IN THE SUPREME COURT OF IOWA

NO. 19-1724
Pottawattamie County No. CVCV115108

DAVID BUBOLTZ and DONNA 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

FINAL BRIEF FOR APPELLEES / CROSS-APPELANTS

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ROUTING STATEMENT

Appellees agree with Appellant that this matter should be retained by the Supreme Court of Iowa pursuant to *Iowa R. App. P.* 6.1101(2)(c), (d), and (f).

In 1978, the Iowa Supreme Court recognized the tort of intentional interference with inheritance in the matter of *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978). Nearly forty years later, in 2017, in an unpublished opinion, the Iowa Court of Appeals established five elements for the tort. *In re Estate of Boman*, No. 16-0110, 2017 WL 512493, at *10 (Iowa Ct. App. Feb. 8, 2017).

Both Appellees and Appellants argue that the *Boman* elements are clearly erroneous, although in different aspects and for different reasons.

Since, the *Boman* decision in 2017, these elements have been consistently applied by the Iowa Court of Appeals. *See e.g. Estate of Arnold v. Arnold*, 938 N.W.2d 720 (Iowa Ct. App. 2019); *Cich v. McLeish*, 928 N.W.2d 152 (Iowa Ct. App. 2019); *Matter of Estate of Kline*, No. 18-1658, 2019 WL 6358421 (Iowa Ct. App. Nov. 27, 2019).

Because the elements are clearly erroneous, the Iowa Supreme Court should provide additional guidance. Guidance from the Iowa Supreme Court would be helpful to not only the Iowa District Courts and Iowa Court of

Appeals, but to the numerous other jurisdictions who are similarly grappling to define and implement this most unusual intentional tort.

STATEMENT OF THE CASE

Nature of the Case

This case involves an action to set aside a will based on lack of capacity and undue influence, a related intentional tort claim for intentional interference with inheritance, and claims of fraud, constructive fraud, fraud at law, negligent misrepresentation, and conspiracy.

The protagonist of the story is Cletis Ireland, a woman who died in 2016 at the age of 90 years, without a spouse, children, or any significant surviving siblings. For most of her adult life, Ms. Ireland lived on her family's century farm.

In 2001, Ms. Ireland executed a will that included a bequest of her farm in equal shares to David Buboltz, a cash rent farmer who leased her farm, and Edith Mae Maertens, her cousin.

In 2015, Ms. Ireland executed a new will, which removed Ms. Maertens (who had since died) and her tenant farmer, Mr. Buboltz; and instead, gave her farm to a family friend, the Defendant Kumari Durick. Ms. Durick had previously suggested that Ms. Ireland place the farm in trust to fund a scholarship for women in agriculture at Iowa State University.

Shortly after Ms. Ireland's death, suit was filed by the farm tenant, Mr. Buboltz, and one of the surviving daughters of Edith Mae Maertens,

Dona Reece, who was Ms. Ireland's first cousin, once removed. Ms. Reece resides in Colorado and testified that she had only actually seen Ms. Ireland for a few hours on two occasions over the last many years of Ms. Ireland's life.

At issue in this appeal is whether the law related to the intentional tort of intentional interference with inheritance was properly applied by the District Court. The specific issues of concern to Defendants, in response to Plaintiffs' appeal, are: (1) whether a defendant can be found liable for intentional interference with inheritance without a finding that the defendant committed an act that was intentional and tortious; (2) whether the defendant can be found to have tortiously and intentionally interfered with the inheritance of an expecting beneficiary, without a finding that the defendant had actual knowledge of the beneficiaries' expectancy; and (3) whether justice would best be served by following the majority of states which require that a party only be allowed to pursue the tort of intentional interference with inheritance if a will contest or other probate remedy is not available.

In their cross-appeal, Defendants request a new trial on the will contest claims due to: (1) the improper admission of highly prejudicial

hearsay testimony; and (2) the improper and highly prejudicial closing argument made by Plaintiff Buboltz's counsel.

Relevant Events of the Prior Proceedings

Appellees agree with Appellants' summary of prior proceedings. However, Appellees/Defendants must add that after Defendants filed their Partial Motion for Summary Judgment (App. pp. 16-18), Plaintiffs dismissed all their independent intentional tort claims (App. pp. 238-239).

Disposition of the Case in District Court

Appellees agree with Appellants' summary of the disposition of the case in the District Court.

STATEMENT OF FACTS

The case at issue and the parties themselves will be familiar enough to most Iowans. The protagonist of the story is an elderly woman named Cletis C. Ireland. (Tr. 24:5-7.) By all accounts, Ms. Ireland was a woman that all of us would have enjoyed getting to know. She was described as an immensely proud and independent person, who had cut her teeth as a female farmer, back in the days when there were not any. (Tr. 31:11-16, 83:22-25.)

Ms. Ireland died in 2016 at the age of 90 years, without a spouse, children, or any significant surviving siblings. For much of her adult life, Cletis lived on her family's century farm (Tr. 371:6-8), which she rented to the Plaintiff David Buboltz (Tr. 288:2-7.)

In 1977, Ms. Ireland executed her first will – a holographic will that identified Stephen Jurshak as her beneficiary. (App. p. 283; Tr. 64:11-24.)

Then, in 2001, Ms. Ireland executed a will that included a bequest of her farmland in equal shares to Mr. Buboltz, her farm tenant, and Ms. Maertens, a cousin. (App. pp. 280-281.)

Sometime after the 2001 will was executed, Ms. Ireland became friends with the Birusingh family. (Tr. 171:12-176:15.) Dr. Krishna Birusingh initially got to know Ms. Ireland as his patient. (Tr. 171:2-9.) Then, as he neared retirement and after, the two became friends. (Tr. 171:12-

176:15.) Over time, the friendship was extended to Dr. Birusingh's wife, Defendant Patricia Birusingh, and then to their daughter, Defendant Kumari Durick. (Tr. 171:12-176:15, 204:2-205:23.) As she grew older, Ms. Ireland's need for personal assistance grew and the Birusinghs filled this void by helping Ms. Ireland with grocery shopping, doctor's appointments, and other errands. (Tr. 171:12-176:15, 204:2-205:23.)

After Ms. Ireland and Ms. Birusingh grew closer, Ms. Ireland told Mrs. Birusingh that she planned to give Ms. Birusingh her farmland. (Tr. 207:1-7.) Ms. Birusingh told her that she did not want the farm. (Tr. 207:1-24, 143:6-144:3.) Ms. Birusingh later discussed the matter with her daughter Ms. Durick, who suggested that Ms. Ireland consider placing her farm in a trust with the University, which could provide funds for a scholarship for a woman in agriculture. (Tr. 207:20-24.) Ms. Birusingh later discussed Ms. Durick's idea with Ms. Ireland and suggested that the farm could be placed in a new foundation that would be called the "Cletis Ireland Foundation," whose resources could be used to fund a scholarship for women. (Tr. 143:6-144:3.) Ms. Birusingh later met with Ms. Ireland's attorney to discuss the idea. (Id.) During the meeting, Ms. Birusingh told Ms. Ireland's attorney that she didn't want the farm and suggested that the farm could be used to set up the foundation. (Id.)

In 2015, Ms. Ireland executed a new will that removed Ms. Maertens (who had since died) and Mr. Buboltz, the farm tenant, and instead bequeathed the farmland to Ms. Durick. (App. pp. 278-281.) The will is an exceedingly simple instrument that does little to help illuminate Ms. Ireland's intentions, other than her intention to bequeath the land to Ms. Durick. (App. pp. 278-281.)

Both the 2001 will and the 2015 will were prepared by Ms. Ireland's longtime attorney, James Sulhoff, who had represented Ms. Ireland since the late 1980s. (Tr. 55:14-15.)

Attorney Sulhoff met with Ms. Ireland about the 2015 will frequently before, during, and after the 2015 will was executed by Ms. Ireland. Sulhoff began discussing the will update with Ms. Ireland in November of 2015. (App. pp. 286-287) Initially, Mr. Sulhoff provided Ms. Ireland with a copy of the 2001 will, which she wrote notes on. (Tr. 69:5-23; App. pp. 286-288.) Several months later, on February 13, 2015, Mr. Sulhoff visited Ms. Ireland to discuss the will again. (Tr. 45:1-6.) During this meeting, Mr. Sulhoff told Ms. Ireland to put her wishes down in her own writing. (Tr. 45:1-6.)

The next day, Mr. Sulhoff returned to discuss the will with Ms. Ireland once again. (Tr. 36:22-37:14.) At this point, Ms. Ireland informed Mr. Sulhoff that Ms. Birusingh had told Ms. Ireland that she did not want

the farm. (Tr. 37:6-11.) Ms. Ireland asked her attorney if she could instead give the farm to Ms. Birusingh's daughter, Ms. Durick. (Id.) Mr. Sulhoff informed her that she could give the farm to whomever she wants, and that he will write the will in accordance with her wishes. (Id.)

Without any sense of urgency, Mr. Sulhoff returned a couple of months later to review the will that he had drafted with Ms. Ireland, which she then signed. (Tr. 45:7-9.) Mr. Sulhoff testified that if he had any concerns about her competency or that she was being unduly influenced, he would not have prepared the will.[1] He testified that the ideas expressed in the will were clearly Ms. Ireland's.[2]

Dr. Birusingh died in February of 2016. (Tr. 127:20-21.) Ms. Ireland died shortly thereafter on March 27, 2016. (Tr. 127:25-128:1.)

After Ms. Ireland passed away, this suit was filed by the farm tenant, David Buboltz (Tr. 288:5-9), and Dona Reece, Ms. Ireland's first cousin once removed (Tr. 392:17-19).

[1] This statement is addressed at length in Appellees' Reply Brief.
[2] This statement is addressed at length in Appellees' Reply Brief.

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN FAILING TO SUBMIT PLAINTIFFS' CLAIM FOR INTENTIONAL INTERFERENCE WITH INHERITANCE.

A. PRESERVATION OF ERROR.

Defendants agree that error was preserved regarding the legal standard applied by the District Court to Plaintiffs' claim of intentional interference with inheritance.

B. SCOPE AND STANDARD OF REVIEW.

Defendants agree with Plaintiffs that the Supreme Court typically reviews summary judgment rulings for corrections of error at law. However, in this matter, Plaintiffs are not arguing that the District Court misapplied existing Iowa law. Instead, Plaintiffs are arguing that the existing legal precedent that was applied by the District Court needs to be changed. Specifically, Plaintiffs are requesting that the Iowa Supreme Court be a "leader in this area of the law" (Plaintiffs' Brief, p. 7) by abandoning an existing legal precedent and "reform[ing] the current process" (Plaintiffs' Brief, p. 9).

Defendants agree.

It is true that the Supreme Court has a great preference for holding fast to existing precedent. "From the very beginnings of this court, we have

guarded the venerable doctrine of stare decisis and required the highest possible showing that a precedent should be overruled before taking such a step." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005). However, even an established legal precedent may be overturned, if shown to be clearly erroneous. *Id*.

For the reasons stated in the Argument that follows, Defendants agree with Plaintiffs that the current law is clearly erroneous. However, Defendants disagree with Plaintiffs both about their reasoning and their conclusion.

C. ARGUMENT.

Introduction: The Current Law in Iowa

The tort of intentional interference with inheritance was recognized by the Iowa Supreme Court in 1978 in the matter of *Frohwein v. Haesemeyer*, 264 N.W.2d 792 (Iowa 1978). In that case, the Court expressed an intention to expand the torts of intentional interference with contract and wrongful interference with business advantage to the non-commercial context. See Id. The case later received favorable treatment in *Huffey v. Lea*, 491 N.W.2d 518 (Iowa 1992). Then, in 2017, in an unpublished opinion, the Iowa Court of Appeals established the following five elements for the tort:

> (1) The plaintiff expected to receive a bequest from a third party; (2) the defendants knew of the plaintiff's expected bequest; (3) the

> defendants intentionally and improperly interfered with the plaintiff's expectancy through undue influence or other tortious means; (4) there was a reasonable certainty the plaintiff would have received an inheritance but for the defendants' interference; and (5) the plaintiff suffered damages as a result of his loss of the bequest.

In re Estate of Boman, No. 16-0110, 2017 WL 512493, at *10 (Iowa Ct. App. Feb. 8, 2017).

Since ***Boman***, these elements have been consistently applied by the Iowa Court of Appeals but have not been reviewed or endorsed by the Iowa Supreme Court. *See e.g. Estate of Arnold v. Arnold*, 938 N.W.2d 720 (Iowa Ct. App. 2019); *Cich v. McLeish*, 928 N.W.2d 152 (Iowa Ct. App. 2019); *Matter of Estate of Kline*, No. 18-1658, 2019 WL 6358421, at *8 (Iowa Ct. App. Nov. 27, 2019).

Because the elements are clearly erroneous, the Iowa Supreme Court should provide additional guidance.

The Law on Intentional Interference with Inheritance is Far from Settled as Claimed by Plaintiffs

In their Brief, Plaintiffs state that Iowa's legal precedent with respect to the tort of intentional interference with inheritance is an "aberrational case" that "no other state has elected to follow." (Appellants' Brief, p. 7.) As explained below, these statements are misleading, inaccurate, and patently untrue. With this false statement, Plaintiffs imply that Iowa is preventing parties' access to remedies that have become universal in other jurisdictions.

(Appellants' Brief, p. 7) ("Iowa has veered off the path of established law in this area. A path no other state has elected to follow.") This is also untrue.

First, the tort of intentional interference with inheritance remains far from settled law. In fact, outside of Iowa, the tort has only been definitively recognized in the court of last resort in approximately nine states, including: Florida (*DeWitt v. Duce*, 408 So. 2d 216, 218 (Fla. 1981) ("[A] cause of action for wrongful interference with a testamentary expectancy has been recognized in this state ...")); Georgia (*Mitchell v. Langley*, 85 S.E. 1050, 1053 (Ga. 1915)), Illinois (*In re Estate of Ellis*, 923 N.E.2d 237, 241 (Ill. 2009) (acknowledging tort and describing its elements)), Maine (*Cyr v. Cote*, 396 A.2d 1013, 1018 (Me. 1979)), Massachusetts (*Lewis v. Corbin*, 81 N.E. 248, 250 (Mass. 1907)), North Carolina (*Bohannon v. Wachovia Bank & Tr. Co.*, 188 S.E. 390, 394 (N.C. 1936)), Ohio (*Firestone v. Galbreath*, 616 N.E.2d 202, 203 (Ohio 1993)), Oregon (*Allen v. Hall*, 974 P.2d 199, 206 (Or. 1999)), and West Virginia (*Barone v. Barone*, 294 S.E.2d 260, 264 (W. Va. 1982)).

Furthermore, the court of last resort in at least two states initially favored recognition of the tort, but later backed away from the tort, by strongly suggesting that the earlier decisions were no longer good law, including: Kentucky (*Simmons v. Simmons*, No. 2012-CA-000383-MR,

2013 WL 3369421, at *23 (Ky. Ct. App. July 5, 2013) ("We agree that while Kentucky has never overtly recognized and adopted this cause of action, neither has it been rejected.")), and Delaware (*Moore v. Graybeal*, 550 A.2d 35, 35 (Del. 1988) (order) ("We agree with the Superior Court, and the federal courts which have considered the issue, that appellants' claim of tortious interference with an inheritance if pursued in a court of law would constitute a collateral attack upon the probate of the will of [decedent]. Such an attack is clearly precluded by Delaware law.")).

At least ten states have explicitly chosen not to recognize the tort at all, including: Texas (*Archer v. Anderson*, 556 S.W.3d 228, 229 (Tex. 2018), reh'g denied (Oct. 19, 2018)("Because existing law affords adequate remedies for the wrongs the tort would redress, and because the tort would conflict with Texas probate law, we hold that there is no cause of action in Texas for intentional interference with inheritance.")), Nebraska (*Litherland v. Jurgens*, 869 N.W.2d 92, 96 (Neb. 2015) (declining to adopt the tort of intentional interference with an inheritance, noting that claimant had adequate probate remedies)), New York (*Vogt v. Witmeyer*, 665 N.E.2d 189, 190 (N.Y. 1996) ("New York…has not recognized a right of action for tortious interference with prospective inheritance.")), Virginia (*Economopoulos v. Kolaitis*, 528 S.E.2d 714, 720 (Va. 2000) ("We also

agree with the trial court that a cause of action for 'tortious interference with inheritance' is not recognized in Virginia.")); Alabama (*Ex parte Batchelor*, 803 So. 2d 515, 515 (Ala. 2001) (following rehearing, withdrawing earlier opinion recognizing tortious interference)), Arkansas (*Jackson v. Kelly*, 44 S.W.3d 328, 328 (Ark. 2001) ("We decline to recognize the tort in this case because the appellant's remedy in probate court would have been adequate had she prevailed in her will contest.")), Kansas (*Axe v. Wilson*, 96 P.2d 880, 888 (Kan. 1939) (concluding that the plaintiff's action for damages, premised on "malicious interference with her alleged right of inheritance," would negate the effect of the operative will--just as in a will contest--and as a result, holding that "remedy to obtain the particular relief sought does not lie in an action for damages, but in her action to contest the will")), Maryland (*Anderson v. Meadowcroft*, 661 A.2d 726, 728 (Md. 1995)), Montana (*Hauck v. Seright*, 964 P.2d 749, 753 (Mont. 1998)), South Carolina (*Malloy v. Thompson*, 762 S.E.2d 690, 692 (S.C. 2014) ("[T]his opinion must not be understood as either adopting or rejecting the tort of intentional interference with inheritance.")), and Tennessee (*Stewart v. Sewell*, 215 S.W.3d 815, 827 (Tenn. 2007) (observing that Tennessee does not recognize tortious interference)).

Of even greater significance here, in a majority of the states that actually recognize the tort (at any level of the judiciary), the action is limited in application, and only available when adequate relief is not available in the probate court – such as through a will contest. *See e.g. Wolf v. Doll*, 229 So.3d 1280, 1283 (Fla. 4th DCA 2017) ("[T]he law permits a claim for tortious interference of a testamentary expectancy 'if the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court.'"); Indiana (*Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996) ("A majority of the states which have adopted the tort of interference with an inheritance have achieved such a balance by prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief.")); *Umsted v. Umsted*, 446 F.3d 17, 22 (1st Cir. 2006) (recognizing as the "majority position that a cause of action for tortious interference with an expectancy of inheritance, if it lies at all, would not lie where an adequate statutory remedy is available but has not been pursued").

In addition to the states that have flat out rejected the tort and the states that have limited the remedy's availability to circumstances where a will contest is not possible, states have also limited the application of the tort to require that a plaintiff prove that the defendant had knowledge of the

expected inheritance in order to recover, either as an explicit element of the tort as Iowa has done, or as a finding that is implicit in one of the other elements.

For example, in California, the Court of Appeals has held that the element of "intent" requires that the plaintiff prove that defendant had knowledge of the plaintiff's expectancy of inheritance and took deliberate action to interfere with it. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1057, 141 Cal. Rptr. 3d 142, 157 (2012).

In Connecticut, a state in which the court of last resort has not yet considered the issue, the Superior Court has suggested that the tort requires "the defendant's knowledge of the expectancy." *DePasquale v. Hennessey*, No. CV106007472S, 2010 WL 3787577, at *3 (Conn. Super. Ct. Aug. 27, 2010).

As discussed above, Plaintiffs would like the Appellate Court to believe that the law on intentional interference with inheritance is settled law. In actuality, there are only *two* states where the court of last resort has explicitly allowed for intentional interference with inheritance as a stand-alone tort that is actionable even when the remedy of a will contest is available. *See Morrison v. Morrison*, 663 S.E.2d 714, 716 (Ga. 2008); *DeHart v. DeHart*, 986 N.E.2d 85, 97 (Il. 2013).

The *Boman* Elements are Inconsistent with the Restatement but not in the Manner Urged by Plaintiffs

Because the law related to intentional interference with inheritance is far from settled, we agree with Plaintiffs that a review of the Restatement of Torts in this matter is appropriate and helpful.

In their appeal, Plaintiffs argue that Iowa is incorrectly applying the law based on the guidance provided by the *Restatement (Second) of Torts*. We agree. However, we believe that Plaintiffs' analysis of the Restatement is incorrect and leads to an incorrect conclusion.

In their Brief, Plaintiffs have gone to great lengths to compare the elements and comments from the *Restatement (Second) of Torts* for the torts of intentional interference with inheritance (*Restatement (Second) of Torts § 774B* (1979)) and intentional interference with contract (*Restatement (Second) of Torts § 766B* (1979)). The lengthy argument by Plaintiffs appears to focus on the fact that the Restatement includes a requirement that the defendant have knowledge of the contract at issue in a claim of intentional interference with contract, while the Restatement does not include a requirement that the defendant have knowledge of the inheritance at issue in a claim of intentional interference with inheritance. *Compare Restatement (Second) of Torts § 774B* (1979)(" Unlike the liability stated in § 766B, the liability stated in this Section is limited to cases in which the

actor has interfered with the inheritance or gift by means that are independently tortious in character") *with Restatement (Second) of Torts § 766B* (1979)("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").

Plaintiffs appear to mistakenly interpret this distinction to mean that the required proof for interference with inheritance is somewhat less than the required proof for interference with contract. However, the proper interpretation of these passages leads to quite the opposite result.

Recall that to satisfy the Restatement under interference with inheritance, a plaintiff must prove "the actor has interfered with the inheritance or gift by means that are *independently tortious* in character." *Restatement (Second) of Torts § 774B* (1979) cmt c *emphasis added*. In cases of interference with contract, a party need not prove that the defendant committed an act that was independently tortious. Instead, in a case of interference with contract, the plaintiff simply must show that the defendant knew about the contract.

The distinction is significant and easily demonstrated through a short hypothetical. Imagine a circumstance where Abbie goes to the auto dealer to

purchase a new car, makes a selection, and buys the car from Bobbie. However, unbeknownst to Abbie and Bobbie, Charlie was already under contract to sell that car to Dave. Did Abbie intentionally interfere with Dave's contract? Would it be fair to make Dave liable to Abbie for intentional interference with contract? Afterall, she intended to buy the car.

Of course, liability in that circumstance would not be reasonable because Abbie did not intend to harm Dave. In fact, she didn't even know about Dave or his contract. Instead, Dave can pursue his remedy in a breach of contract claim against Charlie.

Imagine a similar circumstance, but this time the car is a rare collectors' item and Abbie and Dave are both collectors. In this instance, Abbie learns that Dave is under contract on the car and rushes to the dealership to purchase the car from Bobbie before Dave has the opportunity to pick it up from Charlie. In this case, Abbie knew about Dave's contract and intentionally interfered. She would be liable to Dave for intentional interference with contract.

Now imagine a third circumstance where Abbie doesn't know that Dave is under contract to buy the car but happens to be at the dealer chatting with Charlie. During the conversation, Abbie learns that Charlie also knows Dave, and being a bit a gossip, tells Charlie that Dave is an alcoholic who

has wrecked several cars. Abbie did not have knowledge of Dave's contract to buy the car. However, Charlie is shocked by the news, and quickly decides to sell Abbie the car instead. In this case, Abbie did not intentionally interfere with Dave's contract, nor did she commit an independent tort against Dave. At most, her misconduct was negligent but not intentional.

Finally, imagine a fourth circumstance where Abbie again learns of Dave's plans to purchase the rare car, but instead of simply beating Dave to the lot, Abbie goes to the lot and tells Charlie that Dave is an alcoholic who is only going to destroy the car, and convinces Charlie to sell the car to her instead. In this case, Abbie has perpetrated her interference through tortious conduct. The intentional tort she committed was committed against Dave, and the fact that she knew of the existence of Dave's contract was an implicit factor in the commission of the tort.

It's the fourth level of culpability above that is required for the tort of intentional interference with inheritance. *Restatement (Second) of Torts* § *774B (1979) cmt c* ("In the absence of conduct independently tortious, the cases to date have not imposed liability under the rule stated in this Section.") The expansion of the tort that Plaintiffs are requesting is the third example.

Now, as an illustration, imagine the same hypotheticals presented above but in the context of a claim of interference with inheritance.

First, imagine a circumstance where Abbie and Bobbie become friends. Over a period of several years, the two become close and toward the end of Bobbie's life, he drafts a bequest to Abbie. Unbeknownst to Abbie, Bobbie had previously drafted the same bequest to Dave. Did Abbie intentionally interfere with Dave's inheritance? Would it be fair to make Dave liable to Abbie for intentional interference with inheritance?

Of course, liability in that circumstance would not be reasonable, because Abbie didn't intend to harm Dave. In fact, she did not even know about his bequest. If liability were found to exist in this circumstance, it would be impossible for a donor to change his estate plan without exposing his new beneficiary to liability in tort.

In the second circumstance, after Abbie and Bobbie have grown closer and closer, Bobbie tells Abbie that he had previously planned to make a bequest to Dave, but ceremoniously announces that he has changed his mind and now plans to make the bequest to Abbie instead. Accordingly, Abbie now has knowledge of Bobbie's plans to make a bequest to Dave. Is she liable in tort? Establishing liability here would truly be an absurd result, and if found, would again hamper the ability of any donor to change their

mind. At a minimum, every divorce would be accompanied by a claim of tortious interference with inheritance.

Now imagine the third example, where Abbie and Bobbie have grown close, although Abby has no knowledge that Dave is the expectant beneficiary of Bobbie's bequest. Still struggling with her habit of gossip, one day Abby tells Bobbie that Dave is a drug addict and blows through money. Bobbie is shocked by this news and modifies his bequest to make Abbie his beneficiary instead of Dave. Should Abby be liable in tort to Dave for intentional interference with inheritance when she had no knowledge of Dave's bequest and did not intend to harm Dave? As above, Abby's conduct was at most negligent, but not intentional.

Finally, in the fourth example, imagine a circumstance where after learning about Bobbie's plans to make a bequest to Dave, Abbie told Bobbie that Dave was a drug addict who would blow through the bequest and convinced Bobbie to change his plans to make her the beneficiary. In this example, Abbie has perpetrated her interference through tortious conduct. The intentional tort of defamation that she committed was committed against Dave for the purpose of altering Bobbie's bequest. The fact that she knew of the existence of Dave's bequest was required for her to have the intent

necessary to commit the tort. Afterall, if Abbie had not known of Dave's bequest, she wouldn't have committed defamation against Dave.

These hypotheticals raise two distinct issues. First, whether actual tortious conduct should be required for the tort of intentional interference with inheritance; and second, whether knowledge of the inheritance is required.

Intentional Interference with Inheritance Always Requires Independently Tortious Conduct

Intentional interference with inheritance always requires independently tortious conduct, which the Restatement makes clear:

> 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 to the other for loss of the inheritance or gift.

Restatement (Second) of Torts § 774B (1979). The phrase "fraud, duress or other tortious means" was meant to impose a limit on the tort by requiring the plaintiff to prove that the defendant's conduct was "independently tortious in character"--that is, the sort of wrongful conduct that would in other contexts support liability under an intentional tort.

> Unlike the liability stated in [intentional interference with contract], the liability stated in this Section is limited to cases in which the actor has interfered with the inheritance or gift by means that are *independently tortious in character*. The usual case is that in which the third person has been induced to make or not to make a bequest or a gift by fraud, duress, defamation or tortious abuse of fiduciary duty,

> or has forged, altered or suppressed a will or a document making a gift.

Restatement (Second) of Torts § 774B (1979) cmt c. emphasis added.

The Restatement explicitly provides that there is no liability for intentional interference with inheritance where the actor's conduct is merely negligent:

> It does not purport to cover liability for negligence when the actor, in attempting to effectuate an inheritance or gift, breaches a duty to use reasonable care that he owes to the donee as well as the donor.

Restatement (Second) of Torts § 774B (1979) cmt a.[3]

Nor can there be liability when an actor operates only with the power of persuasion:

> In the absence of conduct independently tortious, the cases to date have not imposed liability under the rule stated in this Section. Thus, one who by legitimate means merely persuades a person to disinherit a child and to leave the estate to the persuader instead is not liable to the child.

Restatement (Second) of Torts § 774B (1979) cmt c.[4]

The elements for the tort of intentional interference with inheritance should be clarified by the Iowa Supreme Court to explicitly require a plaintiff to prove conduct that is independently tortious, as required by the Restatement.

[3] Note that this comment is illustrated in the third hypothetical examples provided above
[4] Note that this comment is illustrated in the second hypothetical examples provided above.

Undue Influence and Duress are Not Intentional Torts and are Not Tortious Conduct Sufficient to Find Liability for Intentional Interference with Inheritance

Plaintiffs have urged the Court to adopt a version of intentional interference with inheritance that allows liability when a plaintiff proves, in addition to the other elements, a finding of "undue influence."[5] (Appellants' Brief, p. 27.) Such an interpretation would dramatically expand the intended application of this tort to include actions by a defendant which are not independently tortious.[6]

In Iowa, undue influence means "a person substitutes his or her intentions for those of the person making the will." *Iowa State Bar Ass'n, Iowa Civil Jury Instructions* 2700.4 (2011). The concept is meant to capture "overreaching" and "over persuasion" – forms of mistreatment that are less

[5] In support of this proposition, Plaintiffs cite a humorously inaccurate or out of date article, 36 Causes of Action 2d 1, Cause of Action for Intentional Interference with Expected Inheritance, which includes citations to at least two cases which are either no longer good law, misquoted, or misapplied. For example, Plaintiffs cite *In re Marshall*, 275 B.R. 5 (C.D. Cal. 2020), which purports to apply Texas law, in support of the element quoted, but the case doesn't include either the elements contained in the quote or the actual tort of intentional interference with inheritance; furthermore, as discussed above, the Supreme Court of Texas has explicitly chosen not to recognize the tort (*Archer v. Anderson*, 556 S.W.3d 228, 229 (Tex. 2018), reh'g denied (Oct. 19, 2018)("Because existing law affords adequate remedies for the wrongs the tort would redress, and because the tort would conflict with Texas probate law, we hold that there is no cause of action in Texas for intentional interference with inheritance.")). In similar fashion, Plaintiffs cite *Lindberg v. United States*, 164 F.3d 1312, 1319 (10th Cir. 1999) in support of the element that duress or undue influence is sufficient to support the tort, when the case cited is a federal tax case, attempting to apply Colorado law, and explicitly acknowledges that "Colorado state courts have not recognized the common law tort of intentional interference with inheritance, we assume for purposes of decision that they would, and treat the settlement agreement as a bona fide compromise of colorable claims." *Id*.

[6] Defendants acknowledge that "undue influence" currently appears in one of the *Boman* elements. However, Defendants argue that the inclusion of "undue influence" is clearly erroneous.

overtly coercive than fraud or force or threat of force. *Restatement (Third) of Restitution and Unjust Enrichment § 15* (2011) cmt. b.

In the inheritance context, undue influence frequently takes the form of a caretaker who ingratiates himself to an elderly and infirm donor, while at the same time isolating the donor from friends and family members (who may be expectant beneficiaries), after which the donor, at the suggestion of the caretaker, arranges to transfer property to the caretaker.

Regardless of the influencer's blameworthiness, undue influence is not "independently tortious" as to the donor or to any other expectant beneficiaries. There is no tort of undue influence in Iowa, or elsewhere. In the absence of fraud, defamation, assault, or other such tortious misconduct, neither the donor nor the expectant beneficiaries has a tort claim against the influencer.

However – and most significantly – the donor or expectant beneficiaries can recover the transferred property in an action against the recipient for restitution by way of constructive trust. *See e.g. Matter of Estate of Welch*, 534 N.W.2d 109, 111 (Iowa Ct. App. 1995). Likewise, if the donor changed his estate plan as a result of undue influence, at the donor's death the disappointed expectant beneficiaries can contest the

disposition in a will contest or in restitution, as Plaintiffs did here. *See e.g. Matter of Estate of Bayer*, 574 N.W.2d 667, 669 (Iowa 1998).

A similar analysis pertains to duress. There is no tort of duress. Of course, certain forms of duress are tortious, such as a threat of imminent physical harm (assault) or a threat of unfounded legal action (abuse of process). But insofar as duress in the inheritance context refers to subtler forms of coercion, such as berating and browbeating an elderly donor into making a transfer or a new estate plan, the donor cannot seek relief in tort. Instead, recourse lies in probate or restitution.

In their Brief, Plaintiffs state that they are seeking expansion of the tort so that they can recover a hodgepodge of tort damages including damages for emotional distress, consequential damages, and attorney fees. Appellants' Brief, p. 22. The imposition of such liability for an "intentional tort" that does not require either intent or an actual tortious act would be quite unusual indeed, and would profoundly pervert the tort into a kind of shapeless equity that would keep Iowans and their lawyers busy for years to come.

The elements for the tort of intentional interference with inheritance should be clarified by the Iowa Supreme Court to explicitly require a plaintiff to prove conduct that is independently tortious, and should specify

that a showing of "undue influence" or "duress" without some other intentional tortious conduct, is insufficient to find liability, as required by the Restatement.

Intentional Interference with Inheritance Implicitly Requires Knowledge of the Inheritance

The final issue that requires consideration is the requirement that the actor have actual knowledge of an individual's expectancy before the actor can be liable for intentionally interfering with the expectancy.

As discussed above, at least three states currently explicitly require a finding that the actor have knowledge of the inheritance in order to intentionally interfere with that inheritance. In Iowa and Connecticut, the courts have required that knowledge of the inheritance is an actual element that must be proved as part of the tort. *See e.g. Estate of Arnold v. Arnold,* 938 N.W.2d 720 (Iowa Ct. App. 2019)(citing the requirement that plaintiff must prove that "the defendants knew of the plaintiff's expected bequest"); *DePasquale v. Hennessey*, No. CV106007472S, 2010 WL 3787577, at *3 (Conn. Super. Ct. Aug. 27, 2010) (the tort requires "the defendant's knowledge of the expectancy"). In California, the Court of Appeals has held that the element of "intent" requires that the plaintiff prove that the defendant had knowledge of the plaintiff's expectancy of inheritance and

took deliberate action to interfere with it. *Beckwith v. Dahl*, 205 Cal. App. 4th 1039, 1057, 141 Cal. Rptr. 3d 142, 157 (2012).

In the states where knowledge is not explicitly required, it may in fact be that an actor's knowledge of the inheritance is a requirement that is too obvious to mention. After all, imposing liability for intentional interference against an actor for intentionally interfering with something with which he does not know exists, would require a level of intellectual acrobatics that would be quite outside the typical requirements of the law. In order to be liable for intentional interference with inheritance without having knowledge of the inheritance, an actor would need to inadvertently, intentionally interfere with the bequest. The undersigned counsel has endeavored to find a case where this has occurred but been unable.

Plaintiffs' counsel appears to address this logical fallacy by arguing that the relevant intent is the actor's intent to obtain the bequest, rather than the intent to harm the expectant beneficiary. This argument fails for three reasons.

First, as discussed above, the Restatement makes clear that an intent to harm the expectant beneficiary is required, rather than merely an intent to obtain the inheritance. The Restatement provides that no cause of action arises where the actor deprives an expectant beneficiary of a bequest through

actions that are legitimate (including persuasion), negligent, or even reckless; any of which, if allowed, would give rise to an argument that "intent to obtain" is enough and that the harm to the expectant beneficiary can be incidental. *See Restatement (Second) of Torts § 774B* (1979) cmts. a. and c. Instead, the restatement requires an intent to harm the beneficiary, in the form of an intentional tort. The Restatement contemplates that the underlying intentional tort may be committed against either the donor or the expectant beneficiary, but in either case, the underlying tort only triggers the tort of interference if there is an intent to harm the expected beneficiary. For example, if the underlying tort is directed at the expectant beneficiary, the interference tort is obviously triggered. *Id*. (recognizing that the intentional tort of defamation supports the tort of intentional interference with inheritance.) In the event that the underlying tort is directed at the donor, the examples provided by the Restatement also all implicitly requires that the actor have knowledge of the expectant beneficiary. *Id*. (recognizing that the intentional torts of fraud, abuse of fiduciary duty, forgery, alteration, or suppression could all support the interference tort.) In either case, the actor would necessarily have knowledge of the bequest in order to intentionally commit the underlying tort, regardless of whether the underlying tort is directed at the donor or intended beneficiary.

Second, all intentional torts require an intent to harm another, not simply an intent to obtain a certain outcome. Tort law provides for the recovery of damages in instances where a harm is inadvertent, but in those cases a lower level of culpability is required, such as recklessness, negligence, or strict liability. However, both the ALI and the Iowa Supreme Court intended that the highest level of culpability be required here.

For example, when the ALI began drafting the section that would become intentional interference with inheritance, the section initially did not specify a particular mental state. Later, the word "purposely" was inserted, which was then changed to "intentionally." *Compare Restatement (Second) of Torts §774B (Council Draft No. 23, 1967), with Restatement (Second) of Torts §774B (Council Draft No. 40, 1976).*

In adopting the tort in Iowa in *Frohwein*, the Iowa Supreme Court recognized their desire to expand the torts of commercial interference to a "non-commercial context." *Frohwein*, 264 N.W.2d 792 (Iowa 1978). The commercial context has recognized a two-tiered approach to culpability by recognizing torts for both negligent interference and intentional interference. *Compare Restatement (Second) of Torts § 766B Intentional Interference with Prospective Contractual Relations with Restatement (Second) of Torts § 766C Negligent Interference with Contract or Prospective Contractual*

Relation. However, the *Frohwein* court chose "intent" for the tort of interference with inheritance. *Frohwein*, 264 N.W.2d 792 (Iowa 1978). If the Iowa Supreme Court had wanted to allow for claims of interference with inheritance in circumstances where an actor inadvertently interfered with expectant beneficiaries' inheritance, they would have specified so – perhaps by establishing a tort for negligent interference with inheritance.

In *Huffey*, the Supreme Court confirmed their desire that the tort require intentional conduct, stating, "[I]n an intentional interference case, the wrongdoer's unlawful intent to prevent another from receiving an inheritance is the key issue." *Huffey*, 491 N.W.2d at 521. Again, in *Huffey*, the focus of the Court was on the intent to harm, not the intent to obtain.

Accordingly, both Iowa and the ALI require an actor to have an intent to harm, rather than an intent to obtain the bequest. In order to have an intent to harm, the actor must know of the existence of the expectant beneficiary.

Third, the Iowa courts have endeavored to provide additional insight on this issue by recognizing the two distinct roles played between the tort claim of intentional interference with inheritance and a will contest.

"The necessary proof in an action for intentional interference with a bequest or devise focuses on the fraud, duress, or other tortious means intentionally used by the alleged wrongdoer in depriving another from

receiving from a third person an inheritance or gift." *Huffey*, 491 N.W.2d at 521. "[I]n an intentional interference case, the wrongdoer's unlawful intent to prevent another from receiving an inheritance is the key issue." *Id*. A claim of intentional interference differs from a claim of undue influence where "the required proof focuses on the testator's mental strength and intent." *Id*.

This analysis further illustrates Defendants' argument. To pursue a remedy in tort, the actor must intend to harm the expectant beneficiary, which necessarily requires that the actor knows the intended beneficiary exists. In instances where the actor improperly interferes with the bequest of an expectant beneficiary, but does so without knowledge of the expectant beneficiary or the bequest, the expectant beneficiary must pursue relief through either a constructive trust, will contest, or action for restitution, as discussed in detail above.

The knowledge element currently utilized by the Iowa courts for the tort of intentional interference with inheritance is appropriate and should be explicitly confirmed by the Iowa Supreme Court, either as a distinct element as it exists today, or as a required finding as part of the element of intent.

The Iowa Supreme Court Should Require a Plaintiff to Pursue their Remedy in a Will Contest When Available

After clarifying the elements of intentional interference with inheritance to include an underlying intentional tort and knowledge, as discussed above, the Iowa Supreme Court should join the majority of states that recognize the tort, to further limit the action to instances where a remedy is not otherwise available through probate or inheritance laws. As discussed in greater detail above, a majority of the states that recognize the tort of intentional interference with inheritance provide that an action in tort is only available if adequate relief is not available through the laws of inheritance or probate. *See e.g. Wolf v. Doll*, 229 So.3d 1280, 1283 (Fla. 4th DCA 2017) ("[T]he law permits a claim for tortious interference of a testamentary expectancy 'if the circumstances surrounding the tortious conduct effectively preclude adequate relief in the probate court.'"); Indiana (*Minton v. Sackett*, 671 N.E.2d 160, 162 (Ind. Ct. App. 1996) ("A majority of the states which have adopted the tort of interference with an inheritance have achieved such a balance by prohibiting a tort action to be brought where the remedy of a will contest is available and would provide the injured party with adequate relief.")); *Umsted v. Umsted*, 446 F.3d 17, 22 (1st Cir. 2006) (recognizing as the "majority position that a cause of action for tortious interference with an expectancy of inheritance, if it lies at all,

would not lie where an adequate statutory remedy is available but has not been pursued").

The interference-with-inheritance tort changes the rules under which inheritance disputes are litigated and offers different remedies than inheritance law, which means that in instances where a party requests that a will be set aside due to "undue influence" or "duress," the tort creates a rival legal regime that addresses the same problems. The tort allows a disappointed expectant beneficiary to choose his preferred rules of procedure and potential remedies--the specialized rules of inheritance law, or the general civil litigation rules of tort law.

If the law is to be applied as Plaintiffs request, there would be an incredible amount of redundancy between tort law and inheritance law.

> What makes the redundancy between tort law and inheritance law pernicious is that tort, as a general law of wrongful injury, is ill-suited to posthumous reconstruction of the true intent of a decedent. Such an undertaking, which is hampered by the inability of the decedent to give testimony to authenticate or clarify his intentions, requires the court to distinguish between legitimate persuasion and "undue influence" or "duress," and to do so in the context of nuanced family dynamics and customs that are often inaccessible to outsiders. In contrast to tort law, inheritance law has developed a host of specialized doctrines and procedures to deal with these difficulties. There is thus little reason to suppose that tort concepts and procedures, which have developed primarily to deal with less subtle forms of injurious misconduct, will help courts better distinguish a bona fide claim of wrongful interference from a strike suit by a disappointed expectant beneficiary.

John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance, 65 Stan. L. Rev. 335, 338 (2013).

Furthermore, allowing plaintiffs to seek recovery for tort damages – including punitive damages, consequential damages, emotional distress damages, and attorney fees – for undue influence or duress against an individual who is deceased and unable to testify should raise significant concerns about fairness. In addition, allowing those categories of damages to be available to a party without proving that the defendant had the intent to harm the plaintiff, had committed an actual independent tort, or in instances (such as those proposed by Plaintiffs) where the defendant doesn't even know the plaintiff exists, would lead to extraordinarily inequitable results.

However, in circumstances where there is an appropriate underlying intent to harm the expected beneficiary, the tort of intentional interference with inheritance could be made available for the recovery of tort remedies – including punitive damages, consequential damages, damages for emotional distress and attorney fees. However, claims based on duress or undue influence are best left to inheritance law and the remedies and actions available there. Iowa should join the majority of states who recognize this tort to impose this limitation.

The District Court's Ruling on Partial Summary Judgment Must be Affirmed Because Plaintiffs Failed to Prove that Defendants Committed any Independent Intentional Tort Against Plaintiffs

Even if the Supreme Court declines to impose the limitation argued above which would require a plaintiff to pursue relief through a will contest when available, the District Court's decision on summary judgment must be affirmed because Plaintiffs failed to allege, let alone prove, that Defendants engaged in any "independently tortious conduct" as required with a claim of intentional interference with inheritance as discussed at length above.

Plaintiffs initially pled fraud, constructive fraud, fraud at law, negligent misrepresentation, and conspiracy. (App. pp. 12-14). However, after Defendants filed their Motion for Partial Summary Judgment, Plaintiffs voluntarily dismissed these tort claims. (App. pp. 238-239) Rather than defend that the factual record in the case was sufficient to support Plaintiffs' intentional tort claims during Defendants' Partial Summary Judgment, and argue that a genuine issue of material fact existed, Plaintiffs simply dismissed the claims – effectively conceding that Plaintiffs had not engaged in any conduct that was independently tortious.

In reviewing the grant or denial of summary judgment motions, the task on appeal is to determine only whether a genuine issue of material fact existed, whether the law was correctly applied, and to reverse the grant of

summary judgment if it appears from the record there is an unresolved issue of material fact. *Frohwein v. Haesemeyer*, 264 N.W.2d 792, 795–96 (Iowa 1978). There can be no genuine issue of material fact when Plaintiff voluntarily dismissed the claims.

II. THE DISTRICT COURT ERRED IN ALLOWING HIGHLY PREJUDICIAL HEARSAY EVIDENCE

A. PRESERVATION OF ERROR

A specific objection is effective to preserve error on the grounds specified. *Porter v. Iowa Power and Light Company*, 217 N.W.2d 221, 231 (Iowa 1974). "Once a proper objection has been made and overruled, an objector is not required to make further objections to preserve his right on appeal when a subsequent question is asked raising the same issue. Repeated objections need not be made to the same class of evidence." *State v. Kidd*, 239 N.W.2d 860, 863 (Iowa 1976); *State v. Padgett*, 300 N.W.2d 145, 146 (Iowa 1981)("trial court was alerted by defendant's two objections to his claim of hearsay, and its ruling adequately informed defense counsel that additional objections on the same ground to testimony of the same kind would be to no avail.")

B. SCOPE AND STANDARD OF REVIEW

Generally, claims of error regarding a trial court's admission of evidence are reviewed for abuse of discretion. *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009). However, to the extent an appellant's challenge to the trial court's ruling implicates the interpretation of a rule of evidence, review is for errors at law. *Scott v. Dutton-Lainson Co.*, 774 N.W.2d 501, 503 (Iowa 2009).

Accordingly, a claim of error regarding a hearsay ruling is reviewed for errors at law. Furthermore, improper admission of hearsay evidence is presumed prejudicial unless the party offering the hearsay establishes that the error was harmless. *Hawkins v. Grinnell Regional Medical Center*, 929 N.W.2d 261, 266-67, 2019 A.D. Cas. (BNA) 211471, 2019 Fair Empl. Prac. Cas. (BNA) 211471 (Iowa 2019) (reversing $5 million judgment in employment discrimination case because record did not negate prejudice associated with improperly admitted hearsay exhibit); *State v. Plain*, 898 N.W.2d 801, 813 (Iowa 2017) (placing burden on State who offered inadmissible hearsay "to affirmatively establish that the admission of hearsay evidence over proper objection was not prejudicial"); *State v. Russell*, 893 N.W.2d 307, 314 (Iowa 2017) (appellate court must presume prejudice unless record affirmatively establishes otherwise).

C. ARGUMENT

Introduction: The Hearsay Statements

At issue in the litigation are two wills prepared by Attorney James Sulhoff for the decedent, Cletis Ireland. The first will was prepared by Attorney Sulhoff and signed by Ms. Ireland in 2001. (Tr. 24:20-22; App. p. 283) The second will was prepared by Attorney Sulhoff and signed by Ms. Ireland in 2015. (Tr. 45:7-9; App. pp. 276-277)

In Ireland's 2001 will, Ms. Ireland's farm tenant, Plaintiff Buboltz, received a fifty-percent share of Ms. Ireland's farm. (App. p. 283) In Ireland's 2015 will, Plaintiff Buboltz no longer received this share. (App. pp. 276-277)

Plaintiff Buboltz believed that he was a beneficiary of Ms. Ireland's will. (Tr. 342:10-13.) Accordingly, after Ms. Ireland passed away, Plaintiff Buboltz visited Attorney Sulhoff and requested that he be allowed to review the will. (Tr. 342:2-23.) Plaintiff Buboltz then had a conversation with Attorney Sulhoff about the will and Ms. Ireland's bequest to Defendant Durick. (Tr. 343:11-344:21.)

At trial, Buboltz's Counsel asked his client, "When you asked about Patti's daughter, what did Jim Sulhoff say?" (Tr. 343:24-25.)

Defendants' counsel objected to this question on the basis that the question called for hearsay. (Tr. 344:2.) The District Court initially sustained the objection, but after a short sidebar (discussed further below), the Court overruled the objection. (Tr. 344:9-10)

Plaintiff Buboltz then testified as follows:

MR. BUBOLTZ: I asked who Kumari was, and he said that that was her daughter. And I had asked, "Why was she there?" And he said that Cletis had said that Patti said, "Give it to my daughter. I have all the money. I have plenty of money. And give it to my daughter." And then he said – Well, do you want me to continue?

MR. WANIO: Yeah. What else did he say?

MR. BUBOLTZ: Then he said, "I know. It's dirty and it stinks."

MR. WANIO: What did you make of that comment?

MR. BUBOLTZ: I didn't know what to think of it at the time.

MR. WANIO: You're not a lawyer?

MR. BUBOLTZ: No.

MR. WANIO: You're a farmer; right?

MR. BUBOLTZ: Yep.

…

MR. WANIO: Did you think it stunk?

MR. BUBOLTZ: Yes.

MR. WANIO: Have you been a Plaintiff to some thirty lawsuits?

MR. BUBOLTZ: No.

MR. WANIO: Why are you bringing this lawsuit?

MR. BUBOLTZ: I think what happened here was wrong. When you look back at it, everything over the years, and put it together, and I think that basically it's dirty and it stinks and that they should not be rewarded for what happened here.

(Tr. 344:13-345:15.)

In this short exchange, Buboltz's counsel adroitly expanded the Court's opening to create an absolutely eviscerating series of questions that included not only the hearsay statement from the Attorney Sulhoff, but also bootstrapped in a triple-hearsay statement that included not only Attorney Sulhoff, but also the decedent, Ms. Ireland, and the Defendant, Patti Birusingh.

In a matter of seconds, Buboltz's counsel had hearsay testimony from the decedent's own lawyer – the very person who drafted the will at issue in the litigation – saying that he thought the will "stinks" and a hearsay statement from one of the co-defendants stating that she had so much money that she couldn't possibly need another farm, and then flippantly passing it off to her daughter.

Buboltz's counsel then piled on while drawing upon earlier irrelevant and prejudicial testimony from Defendant Birusingh that she had been a plaintiff in some thirty lawsuits (which testimony was admittedly not objected to by Defendants' trial counsel at the time) (Tr. 108; Tr. 158.)

(Defendant Birusingh and her husband owned apartments and had been involved in typical eviction proceedings over the years, which initially Defendant Birusingh did not recall). (Tr. 108:10-15, Tr. 158:8-18.)

Plaintiff Buboltz then finished the exchange by returning to the purported hearsay statement of Attorney Sulhoff, while stating that he agreed with Attorney Sulhoff's purported conclusion that the bequest to Defendant Durick "stinks." (Tr. 345:11-15.)

So damaging were these hearsay statements, that Buboltz's counsel returned to these words again and again in his closing argument, weaving the hearsay into an absolutely devastating theme for the entire dispute. (Tr. 507:9, 511:10-12, 512:4).

The Hearsay Exceptions Do Not Apply

Hearsay is an out-of-court statement offered in evidence to prove the truth of the matter asserted. *Iowa R. Evid. 5.801(c)*; *State v. Shortridge*, App.1998, 589 N.W.2d 76. Hearsay consists of a statement which is offered to prove the truth of what was said, not simply that the statement was said. *State v. Wycoff*, 1977, 255 N.W.2d 116. Accordingly, in order to determine if a statement is hearsay, the court must look to the statement's purpose. *State v. Mueller*, App.1983, 344 N.W.2d 262. A hearsay statement within a

hearsay statement is only allowed if each part of the combined statement conforms to an exception to the hearsay rule. *Iowa R. Evid. 1.5805*.

Here, Buboltz's testimony included two hearsay statements. The first hearsay statement was a judicial rarity known as a "triple hearsay statement" – meaning that the hearsay statement included testimony from a total of three declarants. In this hearsay statement, Plaintiff Buboltz (the witness) testified that Attorney Sulhoff (the first declarant) told Plaintiff Buboltz (the witness) that decedent Ireland (the second declarant) told Attorney Sulhoff (the first declarant) that Defendant Birusingh (the third declarant) told Decedent Ireland (the second declarant) that Defendant Birusingh (the third declarant) had plenty of money and that the Decedent Ireland should give her farm to Birusingh's daughter, Defendant Durick. (Tr. 344:11-17.)

In the second hearsay statement, Plaintiff Buboltz (the witness) testified that Attorney Sulhoff (the declarant) said that the bequest to Defendant Durick "stinks." (Tr. 344:20-21.)

Both the first and second statements (and the declarations within the triple-hearsay statement), were statements made out of court and were offered to prove the truth of the matter asserted – specifically, that Ireland's own attorney thought the bequest to the Defendants "stinks" and that Defendant Birusingh had "plenty of money" and instructed Ireland to give

her farm to Defendant Birusingh's daughter, Durick. (Tr. 344:11-17; *See Iowa R. Evid. 5.801(c)*.)

Neither of the statements falls within the hearsay carve-out contained in Rule 1.801(d), or the hearsay exceptions contained in Rules 1.802, 1.803, 1.804, or 1.805.

So obviously were the statements hearsay, that Buboltz's counsel didn't deny it when the objection was raised. (Tr. 344:4-5.) Instead, Appellants' counsel argued that Defendants' counsel had "opened the door" to the testimony. (Tr. 344:6-7.)

Defendants' Did Not "Open the Door"

The argument that a party has "opened the door" to allow for the introduction of evidence that would otherwise be improper typically refers to two circumstances: (i) First, where fundamental fairness allows the admission of the otherwise inadmissible evidence under the doctrine of "curative admissibility"; and (ii) Second, where a prior inconsistent statement is offered to impeach a witness.

1. Curative Admissibility Does Not Apply

The first context where a party is alleged to have "opened the door" is a concept more formally known as "curative admissibility." Curative admissibility allows the introduction of evidence that would otherwise be

inadmissible, based on the theory that a party may not object or predicate error on the admission of inadmissible evidence when the objecting party introduced or elicited the evidence at issue. *See, e.g.*, *Brown v. First Nat. Bank of Mason City*, 193 N.W.2d 547, 555, 52 A.L.R.3d 728 (Iowa 1972) (defendant challenged admission of evidence of "rumor and gossip"; "examination of the record indicates that most of the evidence of which defendant complains, was introduced by the defendant itself"); *Olsen v. Harlan Nat. Bank*, 162 N.W.2d 755, 761 (Iowa 1968) (bank which offered particular exhibit cannot complain of its admission into evidence); *Glatstein v. Grund*, 243 Iowa 541, 552, 51 N.W.2d 162, 169, 36 A.L.R.2d 531 (1952) ("obviously defendant cannot complain of testimony elicited by her counsel.") Stated more simply, the rule provides that a party can't complain about their own evidence.

From this foundational concept, the doctrine of curative admissibility extends to circumstances where the party who introduced the inadmissible evidence attempts to preclude the opposing party from introducing or eliciting similarly inadmissible evidence in rebuttal, or engaging in otherwise improper cross-examination in an effort to explain the initial evidence. *Lala v. Peoples Bank & Trust Co. of Cedar Rapids*, 420 N.W.2d 804, 807–08 (Iowa 1988) (recognizing the doctrine of curative admissibility

when inadmissible evidence is introduced into the record and opposing party is allowed to offer inadmissible evidence to cure the problem). "[W]hen one party introduces inadmissible evidence the opponent under proper circumstances may be entitled to rebut this proof by other inadmissible evidence." *Vine Street Corp. v. City of Council Bluffs*, 220 N.W.2d 860, 864 (Iowa 1974). This legal doctrine is often referred to as the "fight fire with fire" theory. *State v. Huser*, 894 N.W.2d 472, 507 (Iowa 2017).

As shown from these examples, the doctrine of curative admissibility is predicated on considerations of fairness. The central idea is that a party who is harmed by an opponent's use of inadmissible evidence should be afforded an opportunity to neutralize or rebut the impact of that evidence.

Application of the doctrine requires three steps. First, the Court must determine if the evidence originally introduced was inadmissible. Then, the Court must determine if otherwise inadmissible rebuttal evidence should be permitted. Finally, any rebuttal evidence that is offered must be "on the same subject" and "fairly responsive." *State v. Padgett*, 300 N.W.2d 145, 147 (Iowa 1981)("The rule in Iowa is that when one party introduces inadmissible evidence, with or without objection, the trial court has discretion to allow the adversary to offer otherwise inadmissible evidence on

the same subject when it is fairly responsive" (*quoting State v. Pepples*, 250 N.W.2d 390, 394 (Iowa 1977).)

This analytical process requires that the rebuttal testimony concern the same disputed fact as the initial evidence and that it be limited to neutralizing the prior evidence without injecting unwarranted prejudice. *U.S. v. McClain*, 440 F.2d 241, 244 (D.C. Cir. 1971)(finding that the doctrine of curative admissibility rests "upon the necessity of removing prejudice in the interest of fairness."); *U.S. v. Winston*, 447 F.2d 1236, 1240 (D.C. Cir. 1971)("The doctrine is to prevent prejudice and is not to be subverted into a rule for the injection of prejudice.")

The hearsay passage reproduced above fails all three requirements of the curative admissibility doctrine.

As a reminder, the passage at issue involved a conversation between Plaintiff Buboltz and the decedent's attorney Sulhoff. The occurrence of this conversation first occurred during the direct examination of Attorney Sulhoff by Buboltz's counsel, as follows:

MR. WONIO: After her passing, you had a discussion with David Buboltz?

MR. SULHOFF: I believe he came in, yes.

…

MR. WONIO: You don't recall the specifics of that discussion?

MR. SULHOFF: No, I don't.

MR. WONIO: But you did meet with Mr. Buboltz in your office?

MR. SULHOFF: He was one of those people who walked in, yes.

MR. WONIO: And you discussed Cletis Ireland?

MR. SULHOFF: Yes.

MR. WONIO: In fairness, David was farming the land at the time she passed?

MR. SULHOFF: Well, I had no idea what the lease terms were. I was executor. I have to collect the rent. I have to pay – take the rent and pay the taxes. I didn't know whether they still had grain stored on the farm. That was his or hers. Often there are grains stored on farms that aren't from that farm. There's all kinds of issues. There's a lot of equipment in buildings from another farmer, in the farm buildings of the tenants. So, there are multiple issues that can arise because of the business relationship that they had.

(Tr. 42:14-43:16.)

It is important to note that Attorney Sulhoff was Plaintiff Buboltz's witness and that Attorney Sulhoff was on direct at the time the issue was first raised. None of the testimony was hearsay and all of the testimony solicited was admissible. The only testimony between Sulhoff and Buboltz was related to issues with Buboltz's tenancy on the farm.

Defendants' counsel anticipated that Plaintiff Buboltz would later testify that Attorney Sulhoff said the will "stinks" because Plaintiff Buboltz

made a similar allegation during his deposition. Accordingly, during cross-examination, Defendants' counsel asked Attorney Sulhoff the following:

MR. COX: Do you ever recall telling anyone that Cletis's will was dirty or that it stunk?

MR. SULHOFF: Not that I remember, no.

This testimony was similarly admissible, non-hearsay testimony.

Therefore, before Plaintiff Buboltz's direct examination, there was no other reference in the record to the conversation between Attorney Sulhoff and Plaintiff Buboltz by which Defendants could have "opened the door."

All of the testimony at issue was admissible, and therefore, the doctrine of curative admissibility was not an applicable ground for the introduction of the inadmissible hearsay statements.

Furthermore, even if the Defendants had somehow opened the door to the possibility of curative admissibility, the hearsay statements that were ultimately solicited were highly prejudicial and unfair (as discussed at length above), in further violation of the doctrine of curative admissibility.

2. <u>The Statements Were Not Proper Impeachment</u>

The second context where a party is alleged to have "opened the door" involves circumstances where an out-of-court statement is offered to impeach a witness's testimony pursuant to *Iowa R. Evid. 5.613*.

Generally, a witness may be impeached by showing his testimony on material matter is inconsistent with prior statement made by him. *State v. Frommelt*, 1968, 159 N.W.2d 532; *Iowa R. Evid. 5.613(b).* Although the prior statement is an out-of-court statement, the rule is not considered an exception to the hearsay rule because the out-of-court statement is not allowed to be used to "prove the truth of the matter asserted," (as required under *Iowa R. Evid. 5.801(c)(2)*) but is instead limited to use as evidence that the witness is not credible. Evidence of contradictory statements made out of court are not admissible as affirmative proof of facts related in the statement and are only admissible as tending to discredit and impeach the witness. *Chandler v. Harger*, 113 N.W.2d 250 (Iowa 1962).

Here, the hearsay statements were not used to simply impeach Attorney Sulhoff's memory of the conversation with Plaintiff Buboltz. The statements were intentionally, obviously, and repeatedly used by Plaintiff's counsel as proof of facts. Such use was improper and highly prejudicial to Defendants. As a result, a new trial is warranted.

III. A NEW TRIAL IS REQUIRED DUE TO THE IMPROPER CLOSING ARGUMENT BY PLAINTIFF BUBOLTZ'S COUNSEL

A. PRESERVATION OF ERROR

During his closing argument, Buboltz's counsel engaged in repeated instances of attorney misconduct. The Iowa Supreme Court has noted that "generally, in order to properly preserve for review in this court alleged error of counsel occurring during the course of jury argument it is the duty of the aggrieved party to call attention of the presiding judge to the alleged misconduct by timely objection and move by some proper procedure to give the trial court opportunity to correct the matter by admonition or further instruction." *State v. Phillips*, 226 N.W.2d 16, 18-19 (Iowa 1975); *Pose v. Roosevelt Hotel Co.*, 208 N.W.2d 19, 31 (Iowa 1973).

In *Andrews v. Struble*, the Court of Appeals recognized the difficulty of making continued objections to improper statements because,

> Continued objections by counsel to prejudicial statements of opposing counsel in his argument to the jury could place the former in a less favorable position with the jury, and thus impose an unfortunate consequence upon his client which was actually caused by the wrongful conduct of opposing counsel. This he is not required to do. Attorneys engaged in the trial of cases to a jury know or ought to know the purposes of arguments to juries. When they depart from the legitimate purpose of properly presenting the evidence and the conclusions to be drawn therefrom, they must assume the responsibility for such improper conduct. They are in no position to

> demand that opposing counsel shall jeopardize his position with the jury by constant objections to their improper conduct.

Andrews v. Struble, 178 N.W.2d 391, 402 (Iowa 1970).

Here, Defendants' trial counsel made a timely objection to the improper argument of Buboltz's counsel and error was accordingly preserved. (Tr. 508:3-6.) It was not necessary for counsel to move for a mistrial in order to preserve the error asserted. *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975).

B. SCOPE AND STANDARD OF REVIEW

"[T]he general rule is that in order for the granting of a new trial based upon attorney misconduct to be warranted, the objectionable conduct ordinarily must have been prejudicial to the interest of the complaining party." *Mays v. C. Mac. Chambers Co.*, 490 N.W.2d 800, 803 (Iowa 1992).

The decision of the trial court judge is reviewed for abuse of discretion. *Fry v. Blauvelt*, 818 N.W.2d 123, 128 (Iowa 2012).

C. ARGUMENT

One of the foundational principles of the American judicial system is that an attorney may not state a personal opinion as to the justness of a cause, express an opinion on the credibility of a witness, or use his or her closing argument to create evidence. *Iowa R. Prof'l Conduct 32:3.4* ("A

lawyer shall not: in trial…state a personal opinion as the justness of a cause [or] the credibility of a witness").

> Counsel has no right to create evidence by his or her arguments, nor may counsel interject personal beliefs into argument. This is true whether the personal belief is purportedly based on knowledge of facts not possessed by the jury, counsel's experience in similar cases, or any ground other than the weight of the evidence in the trial.

Rosenberger Enters, Inc. v. Ins. Serv. Corp. of Iowa, 541 N.W.2d 904, 908 (Iowa Ct. App. 1995).

Here, Plaintiff Buboltz's counsel did all three.

Plaintiff Buboltz's counsel began his closing argument by speaking to the justness of his client's cause by stating,

> I'm scared to death up here right now. I may not show it, but I'm literally scared to death. This is what we do. This is it. This is my culmination of getting to know you guys and presenting this case. My fear is I'm not going to give them the argument that they deserve or that I didn't present the case that they entrusted me to present for them and for Cletis. And maybe – I hope I'm not showing it too much, trembling; but I am scared to death.

(Tr. 505:12-20.)

Plaintiff Buboltz's counsel then created new evidence by fabricating statements on behalf of the decedent, Ms. Ireland, including, "help me save this," and "something wrong has happened." (Tr. 506:10-11.) Two statements that do not otherwise appear in the record.

Then, Plaintiff Buboltz's counsel made a series of self-aggrandizing statements about the success of his legal practice to bolster his own credibility before personally vouching for the credibility of his client, as follows:

> And I'm in a real fortunate situation with my law firm. I don't have to take every case that comes in the door. I get to pick and choose … and pat myself on the back a little bit. In trial work I get to pick my clients. That means I get to take the first measure of them. I feel like I've built up this good ability to read if somebody is snowballing me. David never struck me as anything but [] earnest.

(Tr. 507:14-508:2.)

The Iowa Supreme Court has repeatedly recognized that misconduct in argument may be so flagrantly improper and evidently prejudicial it may be a ground for new trial, even in instances where no objection was given when the argument was made. *Shover v. Iowa Lutheran Hospital*, 107 N.W.2d 85, 91 (Iowa 1961)("We have recognized that misconduct in argument may be so flagrantly improper and evidently prejudicial it may be a ground for new trial even though no exception was taken when the argument was made"); *State v. Phillips*, 226 N.W.2d 16, 19 (Iowa 1975); *Connelly v. Nolte*, 21 N.W.2d 311, 317 (Iowa 1946); *Hall v. Wolff*, 16 N.W. 710; *State v. Peirce*, 159 N.W. 1050; *Whitsett v. Chicago R. I. & P. Ry. Co.*, 25 N.W. 104; *State v. McIntyre*, 212 N.W. 757; *State v. Browman*, 182 N.W. 823. A new trial was also found to be appropriate in circumstances where

the objection to the attorney statements was sustained. *See e.g. Bronner v. Reicks Farms, Inc*., 919 N.W.2d 766 (Iowa Ct. App. 2018).

Because of Plaintiff Buboltz's counsel's professional misconduct, a new trial on Plaintiffs' action to set aside the will should be ordered.

CONCLUSION

The Supreme Court of Iowa should affirm the District Court's dismissal of Plaintiffs' claim for intentional interference with inheritance and remand the case for a new trial on Plaintiffs' claim to set aside the will based on undue influence and lack of capacity.

REQUEST FOR ORAL SUBMISSION

This matter should be submitted with oral argument and Defendants respectfully request the same. Iowa R. App. P. 6.908.

CERTIFICATE OF FILING

The undersigned hereby certifies that on the 6th day of July, 2020, one (1) copy of Appellees' Final Brief was filed via EDMS system with the Clerk of the Iowa Supreme Court.

Charles N. Wittmack

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on the 6th day of July, 2020, one (1) copy of Appellees' Final Brief was provided to the undersigned by the Clerk via EDMS system:

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Appellees' Final Brief was the sum of $ 0 .

Charles N. Wittmack

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Charles N. Wittmack — July 6, 2020
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