Cletis wanted to do with her estate from a specific version of the 2001 Will that Cletis wrote on. (App. 284-285, 342-343) The handwriting on this Will is anything but clear in that it identifies

multiple potential beneficiaries and contains several express questions ("?") (App. 284-285) Mr. Sulhoff testified as follows:

Q: *Page 229, this is the Will you claim you picked up with the handwriting in February of 2015; correct?*

A: *That is Cletis's handwriting.*

Q: *And you believe its clear who she wanted her farm to go to?*

A: *Yes.*

Q: *Under farm real estate it says, "I think Kumari or Patti or KAB," which is circled. "KAB" is crossed out and there's a question mark. "Kumari or and Dan?" That's clear to you who she wanted her farm to go to?*

A: *The—After discussing it with her. This is when she told me that Patti told her she did not want it.*

Q: *So she would have had a discussion with Patti about this?*

A: *At some point she indicated to Patti that she wanted to give her the farm, and Patti said, "No. I do not want it."*

(App. 359-360)

The 2015 Will that was ultimately submitted to the probate court also raised additional issues. (App. 355-358) Notably, the Will identifies Defendant Birusingh as a "relative," when she is not in any way related to Cletis Ireland. (App. 355) Attorney Sulhoff testified that Cletis told him that "[Defendant Birusingh] was a cousin in some way." (App. 355) Moreover,

the Will improperly spells Defendant Kumari Durick's name. (App. 357-358)

While Mr. Sulhoff was unable to meaningfully provide any details of the process that resulted in the new Will, he did testify that Cletis told him that she and Defendant Birusingh discussed changes in the disposition of Cletis' property. (App. 340) For her part, Defendant Birusingh **admits** to having had discussions with Cletis about inheritance. (App. 366) Moreover, while Mr. Sulhoff denies recollection of any discussions or meeting with Defendant Birusingh, she expressly testified that she went to Sulhoff's office to discuss the Will and, **despite Sulhoff's objection to her attendance**, insisted on discussing Cletis' estate planning with him at one such meeting in March of 2015. (App. 378-380, 381-383, 403-404) Defendant Durick admits she also had discussions about Cletis, her farm, and her estate planning with her husband Dan (a farmer) and Defendant Birusingh. (App. 402-406)

After probate was initiated, Attorney Sulhoff had separate and bizarre discussions with the Plaintiffs. (App. 418) In meeting with Plaintiff Buboltz, Sulhoff, discussing the new Will, classified it as "Dirty and it stinks." (App. 418) In a subsequent conversation with Plaintiff Reece,

Sulhoff told her that he would be happy to assist her in contesting the 2015 Will. (App. 432)

APPELLANTS' ARGUMENTS

I. THE DISTRICT COURT ERRED IN FAILING TO SUBMIT PLAINTIFFS' CLAIM OF INTENTIAONL INTERFERENCE WITH INHERITENCE.

SCOPE OF REVIEW/PRESERVATION OF ERROR

The Supreme Court reviews summary judgment rulings for corrections of errors at law. *Matter of Estate of Workman*, 903 N.W.2d 170, 175 (Iowa 2017). In reviewing a grant of a summary judgment motion, the Supreme Court determines whether a material fact exists and whether the law was correctly applied. *Meylor v. Brown*, 281 N.W.2d 632, 634 (Iowa 1979) (citing *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795-96 (Iowa 1978)). The Court will reverse the grant of summary judgment if it appears from the record an **unresolved** issue of material fact. *Id.*

This issue was presented to the Court, later asserted by oral motion during trial and ultimately determined by the District Court. Error was preserved. (Tr. 481-499)

A. The District Court Erred in Concluding that Plaintiffs were Required to Prove Defendants' Knowledge of their Expected Inheritance.

Argument

The District Court, in granting partial summary judgment, concluded that Plaintiffs were required to show that Defendants knew of Plaintiffs' expected inheritance from Cletis. (Order Re Summary Judgment) In ultimately refusing to alter its ruling on this issue, the District Court stated: "This Court does believe there has to be some **knowledge** by the Defendants of an inheritance." (App. 452)(emphasis added)

Plaintiffs disagree and, as detailed in argument to the Court, asserted that "knowledge" is an element of this claim. (App. 437) Plaintiffs believe analysis of the claim's evolution in Iowa, together with a reading of the relevant Restatement sections and outside authorities, totally supports their position.

Supreme Court of Iowa Perspective:

The Supreme Court of Iowa first recognized a claim for wrongful interference with a bequest in 1978 with the *Frohwein* case. *Frohwein v. Haesmeyer*, 264 N.W.2d 792, 795 (Iowa 1978). The Court makes no mention of a "knowledge" requirement by an accused defendant.

In 1992, in the seminal case of *Huffey v. Lea* in Iowa, the Supreme Court confirmed the availability of a claim for Intentional interference with

inheritance or gift and provided further guidance to litigants. *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992).

In the *Huffey* case, the Supreme Court directly referenced a portion of the *Restatement (Second) of Torts*, §774B (1979) in support of its conclusions:

> *This section provides:*
>
> > *One who by fraud or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability for the loss of the inheritance or gift.*

Id. at 520. The Court further discussed the remedies available to litigants:

> *These remedies include recovery of damages for pecuniary loss, consequential loss and emotional distress. A claim for emotional distress in tortious interference claims does not require proof of outrageous conduct*
> *…*
> *We are strongly committed to the rule that attorney fees are proper consequential damages when a person, through the tort of another, was required to act in protection of his or her interest by bringing or defending an action against a third party.*

Id. at 521, 522 (internal citations omitted).

No where in these two opinions does the Supreme Court of Iowa establish or suggest that the third party's actual knowledge of a litigant's expected inheritance is an element they must prove. The Supreme Court of Iowa has **not** weighed in on claims for intentional interference with inheritance or gift since the 1992 opinion in *Huffey*.

Restatement Perspective:

The operative section from the Restatement, *Restatement (Second) of Torts*, §774B (1979), provides:

> *One who by fraud, duress, or other tortious means intentionally prevents another from receiving from a third person an inheritance or gift that he would otherwise have received is subject to liability for the loss of the inheritance or gift.*

Notably, the governing section expressly contemplates a scenario of "intentionally" preventing; **not** "knowingly" AND "intentionally." **Nothing** in the Restatement supports a knowledge element.

The Restatement goes on to further define its scope: "This section represents an **extension** to a type of noncontractual relation of the principle found in the liability for **intentional interference with prospective contracts stated in §766B[1].**" *Restatement (Second) of Torts*, §774B (1979)(Comment a)(emphasis added).

As indicated, *Restatement (Second) of Torts*, §766B not only expressly references §774B (Comment a), but it supports that a knowledge element is not contemplated, let alone mandated. In Comment d, §766B defines intent and purpose:

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[1] Notably, the Restatement does NOT state that §774B is an extension of §766-a claim under which does expressly require knowledge.

d. Intent and purpose. The intent required for this Section is that defined in 8A. The interference with the other's prospective contractual relation is intentional if the actor desires to bring it about or if he knows that the interference is certain or substantially certain to occur as a result of his action. (See §766, Comment j).

There are two alternative Sections to unpackage in this Comment, and one glaring omission to point out:

1. Section 8A Intent: **The word "intent" is used throughout the Restatement of this Subject to denote that the actor desires to cause consequences of his act, or that he believes the consequences are substantially certain to result from it.** *Restatement (Second) of Torts*, §8A (1979)

Here, we see the definition of "intentional" as it pertains to Intentional interference with inheritance or gift in §744B as expressly referenced through its extension of §766B. "Intentional" has **nothing** to do with a knowledge of another expectation, only that a certain effect is desired or substantially certain.

2. §766, Comment j: *Intent and purpose*. The rule stated in this Section is applicable if the actor acts for the primary purpose of interfering with the performance of the contract, and also if he desires to interfere, even though he acts for some other purpose in addition. The rule is broader, however, in its application than to cases in which the defendant has acted with this purpose or desire. It applies also to intentional interference, as that term is defined in § 8A, in which the actor does not act for the purpose of interfering with the contract or desire it but knows that the interference is certain or substantially certain to occur as a result of his action. The rule applies, **in other words, to an interference that is incidental to the actor's independent purpose and desire but known to him to be a**

necessary consequence of his action. *Restatement (Second) of Torts* § 766 (1979)(Comment j).

Again, we have confirmation of §8A and its definition, but further guidance in that incidental interference that, by definition, does **not** contemplate actual knowledge.

The Restatement provides more compelling evidence from what it does **not** say. Remarkably, Comment d of §766B, above, specifically references §766, Comment j, but **does not** reference §766, Comment i. We believe that is for good reason:

3. §766, Comment i: *Actor's knowledge of other's contract.* To be subject to liability under the rule stated in this Section, **the actor must have knowledge of the contract with which he is interfering and of the fact that he is interfering with the performance of the contract**. Although the actor's conduct is in fact the cause of another's failure to perform a contract, the actor **does not** induce or otherwise intentionally cause that failure **if he has no knowledge of the contract**. But it is not necessary that the actor appreciate the legal significance of the facts giving rise to the contractual duty, at least in the case of an express contract. If he knows those facts, he is subject to liability even though he is mistaken as to their legal significance and believes that the agreement is not legally binding or has a different legal effect from what it is judicially held to have. Restatement (Second) of Torts § 766 (1979)(Comment i)(emphasis added).

This election **not** to reference the actual knowledge requirement further supports Plaintiffs' position. If the Restatement upon which the claim is based, and that which was expressly adopted by the Supreme Court of Iowa,

contemplated an actual "knowledge" element, as determined by the District Court in this case, it stands to reason that it would have referenced § 766 (Comment i). If an actual knowledge requirement was intended, there would be no reason it would not reference the comment so requiring.

Finally, it is worth noting in the approximately one hundred (100) cases cited in the relevant Restatement provision, Section 774B, not a single case recognized or focused on an actual "knowledge" element upon which a jury should be instructed.

The Restatement is in direct conflict with the Court of Appeals' conclusion that a "knowledge" element must be proven in a claim for Intentional Interference with Inheritance; "intentional" does not equate to actual knowledge.

Outside Jurisdictions and Other Legal Authorities' Perspective:

To date, a large number of jurisdictions recognize a claim for intentional interference with inheritance. However, it does not appear that a single other jurisdiction mandates a litigant prove the defendant(s) had knowledge of their expected inheritance or gift in order to prevail on their claim.

An extensive treatise detailing those states who have adopted the intentional interference with inheritance as a cause of action, supplemented in November of 2019, outlined a segment on the elements of a cause of action for interference with expected gift or inheritance. See, 36 Causes of Action 2d 1, *Cause of Action for Intentional Interference with Expected Inheritance.* (Originally published in 2008).

The article identifies dozens of jurisdictions that recognize a claim for intentional interference with inheritance, and not a single one requires proof of defendant's knowledge of the expected inheritance/gift. *Id*. To the contrary, the article concludes: "[M]ost courts that recognize the cause of action apply a rule requiring the following five elements in some order:

(1) The existence of some sort of expectancy on plaintiff's part involving an inheritance;

(2) The defendant's intentional interference with such expectancy;

(3) Involvement of tortious conduct, such as fraud, duress, or undue influence, in the defendant's interference;

(4) Reasonable certainty that the plaintiff's expectancy would have been realized if not for the defendant's interference; and

(5) Damages.

Id. (citing, e.g., *Lindberg v. U.S.*, 164 F.3d 1312, 99-1 U.S. Tax Cas. (CCH) P 60334, 83 A.F.T.R.2d 99-444 (10th Cir. 1999) (applying Colorado law);

Peralta v. Peralta, 139 N.M. 231, 2006-NMCA-033, 131 P.3d 81 (Ct. App. 2005) (interference with a prospective inheritance); *Sull v. Kaim*, 172 Ohio App. 3d 297, 2007-Ohio-3269, 874 N.E.2d 865 (8th Dist. Cuyahoga County 2007), appeal not allowed, 116 Ohio St. 3d 1456, 2007-Ohio-6803, 878 N.E.2d 34 (2007) (intentional interference with an expectancy of an inheritance); *In re Marshall*, 275 B.R. 5 (C.D. Cal. 2002), vacated and remanded on other grounds, 392 F.3d 1118, 44 Bankr. Ct. Dec. (CRR) 14 (9th Cir. 2004), rev'd and remanded on other grounds, 547 U.S. 293, 126 S. Ct. 1735, 164 L. Ed. 2d 480, 46 Bankr. Ct. Dec. (CRR) 122, Bankr. L. Rep. (CCH) P 80505 (2006) (applying Texas law; intentional interference with expectancy of inheritance or inter vivos gift); *Wickert v. Burggraf*, 214 Wis. 2d 426, 570 N.W.2d 889 (Ct. App. 1997) (intentional interference with an expected inheritance; adding defamation to the list of illustrative classes of tortious conduct).

In an earlier treatise, 30 Real Prop. Probate & Trust Journal, 325, "Note-Intentional Interference with Inheritance," the authors again cite to dozens of cases without a single reference to a "knowledge" requirement. Like other authorities, it details the general formula as follows:

> *[A] plaintiff must generally allege the following elements to state a claim for intentional interference with inheritance: (1) The existence of an*

> *expectancy; (2) Intentional interference with the expectancy through tortious conduct, such as fraud, duress, or undue influence; (3) Causation; and (4) Damages.*

Id.

The Plaintiffs' review of extensive legal and secondary authorities further demonstrates that the actual "knowledge" element is not required in any other jurisdiction that recognizes such claims.

In specifically addressing the question of jury instructions on the elements, the United States Court of Appeals, Fifth Circuit, affirmed the instructions given because they "essentially mirror" the elements of tortious interference with inheritance as defined by Restatement (Second) of Torts Section 774. Wackman v. Rubsamen, 602 F.3d 391, 410 (5th Cir. 2010). Unsurprisingly, the elements that "essentially mirrored" the Restatement did not contain a "knowledge" requirement:

The jury was instructed that the evidence must show by a preponderance of evidence that:

(1) There is a reasonable probability that Carolyn would have devised a gift or inheritance to Joey;
(2) Rubsamen interfered with Joey's expected gift or inheritance;
(3) The interference was intentional, was independently tortious, or was unlawful and caused damage; and
(4) The interference was conducted with neither just cause nor legal excuse.

Id. Actual knowledge is not a listed element in any other jurisdiction. So how did it become so in Iowa?

Court of Appeals' of Iowa Perspective:

While the overwhelming (truly uncontradicted) authority does not require a knowledge element, it begs the question as to how it appeared in Iowa law. As indicated above, this was purely by accident. However, things did not start out that way.

After the Iowa Supreme Court's leading decision in *Huffey*, the Court of Appeals was faced with its first application a few years later in the *Hosier* decision. *Hosier v. Hosier ex rel. Estate of Hosier*, 2001 WL 1451137 (Iowa App. 2001). In *Hosier*, the Court of Appeals was faced with two separate intentional interference claims. The Court of Appeals cites to the relevant Restatement, Section 774B, and undertakes an in-depth analysis of the requisite elements. **Not once** in the detailed decision does the Court of Appeals recognize the plaintiff's burden of proving actual knowledge; its totally absent! *Id.* The *Hosier* case was in line with *Huffey*, the Restatement, and other authorities. It wasn't until later that confusion was generated.

In an unpublished opinion, *Bronner v. Randall*, the Court of Appeals of Iowa was faced various claims of error in a case that included tortious

interference with a beneficiary's expected portion of an investment account. *Bronner v. Randall*, 867 N.W.2d 195 (Iowa App. 2015). As summarized by the Court of Appeals, apparently with the consent of both parties, the District Court instructed as follows:

> *The jury was instructed that in order to prove his claim., Kenneth needed to prove:*
>
> 1. *The plaintiff had a prospective expectation that he would receive a portion of Edith Benson's Ameriprise account upon her death.*
> 2. *The defendant or defendants knew of the expectation.*
> 3. *The defendant or defendants intentionally and improperly interfered with the expectation by undue influence.*
> 4. *The interference caused Edith Benson not to keep Kenneth M. Bronner listed on her beneficiary designation; and*
> 5. *The nature and amount of damage.*

Id. at *9.

Several characteristics of this case are noteworthy. Number one, the jury instructions were **not** contested. As a result, they become, right or wrong, the operative "law of the case." See, *Hoskinson v. City of Iowa City*, 621 N.W.2d 425, 430 (Iowa 2001)(When instructions are not objected to, they become "the law of the case."); *see also Poulson v. Russell*, 300 N.W.2d 289, 294 (Iowa 1981)("Unless objected to by a party, an instruction to the jury, right or wrong, is the law of the case."). As a result of the lack of any objection or contest on appeal, the Court of Appeals had no reason to discuss or evaluate these elements. However, it is notable that the Court of Appeals merely

recites them as the law of that case; it does not cite any Iowa law or other legal authority in connection with the referenced jury instructions. This was purely a recitation of the unopposed instructions submitted in the underlying case. This decision did not expressly overrule its prior decision in *Hosier*, nor did it pretend to impact the two previous Iowa Supreme Court opinions.

Less than two years later, in another unpublished opinion, the Court of Appeals faced sufficiency of evidence claims related to a will contest action. See, *In re Estate of Bowman*, 898 N.W.2d 202 (Iowa App. 2017). As with *Bronner* before, the Court of Appeals cited the uncontested jury instructions that require plaintiff to prove defendants "knew" of plaintiff's expected inheritance. *Id*. at *10. As with before, there is **no** Iowa law or other legal authority cited to support the jury instructions. As with *Bronner*, there was **no** reason to cite legal authority because this was a mere recitation of the uncontested jury instructions in the underlying case-right or wrong "the law of the case."

Approximately one year later, the Court of Appeals was again faced with evaluating a claim for tortious interference with bequest in *Matter of Estate of Erickson*, 922 N.W.2d 105 (Iowa App. 2018). The Court of Appeals undertakes an extensive evaluation of Restatement (Second) of Torts 774B,

and the conclusion that such a claim, according to *Huffey*, "focuses on the fraud, duress, or other tortious means used by the alleged wrongdoer." *Id*. at *1-3. Not once did the Court of Appeals refer to a knowledge requirement, or that plaintiff needed to prove defendants knew of an expected inheritance. Instead, the Court of Appeals relied on the language of the Restatement and the *Huffey* case.

Less than a year after *Erickson*, the Court of Appeals was again confronted with an appeal concerning intentional interference with inheritance. *Cich v. McLeish*, 928 N.W.2d 152 (Iowa App. 2019). In the opinion, the Court of Appeals cites to both relevant Supreme Court cases, *Frohwein* and *Huffey*, in establishing the existence of the cause of action. Regrettably, and where things went wayward, the Court of Appeals also cites to the *Boman* case, stating:

> *See also In re Estate of Bowman, No. 16-0110, 2017 WL 512493 at *10 (Iowa Ct. App. Feb. 8, 2017) (**setting forth elements of tort**).*

Id. at *3. (emphasis added) Although the case asserts that the *Bowman* case set forth the elements of an intentional interference with inheritance claim, that case did not make such an announcement. As outlined above, that case merely recited the uncontested jury instructions in the underlying case. The

Bowman Court did **NOT** announce the elements of intentional interference, and truly, it had no reason to make any such announcement.

Months later, the Court of Appeals made the same mistake. In yet another unpublished opinion, *Estate of Arnold v. Arnold*, the Court of Appeals cited to the *Bowman* case as establishing the five elements of the tort. *Estate of Arnold v. Arnold*, 938 N.W.2d 720, *4 (Iowa App. 2019). Again, there is **no** other authority cited other than the *Bowman* opinion-a case that never pretended to establish the elements of proof required for intentional interference with inheritance (again, merely recited uncontested "law of the case" jury instructions.).

Shortly after the *Arnold* case, the Court of Appeals was again confronted with an appeal that contemplated an intentional interference with inheritance claim. See, *Matter of Estate of Kline*, 2019 WL 6358421 (Iowa App. 2019). Although the appeal did **not** challenge jury instructions or otherwise implicate the elements of a tortious interference claim, the Court of Appeals, again, improperly detailed the elements necessary to establish the claim for intentional interference with inheritance. *Id.* at *8. As predicted, the Court of Appeals cited to the aforementioned *Arnold* and *Bowman* cases. Once again, neither of these cases sought announcement of the elements of

the claim; instead they merely recited the uncontested jury instructions that were given in the underlying case and therefore became the "law of that case."

Conclusion:

What started as the "law of the case" unfortunately became the "law of Iowa." The knowledge element of an intentional interference with inheritance claim is **not** supported by the originating Restatement, has **not** been endorsed by the Supreme Court of Iowa, and is **not** accepted by any other jurisdiction that recognizes such claims. The Supreme Court of Iowa should reinstate Plaintiffs' claim for intentional interference with inheritance as the District Court's decision to dismiss this claim was based solely on application of this improper standard.

B. The District Court Erred in Concluding Plaintiffs Failed to Present a Fact Issue on the Purported "Knowledge" Element.

Although Plaintiffs do **not** agree that a "knowledge" element is required, as outlined above, even if it is a required element, the Plaintiffs' presented sufficient evidence to generate a fact question on this issue.

The District Court, in granting Defendants' partial summary judgment about a month before trial, concluded that "there is no circumstantial evidence to support the idea that Defendants knew of any prior will existing, let alone that Plaintiffs were both named in the will." Here the District Court sets the

burden on this issue as proving that a defendant be **specifically aware** of plaintiff being named in a will, and, at a minimum, **must be aware of a will**. This standard of actual knowledge is extreme and unsupportable in law. Suggesting a litigant would need to prove the knowledge of a will, or its specific contents, sets an improper standard.

First, the Restatement does not support such an extreme requirement of actual knowledge. The express language of the governing Restatement Section contemplates liability for tortious interference with a "first will." *Restatement (Second) of Torts*, §774B (1979)(Comment b).

Second, a Pennsylvania Court, facing a similar question concluded that a litigant need **not** prove that they were named as a beneficiary in a will to proceed with a claim for intentional interference:

> The tort based on an expectancy of inheritance does **not** require proof that one is in fact named as a beneficiary in the will **or** that one has been devised the particular property at issue. That requirement would defeat the purpose of an expectancy claim.

Plimpton v. Gerrard, 668 A.2d 882, 885–86 (Me. 1995)(internal citation omitted)(emphasis added).

The question, then, is what evidence is required to satisfy the "knowledge" element? As indicated, the sole source of any legal

authority on this is the Court of Appeals of Iowa, as no other Court has adopted this requirement.

The Court of Appeals' decision in *Bronner* provides some insight:

> *While there is a **lack of evidence** as to whether Susan, Elsie, and/or Glen **knew** of Kenneth's expectation to receive a share of the Ameriprise account, it was **reasonable for the jury to conclude based on the evidence presented** that Susan, Glen, and Elsie would know Kenneth expected to receive something from Edith upon her passing considering how close Kenneth was to Edith and Ed.*

Bronner, 867 N.W.2d at *9. Here, the original authority for the purported "knowledge" requirement unconditionally states that actual knowledge of a prior will and/or knowledge that plaintiff is named in the prior will is **not** required. Moreover, in finding evidence of a close relationship as satisfactory for the jury to conclude that they would know litigant expected to get something, the Court of Appeals identified the sufficiency and import of **circumstantial evidence**.

Similarly, in a claim involving intentional interference with performance of contract (claim under Restatement §766-that which **does** require proof of knowledge), the Minnesota Court discussed the value and threshold of circumstantial evidence:

> *It is not **necessary** to prove **actual knowledge**. It is enough to show that defendant had knowledge of facts which, if followed by reasonable inquiry, would have led to a complete disclosure of the contractual*

relations and rights of the parties.

Cont'l Research, Inc. v. Cruttenden, Podesta & Miller, 222 F. Supp. 190, 199 (D. Minn. 1963). Even under the heightened standard of Restatement §766 requiring knowledge, actual knowledge is **not** mandatory.

In the present case, the circumstantial evidence in the record was overwhelming in supporting conclusion that Defendants know what they were doing and whom they were harming. Both Plaintiffs had a long-standing and close relationship with Cletis Ireland, and that the Defendants were aware of that relationship. (App. 154, 156-157) Specifically, Defendants knew the familial and personal relationship between Plaintiff Reece and Cletis. (App. 156-157) For example, Defendants were expressly told to communicate with Plaintiff Reece when she was receiving medical treatments. (App. 156-157) Most prominently, Defendant Birusingh provided moving testimony about how she knew of, and understood, the tremendous bond that Dona and Cletis had. (App. 373-374) The courtroom was moved when Defendant Birusingh described the story of Dona desperately wanting to be there to hold Cletis' hand when she passed away:

> A: I called Dona and said, "we're near the end." And she said, "Would you let me know when its going to happen? Because I would like to be there to **hold her hand**."…
>
> "I want to be there to **hold Cletis's hand**," **which I get**.

Q: You would totally understand why **someone like Dona** would want to be there when Cletis passed away?

A: Yes.

(App. 373-374)[2](emphasis added)

This heartbreaking evidence alone suffices under the *Bronner* standard outlined above. However, the record developed at the summary judgment stage is full of additional evidence that forcibly supports a **fact issue** on the "knowledge" element (should that be required):

1. Defendants were immediately involved in Cletis' personal, business and financial affairs. (App. 191)
2. Despite their intimate involvement in Cletis's life, the Defendants' intentionally avoided ever meeting or interacting with Plaintiffs. (App. 155-157).
3. In April, 2014, the Defendants were both named in a Power of Attorney document (Defendant Biruisngh as attorney-in-fact and Defendant

[2] Defendant Birusingh's testimony is compelling enough for the purposes of this appeal, but the truth about those conversations, as conveyed by Plaintiff Reece in tear-jerking testimony, is the reason why we must continue to recognize the tort of intentional interference with inheritance. (Tr. 449-450)(Dona: "I told [Birusingh] I didn't want [Cletis] to die alone.")(Dona then responds to Defendant Birusingh's testimony at trial where she learned, for the first time, that Birusingh knew Cletis's death was imminent despite telling her otherwise). Few abandonments compare.

Durick as first alternate attorney-in-fact) prepared by Attorney Sulhoff. (App. 228-237)

4. Attorney Sulhoff sent a copy of Cletis' prior Will to her home in November, 2014, and later dropped off a copy at the nursing home where she was staying in February, 2015. (App. 286).
5. Both Defendants admitted that they were around Cletis often and in her home/care facilities throughout the relevant time period. (App. 129, 169, 207, 219-222)
6. Defendants expressed interest in acquiring Cletis' farm. (App. 179-180)
7. Defendants made promises to Cletis in exchange for her commitment to give them her farm. (App. 209)
8. Defendants told Cletis that they could not afford to buy her farm. (App. 192-193)
9. Upon solicitation from Cletis, Plaintiff Buboltz made her an offer to buy her farm. (App. 201-202)
10. Defendant Birusingh discouraged Cletis from selling the farm to Plaintiff Buboltz. (App. 202)
11. During the last several years of Cletis' life, Defendant Birusingh had a key and unfettered access to her home. (App. 135-136)

12. Defendant Birusingh accompanied Cletis to several of her legal appointments with Attorney Sulhoff. (App. 142-144, 161-162)
13. Defendant Birusingh admitted that she took Cletis to an appointment with lawyer Sulhoff to address her estate planning. (App. 142, 161-162)
14. Defendant Birusingh spoke with Cletis' about her estate planning, including the disposition of her farm, on the car ride to lawyer Sulhoff's office to address her will. (App. 161-162)
15. Defendant Birusingh physically accompanied Cletis inside lawyer Sulhoff's office when she took her to discuss estate planning and her will. (App. 161-162)
16. Lawyer Sulhoff objected to Defendant Birusingh physically attending the meeting between himself and Cletis to discuss her estate planning. (App. 161-162)
17. Defendant Birusingh disregarded lawyer Sulhoff's instructions to not come into the meeting with Cletis to discuss her estate planning. (App. 161-162)
18. Defendant Birusingh proceeded to directly discuss Cletis' estate planning with lawyer Sulhoff. (App. 161-162)

19. Defendant Birusingh provided lawyer Sulhoff with proposals as to how Cletis should dispose of her farm upon her death. (App. 161-162)
20. Defendant Durick was aware that Defendant Birusingh was taking Cletis to lawyer Sulhoff's office to discuss estate planning because Defendant Birusingh told her about the meeting. (App. 171)
21. Defendant Durick was familiar with estate planning and, in particular, options for inheritance of farmland. (App. 171)
22. Defendant Durick concocted a plan whereby Cletis would leave her farm to "a woman in agriculture." (App. 170-171)
23. Defendant Durick communicated this proposal to Defendant Birusingh (and may have told Cletis as well-she couldn't recall) ahead of Cletis' appointment with lawyer Sulhoff to discuss her estate planning. (App. 170-171)
24. Defendant Durick discussed proposals for Cletis' disposition of her farm in direct response to Defendant Birusingh telling her that she was taking Cletis to lawyer Sulhoff's to discuss her will. (App. 173)
25. Defendant Birusingh discussed estate planning with Cletis including planning as it relates to the disposition of her farm. (App. 161-167)

26. Defendant Birusingh spoke with Cletis about the possibility of her or one of her sons inheriting her farm. (App. 161-162, 164-166)

27. As it pertained to Defendant Birusingh inheriting Cletis' farm, Defendant told her: "I don't need the farm." (App. 166)

28. The discussions about Defendant Birusingh or her sons inheriting the farm occurred prior to the meeting with lawyer Sulhoff. (App. 165)

29. Defendants shared "everything about Cletis" with each other. (App. 167)

30. Defendants spoke with each other as to how Cletis should dispose of her farm in her will. (App. 143, 167; 170-171)

31. Defendants, in their collaborative discussions about Cletis' estate planning, came up with specific ideas for the disposition of her property. (App. 161-162)

32. Defendant Birusingh spoke directly with Cletis' lawyer about how Cletis should dispose of her farm when she died. (App. 67, 162)

33. In the final stage of Cletis' life, when confined to a nursing facility, Defendant Birusingh denied Plaintiffs certain access to Cletis by actively removing them from the "approved" lists she controlled at the care facilities. (App. 187)

34. Removing Plaintiffs from Defendant Birusingh's approved list effectively precluded Plaintiffs from speaking with anyone at the nursing facility about Cletis and her status, or reach her directly to talk. (App. 210, 211, 212)

35. Removing Plaintiffs' from the "approved" list at the facilities was against Cletis' wishes. (App. 187)

36. In discussing the 2015 will with Plaintiff Buboltz after Cletis passed away, lawyer Sulhoff told him the disposition of her property was "dirty and it stinks." (App. 206)

Based on the foregoing evidence, partial summary judgment was improper under the law; fact questions pervade the case. As the court has stated:

> *Summary judgment is proper when there is no genuine issue of [material] fact and the moving party is entitled to the judgment as a matter of law. The burden of showing the nonexistence of a material fact is upon the moving party. While an adverse party generally cannot rest upon [the adverse party's] pleadings when the moving party has supported [the] motion, summary judgment is still not proper if* ***reasonable minds could draw different inferences and conclusions from the undisputed facts****. In this respect, summary judgment is functionally akin to a directed verdict;* ***every legitimate inference*** *that reasonably can be deduced from the evidence should be afforded the nonmoving party, and a fact question is generated if reasonable minds can differ on how the issue should be resolved.*

Randol v. Roe Enterprises, Inc., 524 N.W.2d 414, 415–16 (Iowa 1994)(emphasis added). In *Randol*, the Court also confirmed the import of circumstantial evidence as it pertains to fact questions:

> *We think the district court **erroneously discounted** the **probative value of the circumstantial evidence** in this case. In the past, we said this about circumstantial evidence:*
>
> > *This court has routinely observed that circumstantial evidence often may be equal or **superior** to direct evidence.*
> >
> > *Circumstantial evidence in this respect is intrinsically no different from testimonial evidence. Admittedly, circumstantial evidence may in some cases point to a wholly incorrect result. Yet this is equally true of testimonial evidence. All conclusions have implicit major premises drawn from common knowledge; the truth of testimony depends as much upon these, as do **inferences from events. A jury tests a witness's credibility by using their experience in the past as to similar utterances of persons in a like position**. That is precisely the same mental process as when they infer from an object what has been its past history, or **from an event what must have preceded it**.*

Id. at 417. (internal citations omitted)

Taken together, the facts/discussions/events are those that a reasonable person could readily conclude Defendants knew Plaintiffs had an expectation of inheritance. Several of the events, or connected events, taken in isolation would support such a conclusion. Moreover, a juror could reasonably draw a great many inferences from these discussions and events that would support the requisite "knowledge." Why else would Defendants have restricted

Plaintiffs' access to Cletis in the final stages of her life? If Defendants were so intimately involved in Cletis' estate planning, including barging in on a meeting she had with her lawyer (against his objection), is it not reasonable to conclude the Defendants knew much more than they admitted? The Defendants' intimate involvement in all aspects of Cletis' life, including her estate planning, raises a fact question as to their knowledge.

Endorsing the District Court's grant of partial summary judgment would permit intentional tortfeasors to avoid liability by simply stating they had no actual knowledge of a prior will or knowledge of its contents, while at the same time unduly influencing the testator to execute a new one. The facts and circumstances of each case should be evaluated; veracity of any denial of knowledge challenged and those fact issues resolved by a trier of fact. The same should be decided by an Iowa jury in this case.

The claim for intentional interference with inheritance should have been submitted to the jury. It was error not to do so. The Supreme Court of Iowa should reinstate Plaintiffs' claim for intentional interference with inheritance and remand the matter for jury trial on that claim.

CONCLUSION

The Supreme Court of Iowa should reinstate Plaintiffs' claim for intentional interference with inheritance.

APPELLANT'S POSITION REGARDING ORAL ARGUMENT

This matter should be submitted with oral argument and Plaintiffs respectfully request the same. Iowa Rule of Appellate Procedure 6.908.

CERTIFICATE OF SERVICE

On the 29th day of June 2020, the undersigned served the within Appellant's Proof Brief on all parties to this appeal by e-filing it on the State of Iowa's Electronic Data Management System.

I further certify that on the 29th day of June 2020, I filed this document with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 E. Court Avenue, Des Moines, Iowa 50319, by e-filing it in the State of Iowa's Electronic Data Management System.

ALEXANDER E. WONIO

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