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' REPLY BRIEF

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REPLY TO APPELLES' STATEMENT OF FACTS

Several portions of Appellees' Statement of Facts compel reply.

First, Appellees claim that Mr. Sulhoff "testified that the ideas expressed in the will were clearly Ms. Ireland's," citing to page 48 of the Transcript. (Proof Brief, p. 23) Page 48 of the Transcript represents a portion of testimony whereby Mr. Sulhoff was detailing circumstances that could be generally concerning surrounding the will formation process. Nowhere on page 48 does Mr. Sulhoff "testify that the ideas expressed in the will were clearly Ms. Ireland's." Although the reference to the transcript page number may well be a scrivener's error, this is important to address because the substantive insinuation is not accurate.

In testifying quite the opposite, much later in his testimony, Mr. Sulhoff did detail the complete lack of clarity in the documents. (App. 359-360) In reference to the notes placed on the various versions of the wills, Mr. Sulhoff affirmatively testified that he had no idea when they were made, who was with Cletis when they were made, and, in fact, the copy of the original will maintained in his office did not even match the version submitted to probate! (App. 319-320, 353-354, 358) In reality, there is

nothing clear about the various versions of the will, except that the ideas expressed in them were not solely Cletis'.

Second, Appellees attempt to minimize and downplay the relationship between Cletis and both Plaintiffs. In referencing David Bobultz, Appellees simply refer to him as "the farm tenant." (Proof Brief, p. 23) In referring to Dona Reece, the Appellees elect to characterize her as a "first cousin once removed." (Proof Brief, p. 23) Notably, the Appellees' introduce the minimization of these relationships in the Statement of the Case, and insinuate that Dona was essentially absent in Cletis' life. (Proof Brief, p. 18) These characterizations are misleading and an unmistakable attempt to condition the Court into believing the two Plaintiffs were only loosely connected to Cletis Ireland.

Both David and Dona described David's close relationship with Cletis Ireland. (App. 408-412; Tr. 287-308, 346, 371, 405, 407) This testimony makes clear David was anything but simply a tenant farmer to Cletis; she considered him to be much more. (App. 429; Tr. 371, 405, 407)

David's relationship with Cletis spanned more than thirty (30) years. (App. 408) David knew everything about Cletis' farm, and how important it was to her. (App. 409-412; Tr. 288-300)(The farm was "everything" to her)

David would spend long hours with Cletis on the farm and became very familiar with Cletis' farming habits and preferences. (App. 408-412; Tr. 288-291) More specifically, Cletis would spend full days riding in the combines, tractors, and other farm implements with David. (App. 410)

In addition to the important farming relationship, David was, from the outset of their relationship in the 1980s, someone Cletis relied on to help her in her daily life. (Tr. 292-295, 405-406) She would often call on David and, in turn, he would call to check in on her. (Tr. 297) For example, David would be the person she called in the middle of the night to help her fix things around her home. (Tr. 405) Notably, in the latter stages of her life, Appellee Kumari's husband was unable to fix something at her home, so she summoned David and he did fix it. (Tr. 406)

Cletis knew David's wife and children. (Tr. 295) Likewise, the long hours spent with Cletis found David knowing a lot about her family. (Tr. 295) In another example, David's daughter incorporated Cletis' farm into a 4-H project to be presented at the State Fair. (Tr. 296-97) Cletis was involved in that project, traveled to the State Fair to be a part of its presentation, and was "very proud" of her and the farm's inclusion. (Tr. 296-97)

David took her to many doctor appointments and surgeries over the course of their relationship. (Tr. 308) He also went out driving with her when she was unable to get her driver's license back. (Tr. 305)

David considered Cletis an extension of his own family, and she shared that affection. (App. 429; Tr. 346, 371, 405) Cletis would specifically tell others she considered David to be her "son." (App. 429; Tr. 371, 405) David was no mere "tenant farmer." (App. 429; Tr. 405) David and Cletis' longstanding relationship is more accurately described as a familial one based on "mutual love and respect." (Tr. 346)

Similarly, it is unfair and misleading to minimize the relationship Dona had with Cletis. Dona's connection with Cletis was a very intimate, lifelong relationship. (App. 426-433; Tr. 392-476) Dona's mother, Edith Maertens, and Cletis were "like sisters." (App. 426; Tr. 393) Edith and Cletis would engage in marathon telephone calls very frequently. (Tr. 395-96)

While she was growing up, Dona loved to visit Cletis and the farm. (Tr. 395) While her mother was still alive, Dona would also engage in monthly telephone calls with Cletis. (Tr. 395-96) Although Dona would still visit Cletis, when she moved to Colorado and took her current job, the

physical visits were unavoidably less frequent, but the relationship did not change. (Tr. 394-95; 476-77)

Dona's mother died in 2008, and her relationship with Cletis grew much stronger. (Tr. 396-97) The telephone calls, which were monthly, were now weekly or more frequent. (Tr. 396-97) These more-than-weekly calls would last for a couple hours. (Tr. 395-397) Dona also took to writing Cletis letters and sending her greeting cards. (Tr. 396)

As Cletis' faculties began to wane, it was Dona and her sister Lori Blacker with whom Cletis chose to have discussions about her independence. (App. 428; Tr. 402, 411-412) At one point, Dona, Lori, and Cletis discussed the possibility of Cletis moving over with them in Colorado, or to an assistance facility near them. (Tr. 411-12) Although Dona knew in her heart that Cletis could never leave the family farm, the discussions advanced to the point where Dona was visiting facilities and even suggested one. (Tr. 411-12)

In the final years of Cletis' life, Dona physically visited her in nursing facilities, and was directly involved in regular communications with Cletis' medical care providers. (Tr. 408, 447) In the final year or so of Cletis' life, the communication between her and Cletis was *daily*. (Tr. 418-19) More,

Dona was in consistent and constant communication with Cletis' medical care providers to the extent she was permitted. (Tr. 447-449) At one point, due to her medical background, Dona recognized that Cletis was exhibiting signs of a urinary tract infection. (Tr. 447-449) Despite impediments placed by Defendants, Dona was able to essentially diagnose the infection and effect change in her care to address it. (Tr. 447-49) At times Dona's attempts to coordinate with Cletis' care providers were thwarted by Patti, but her resolve did not waiver. (Tr. 450-452)

Dona's relationship with Cletis was a sisterly bond built on mutual love and affection. (Tr. 401) Like in their Brief, Defendants attempted to minimize this relationship at the time of trial. (Tr. 476-77) The jury was not fooled, and the Court should not be misled. Dona's relationship with Cletis was strong from the time she was born and remained strong despite the geographical distance. (Tr. 476-477)

Even though their lawyers have attempted to minimize the relationship, the Defendants were forced to recognize this bond at trial. (App. 372-374; Tr. 449-450) Defendants admitted that Cletis would talk to them about Dona and her relationship with her. (App. 376; Tr. 135) In the most emotional testimony at trial, Defendant and Dona both described

Dona's request that she be there when Cletis died. (App. 373-374; Tr. 449-50) Defendant recognized that she understood the nature of Dona and Cletis' relationship was such that she could appreciate why Dona would want to be there when Cletis died. (App. 374) Admitting she "would totally understand why someone like Dona would want to be there when Cletis passed away.") Further, in discussing the fact that Defendant left to travel to California days before Cletis died, despite knowing Cletis' death was imminent, she admitted that she would not have done so for a family member. (App. 372) Moreover, it is not only ironic that Defendants did not know anyone at Cletis' funeral. (App. 3761)

The admissions outlined above, and distinction between the relationships noted, supplant any conditioning that attempts to minimize Dona's true bond with Cletis. Suggesting they had a closer relationship with Cletis, while downplaying the reality of the bonds Plaintiffs held, is inaccurate and intentionally misleading. (Tr. 476-77)

APPELLANTS' REPLY & CROSS-APPELLES' ARGUMENTS

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

REPLY TO PRESERVATION OF ERROR/ SCOPE OF REVIEW

Defendants assert that they "agree [with Plaintiffs]" that error was preserved regarding the legal standard applied by the District Court to Plaintiffs' claim of interference with inheritance. (Proof Brief, p. 24) This is not, however, what the Plaintiffs' asserted in their Proof Brief:

> *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)*

(Proof Brief p. 19)

Many of Defendants' arguments are, for the first time, being urged in this appeal. Consequently, they cannot be harmonized with mere agreement with Plaintiff's position because they were not presented to the District Court, were not a part of the oral motion made at trial, and were not determined by the District Court. This notably includes a request that the Supreme Court of Iowa completely remake the law. These assertions were not presented to, nor decided by, the District Court. Arguments urged for the first time on appeal should not be considered.

> *In determining whether error has been preserved, it is important to understand the purpose of our error-preservation rules. A helpful starting point is the underlying rationale for the general rule that issues not raised in the district court cannot be raised for the first time on appeal:*
>
> > *The orderly, fair and efficient administration of the adversary system requires that litigants not be permitted to present one case at trial*

> *and a different one on appeal. One reason is that the trial court's ruling on an issue may either dispose of the case or affect its future course. In addition, the requirement of error preservation gives opposing counsel notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling.*

State v. Mann, 602 N.W.2d 785, 790 (Iowa 1999)(quoting *State v. Tobin,* 333 N.W.2d 842, 844 (Iowa 1983)).

Although Defendants concede that the District Court misapplied the law, an admission Plaintiffs' welcome, the extraneous arguments made in support thereof were not part of the presentation to the District Court and are not at issue here. Plaintiffs would, however, gladly accept the opportunity to present them to the District Court in remanding the claim for interference with inheritance.

Although Plaintiffs cannot say the Defendants' assertion on scope of review is clear-cut, Defendants seem to suggest that the Plaintiff's avenue to success in this matter is made more difficult by the application of stare decisis. (Proof Brief, pp. 24-26) Accordingly, Defendants mischaracterize Plaintiff's assertions and improperly insinuate some heightened showing is required.

In this case, the "legal precedent" referenced by the Defendants was outlined by the Plaintiffs. (Proof Brief, pp. 21-32) This "legal precedence"

was, as argued by Plaintiffs, mistakenly established by the Court of Appeals of Iowa in March of 2019. (Proof Brief, p. 30) One can certainly accept the Court of Appeals' pronouncement as "legal precedence," but it is undeniably a more strained announcement for purposes of applying stare decisis. It cannot however be argued that the precedence was long-standing. Finally, this was not the interpretation of a statute, so the need for a heightened showing is even further eroded.

The Supreme Court of Iowa detailed the appropriate application of stare decisis in *Bd. of Water Works Trustees of City of Des Moines v. SAC Cty. Bd. of Supervisors*, 890 N.W.2d 50, 61 (Iowa 2017). The Court noted with particularity the import of how long-standing a precedent had been and whether it implicated judicial interpretation of a statute. *Id.*

In this matter, the "precedent" Defendants reference was established by the Court of Appeals of Iowa in March of 2019 and does not involve judicial interpretation of a statute. No heightened showing should be applied in this case that would otherwise bar the Plaintiffs from having the claim for interference with inheritance remanded by to the District Court.

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

Reply Argument

i. The Legal Authorities Cited by Defendants Do Not Stand in Opposition to Plaintiffs' Position.

The Defendants' first argue that Plaintiffs' assertions regarding existing precedent are "misleading, inaccurate, and patently untrue." (Proof Brief, p. 26) In order to arrive at these conclusions, however, the Defendants first must distort and misapply the Plaintiffs' argument. Plaintiffs' assert that the application of a "knowledge" element is unique in those instances where the law is established. Plaintiff's do not contend that there is accord in all jurisdictions as to whether interference with inheritance is available. This is the Defendants' way of attempting to "shoehorn" the larger argument into the narrow issue considered by the District Court.

Lest there be any continued confusion, Plaintiff's position is accurately stated in its Conclusion section on this issue. (Proof Brief, p. 35) Plaintiffs did not, and are not now suggesting, that all jurisdictions have adopted interference with inheritance claims. The issue presented by Plaintiffs was whether an express "knowledge' element is appropriate.

In addressing the Plaintiff's claims that Iowa is an outlier in requiring a "knowledge" element, Defendant cites to two jurisdictions: California and Connecticut as supportive of this element. These cited authorities are not persuasive.

The case cited in California, *Beckwith*, that division of the appeals' court made the following determination about the knowledge element:

> *Third, the plaintiff must plead intent, i.e., 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)(Citing *Carlson v. Warren* (Ind.Ct.App.2007) 878 N.E.2d 844, 854.)).

Although the *Beckwith* decision did identify a claim for intentional interference with inheritance, that division (one of many) expressly limited its availability to situations when an "aggrieved party has essentially been deprived of access to the probate system." See, *Anderson v. Gleason*, No. G052897, 2017 WL 4003768, at *5 (Cal. Ct. App. Sept. 12, 2017). This appellate division is not on the same footing as Iowa.

Second, and more importantly, in making the determination of a "knowledge" element, the California Court expressly cited to an Indiana Court in the *Carlson* case. The problem? The cited Indiana authority makes absolutely no mention of a knowledge element. Here is the entirety of the Indiana Court's pronouncement:

C. Tortious Interference with an Inheritance

> *Finally, Carlson and Alderson contend that the Warrens tortiously interfered with their inheritance by exerting undue influence over*

> *Mangus to induce him to execute the deed. To prevail on a claim of tortious interference with an inheritance, Carlson and Alderson must show that the Warrens intentionally prevented them, by using fraud or other tortious means, from receiving an inheritance from Mangus that they otherwise would have received. Minton v. Sackett, 671 N.E.2d 160, 162 (Ind.Ct.App.1996). The plaintiffs base their claim in this regard entirely upon a theory of undue influence. We have already determined that there is no question of material fact regarding whether the Warrens exercised undue influence over Mangus. Thus, summary judgment was appropriate on this claim.*

Carlson v. Warren, 878 N.E.2d 844, 854 (Ind. Ct. App. 2007)[1].

The second jurisdiction cited by Defendant, Connecticut, is equally uncompelling on this issue. In the *DePasquale* case, the Connecticut Superior Court made the following determination in an unpublished opinion:

> *Finally, given the **established elements of a cause of action for tortious interference with contractual or beneficial relationships**, the **likely** elements of a claim for tortious interference with an expectancy of inheritance are as follows: 1) the existence of an expected inheritance; 2) the defendant's knowledge of the expectancy; 3) tortious conduct by the defendant, such as fraud or undue influence; and 4) actual damages to the plaintiff resulting from the defendant's tortious conduct. The plaintiffs have alleged facts that are more than sufficient to satisfy each of the likely elements of a cause of action for interference with an expectancy of inheritance as well as undue influence.*

DePasquale v. Hennessey, No. CV106007472S, 2010 WL 3787577, at *3 (Conn. Super. Ct. Aug. 27, 2010)(emphasis added)

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[1] The internal citation to *Minton* offers no additional input. It also fails to mention, let alone establish, knowledge as an element.

The conclusion of *DePasquale* does not establish a knowledge requirement. For one, the elements were not a question for that Court to pass on in reaching its decision. Truly, it did not, as it claimed only to suggest "likely" elements. A deeper analysis of the actual elements was just not done. Second, as Plaintiffs detail in their Brief, tethering the elements to those of tortious interference with contractual benefits does not result in a "knowledge" element. Finally, in addressing these matters from the unpublished opinion, a subsequent case in Connecticut proves that the State did not require a "knowledge" element:

> *It is also worth noting that the trial courts in Connecticut are split on whether our state should recognize the claim of tortious interference with an inheritance. "[I]t is true that no Connecticut Appellate or Supreme Court decisions have been rendered on [the issue of recognizing the claim of tortious interference with an inheritance], which, of course, does not mean the Supreme Court will not recognize this tort ..." "Despite the lack of case law, at least one court in the state has recognized the tort of tortious interference with an inheritance, stating that [s]uch a cause of action is very similar if not identical to a recognized cause of action in Connecticut; tortious interference with a contractual right ... The elements are: (1) that defendant intentionally interfered with the giving or leaving of property to the plaintiff; (2) that defendant used unlawful means to accomplish the interference or had an improper purpose; and (3) proof of damages ... A plaintiff may recover damages for tortious interference with a contract not only where the contract is thereby not performed ... but also where the interference causes the performance to be more expensive or burdensome*

Ferri v. Powell-Ferri, No. MMXCV116006351S, 2013 WL 5289955, at *18 (Conn. Super. Ct. Aug. 23, 2013)(internal citations omitted). This subsequent case expressly excludes a "knowledge" element from the list. Simply put, *DePasuale* does not stand for the proposition that Connecticut requires a "knowledge" element to prove interference with inheritance.

ii. Defendants' Assertion that Undue Influence Does Not Support Interference with Inheritance is Not Accurate.

As indicated above, the Defendants, for the first time, raise this suggestion on appeal. It is inappropriate for the Court to consider. However, should the Court decide to evaluate this claim, the Defendants' assertion is unpersuasive. Defendants' argument, essential is a cut-and-paste from the cited 2013 Standard Law Review Article, asserts reasoning which the Supreme Court of Iowa has previously considered and expressly rejected.

A significant portion of the Defendants' argument is taken directly from the Stanford Law Review Article they cite: *John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance*, 65 Stan. L. Rev. 335, 338 (2013)[2].

[2] A good portion of Defendants' argument is direct cut-and-paste, often **without** any reference to the article-palming them off as their innovative contentions. Defendants' problem is that Defendants' Brief goes to great

The Defendants' primary argument here is that undue influence cannot stand for the tortious conduct sufficient to support liability under a claim for interference with inheritance. The piracy of the Stanford Law Review Article aside, Defendants' offer no compelling support for this contention.

The Restatement and many legal authorities have long recognized undue influence as supportive of a claim for interference with inheritance. For starters, the Defendants' pirated article recognized the acceptance of the claim for interference with inheritance:

> *Here, Wendy argues that there is no true majority, as only twenty-five states have adopted the tort of intentional interference with inheritance. While different observers have reached different conclusions as to the specific number of states that have adopted the tort, what is clear is that a majority of courts that have considered the tort have approved it.*

Wellin v. Wellin, 135 F. Supp. 3d 502, 514 (D.S.C. 2015)(citing, John C.P. Goldberg & Robert H. Sitkoff, Torts and Estates: Remedying Wrongful Interference with Inheritance, 65 Stan. L.Rev. 335, 362 (2013) (recognizing that while appellate courts in twenty states have recognized the tort, "these

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lengths to excoriate the arguments made by Plaintiffs, often with mean spirited adjective. To quote a famous scene in Goodwill Hunting: "Yeah, maybe. But at least I won't be unoriginal." (https://genius.com/Good-will-hunting-good-will-hunting-bar-scene-annotated)

numbers understate courts' receptiveness to the tort," and noting that only three states have rejected it)(internal citations omitted).

The Restatement, including its most current version, expressly defines undue influence as a qualifying "independent legal wrong." (*Restatement (Third) of Torts: Liab. For Econ. Harms*, §19 (2019)(Cmt b.)(*Independent Legal Wrongs*. "Such conduct can…include acts recognized as wrongful in equity, such as use of duress or exertion of undue influence."). Besides the Restatement, other treatises have also recognized the tort of intentional interference with inheritance. *Id.* (citing Dan B. Dobbs et al., *The Law of Torts* § 642 (2d ed.) ("Most courts addressing the issue have recognized a cause of action against defendants who prevent the plaintiff from receiving an inheritance or gift she would otherwise have received, provided the defendant uses **undue influence**, duress, or tortious means.")(emphasis added).

It is important to point out that Defendants concede that Iowa expressly recognizes "undue influence" as an element supportive of a claim for interference with inheritance. (Proof Brief, p. 40 fn. 4) This is for good reason, as the substantive discussion weaved throughout the Defendants'

Brief has been rejected by the Supreme Court of Iowa in development of Iowa's acceptance of this independent cause of action.

In the first instance, the *Frohwein* case that adopted the independent cause of action, the Court expressly recognized the cause of action "exists against one who fraudulently induces or procures a will to exclusion or damage of another." *Frohwein v. Haesemeyer,* 264 N.W.2d 792 (Iowa 1978). Notably, there was no Restatement available upon which to suggest Iowa law was based. Rather, Iowa chose to protect those expectancies from unlawful conduct.

Later, in *Huffey*, the Supreme Court announced Iowa's position in again protecting beneficiaries from unlawful interference:

> *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.*

Huffey v. Lea, 491 N.W.2d 518, 522 (Iowa 1992). In addition to addressing, and concluding that "an adequate remedy has not been provided by the mere setting aside of the will," the Court in *Huffey* addressed many of the arguments the Defendants and their Stanford Law Review Article assert again. *Id.* at 521-22. Stare decisis indeed.

B. Defendant Failed to Respond to Plaintiffs' Claim that they Presented Evidence to Support a Fact Issue on the Purported "Knowledge" Element.

In their Brief, Defendants elected not to attempt to address Plaintiffs' argument in Section I(B)("The District Court Erred in Concluding Plaintiffs Failed to Present a Fact Issue on the Purported "Knowledge" Element.")(Proof Brief, pp. 35-48). This is nearly fifty-percent (50%) of Plaintiffs' entire argument! Plaintiffs believe the silence is telling. While they disagree with the Court's application of a "knowledge" element, they strongly believe sufficient evidence was presented in its satisfaction.

Plaintiffs cite to thirty-six separate and distinct facts in the summary judgment record that support satisfaction of any "knowledge" element. (Proof Brief, pp. 39-45) Defendants do not address a single one!

II. THE DISTRICT COURT DID NOT ERR IN ALLOWANCE OF EVIDENCE.

REPLY TO PRESERVATION OF ERROR/ SCOPE OF REVIEW

Defendants claim that a specific objection is effective to preserve error on the grounds specified, and that once a proper objection is made and overruled, an objector is not required to make further objection. (Proof Brief p. 53)

Defendants do not assert how they satisfied these requirements, assuming they are applicable, and did not preserve error on the issues they now attempt to present.

Defendants object to a line of questioning found on transcript pages 344-45[3]. (Proof Brief, p. 56-57)(App. 418-419) In objecting to the initial question (asking what prior witness Jim Sulhoff said back during discussions after decedent's death), Defendants thereafter did not object to any of the remaining questions they now complain of. Error was not preserved on anything other than the initial objection that was properly overruled. The rest of Defendants' complaints should not be considered.

Notably, after objecting to one question, the Defendants now complain about the answers to seven (7) follow up questions to which they did not object. Notably, their new objection, "hearsay" is not applicable for any except one. *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999)(quoting *State v. Tobin*, 333 N.W.2d 842, 844 (Iowa 1983)).

More problematically, the Defendants then suggest that testimony taken much earlier in the trial somehow compounded the improper hearsay

[3] In what can be assumed a scrivener's error, Defendants' cite to the wrong pages and the wrong legal counsel offering the questions.

testimony. (Proof Brief, p. 57) Practically speaking, it was impossible for Plaintiffs' counsel to "then pile on" when the cited testimony took place earlier in the week. Defendants admit they did not object to this much-earlier testimony, it is not connected to the alleged hearsay, and should not be considered by the Court in any way in deciding this appeal.

ARGUMENT

Defendants' entire recitation of the record in this argument is misleading and not applicable. At the core of Defendants' argument is the complaint that Plaintiff was permitted to testify that Cletis' lawyer, Jim Sulhoff, a person who had testified earlier in the trial, told him that what happened "was dirty and it stinks." (App. 418)

Defendants' argument fails to include an essential portion of the transcript that will be applicable to a determination on this argument. In his examination of the lawyer who prepared the will that the jury found to be the product of undue influence; *Defendants' counsel* had the following exchange with Mr. Sulhoff:

Q: *Mr. Sulhoff, as part of this case there's been testimony in deposition that you told someone that you think the circumstances surrounding Cletis' Will were dirty or they stunk. Do you ever recall telling anyone that Cletis' Will was dirty or that it stunk?*

A: *Not that I remember, no.*

(App. 351)

This exchange, pivotal to determination on this issue is noticeably absent from Defendants' presentation of this issue to the Court. Plaintiffs' believe that is intentional.

Assuming the Court believes that error was preserved on this issue, the testimony was proper for all the reasons Defendants claim it was not. Specifically, it is not improper hearsay, and they opened the door to its introduction.

The testimony from Plaintiff Buboltz is excepted from hearsay. Iowa Rule of Evidence 5.803 governs exceptions to the hearsay rule, and the following portions support its inclusion:

> *The following are not excluded by the rule against hearsay, regardless of whether the declarant is available as a witness:*
>
> *(1) Present sense impression. A statement describing or explaining an event or condition, made while or immediately after the declarant perceived it.*
>
> *(2) Excited utterance. A statement relating to a startling event or condition, made while the declarant was under the stress of excitement that it caused.*
>
> *(3) Then-existing mental, emotional, or physical condition. A statement of the declarant's then-existing state of mind (such as motive, intent, or plan) or emotional, sensory, or physical condition (such as mental feeling, pain, or bodily health), but not including a statement of*

memory or belief to prove the fact remembered or believed unless it relates to the validity or terms of the declarant's will.

Iowa R. Evid. 5.803(1)-(3).

The Iowa Rules of Evidence provide additional support in an earlier section:

d. Statements that are not hearsay. A statement that meets the following conditions is not hearsay:

(1) A declarant-witness's prior statement. The declarant testifies and is subject to cross-examination about a prior statement, and the statement:

(A) Is inconsistent with the declarant's testimony and was given under penalty of perjury at a trial, hearing, or other proceeding or in a deposition;

(B) Is consistent with the declarant's testimony and is offered to rebut an express or implied charge that the declarant recently fabricated it or acted from a recent improper influence or motive in so testifying; or

(C) Identifies a person as someone the declarant perceived earlier.

Iowa R. Evid. 5.801.

Here, Mr. Sulhoff testified, **in examination from Defendants' counsel** that he did not recall any statement to Plaintiff Buboltz that the circumstances surrounding the will were "dirty and they stink." (Tr. 86) In applying the above rules, the Supreme Court of Iowa addressed an identical question. State v. Gilmore, 259 N.W.2d 846, 852 (Iowa 1977)("We now

consider whether a party may impeach his own witness by proof of the witness' prior statement when the witness claims not to remember the underlying facts described in the statement.") The Court made the following pronouncements:

> *There can be no doubt the State had the right to impeach its own witness. In State v. Trost, 244 N.W.2d 556, 559-560 (Iowa 1976), this court adopted rule 607, Uniform Rules of Evidence, which allows impeachment of one's own witness and announced: "Henceforth, in all trials in this state, the credibility of a witness may be attacked by any party, including the party calling him."*
>
> *The first test in determining if such a statement, written or oral, is admissible is whether a proper foundation has been laid for its admission. The laying of a proper foundation is necessary as a* ***warning to the witness****. The witness is warned the statement is going to be used so that he can prepare to prove he did not make it or so that he can prepare to explain it away if he admits he made it. The use of a proper foundation is a prerequisite in most jurisdictions to the use of the statement.*
>
> *It follows, therefore, that the use of prior self-contradictions to discredit is* ***not obnoxious to the hearsay rule****.*
>
> *"(b) It does not follow, however, that prior self-contradictions, when admitted, are to be treated as having no affirmative testimonial value, and that any such credit is to be strictly denied them in the mind of the tribunal. The only ground for doing so would be the hearsay rule. But the theory of the hearsay rule is that an extrajudicial statement is rejected because it was made out of court by an absent person not subject to cross-examination (s 1362 infra). Here, however, by hypothesis the witness is present and subject to cross-examination. There is ample opportunity to test him as to the basis for his former statement. The whole purpose of the hearsay rule has been already satisfied. Hence there is nothing to prevent the tribunal from giving*

> *such testimonial credit to the extrajudicial statement as it may seem to deserve.*

State v. Gilmore, 259 N.W.2d 846, 852–53 (Iowa 1977)(emphasis added)("But the great weight of authority is to the effect that a witness may be impeached by proof of prior contradictory statements, where he merely testified that he does not remember, or has no recollection of, making the statements referred to. Of course if the witness admitted that he made the contradictory statements there is no necessity for proving them and they are, therefore, not admissible in evidence.")

The propriety of this testimony, and negation of Defendants' assertion that the same was improper because it was introduced by Plaintiffs' "own witness" was recently reinforced by the Supreme Court:

> *A prior inconsistent out-of-court statement offered for impeachment purposes falls outside of the definition of hearsay." Rule 5.613 provides for the admission of extrinsic evidence of a prior inconsistent statement. [W]e stated that once a proper foundation had been laid for impeachment evidence and a witness was alerted to the prior inconsistent statement, if the witness "admits making the prior inconsistent statement, then that prior statement is not admissible." and the Iowa Supreme Court determined the sounder approach would be to allow the jury to see and hear exactly what a witness had previously stated. The court found this approach "provides to the witness and opposing counsel full opportunity to explain the inconsistency in previous out-of-court statements while allowing the finder of fact to have the exact words of the prior statement for purposes of comparison with in-court inconsistent testimony." Additionally, if the witness "denies making the prior statement, or is*

evasive in his answer, or cannot remember making it at all, then the statement may be admitted into evidence for purposes of impeachment."

State v. Swift, No. 18-2197, 2020 WL 2487909, at *4 (Iowa Ct. App. May 13, 2020)(internal citations omitted).

Here, the evidence presented, assuming error was preserved, is excluded under the hearsay exceptions as well as the prior contradictory statement rule.

III. NEW TRIAL IS NOT COMPELLED BY PLAINTIFFS' CLOSING ARGUMENT.

REPLY TO PRESERVATION OF ERROR/ SCOPE OF REVIEW

Defendants' claim they preserved error in this matter insofar as an objection was timely made to improper argument of Plaintiffs' counsel during closing argument. (Proof Brief, p. 68) Plaintiffs' disagree.

"Error preservation generally requires an issue to 'be both raised and decided by the district court before we will decide them on appeal.'" *Estate of Poll v. Poll*, 928 N.W.2d 890 (Iowa Ct. App. 2019)(citing, *Bank of Am., N.A. v. Schulte*, 843 N.W.2d 876, 883 (Iowa 2014)).

For closing argument specifically:

Since the remedy for misconduct on the part of anyone during the progress of a trial is to call the attention of the presiding judge to the alleged misconduct and move by some proper procedure to have the matter corrected, it is not timely to await the result of the trial and then

> *first complain by allegation in motion for new trial in the event of an adverse verdict.*

Andrews v. Struble, 178 N.W.2d 391, 402 (Iowa 1970)("In Division VII we held submission of the case of the jury without objection to such misconduct was not timely when raised for the first time in motion for new trial since, for one thing, it indicates willingness of counsel to take his chances on a favorable verdict and constitutes a waiver of the misconduct.") See also, *Pose v. Roosevelt Hotel Co.*, 208 N.W.2d 19, 31 (Iowa 1973):

> *Plaintiffs' counsel did not object to the statements when made or request a mistrial; nor did he even ask for an instruction to the jury to disregard such argument. Not until his motion for new trial did he complain of the statement quoted in the initial paragraph of this division.*
>
> *Ordinarily, where no objection was made at trial to statements made by opposing counsel in his closing argument and counsel did not move for a mistrial due to the alleged misconduct, this court cannot consider the matter on appeal.*

In the present matter, Defendants' counsel raised an objection during Plaintiffs' closing argument and specifically asked to approach the bench. (App. 456) After consulting with the Court and Plaintiffs' counsel, the Court asked Plaintiffs to continue. (App. 456) There was no ruling by the District Court on Defendants' objection; it was not "decided by the district court" as required by error preservation rules.

This was for good reason, Defendants objection interrupted Plaintiffs' counsel in mid-statement. When approaching the bench, counsel for the Defendants suggested that Plaintiffs' counsel was "getting close" to crossing a line in argument and alerted the Court to a concern that it might go further. When confirming he would not go where Defendants' counsel raised concern, the Defendants accepted moving forward, and did not seek a ruling, admonition, instruction from the Court, mistrial, or other such remedy. They cannot now be heard to suggest it was "so flagrantly improper and evidently prejudicial." (Proof Brief, p. 70).

Error has not been preserved.

Scope of review: See also Andrews v. Struble, 178 N.W.2d 391, 402 (Iowa 1970)("The trial court has broad discretion in passing on the propriety of jury argument and we will not reverse unless there has been a clear abuse of such discretion. Before a new trial will be granted for misconduct in argument it must appear prejudice resulted or a different result could have been probable but for such misconduct.")

ARGUMENT

Even assuming error was preserved on this issue, the statements made by counsel do not rise to the level of misconduct requiring a new trial. As

with the preceding segment, the Defendants', in an effort to miscast the record, leave a large portion of the complained-about argument out. The portion left out is telling (the actual record is delineated in full below, with the bracketed/bolded portion being left out by Defendants):

> *And I am 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* ***[alluding to how difficult what Mr. Cox does and, by extension]*** *pat myself on the back a little bit.* ***[It's very difficult trying cases. It's a subspecialty that 99 percent of your lawyers would not do any more than I would never—you'd never come to me, 'Help me with this bankruptcy.' I wouldn't know where to start, frankly.]*** *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* ***[an]*** *earnest--*

(App. 456)

Defendants are forced to leave out the brackets/bolded portion in a desperate attempt to suggest it amounts to misconduct in closing argument. The fact is that Plaintiffs' counsel was paying homage to a difficult profession, and specifically to the work that *ALL* trial lawyers do-a tip of the cap to his opposing lawyer. As a second-generation trial lawyer, as someone who takes very seriously the difficulties associated with the job of a trial lawyer, this is the facsimile of a closing he has given in nearly every one of his many jury trials: respect for the opponent lawyer and the difficult job he/she has to do.

In passing on a similar "endorsement" of a client, the Supreme Court of Iowa did not find closing flagrantly improper or evidently prejudicial:

> *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. Shover v. Iowa Lutheran Hospital, 252 Iowa 706, 717, 107 N.W.2d 85, 91.*
>
> *The claimed misconduct here is **not** of that kind. In pertinent part it follows:*
>
> *I haven't singled (Mr. Struble) out when I thought maybe someone else was at fault, too. I have merely taken the facts as I have found them and tried to analyze it and see who I thought was responsible for this accident and that is the person that we sued after Mr. Andrews told me his story. He called me and I went down to talk to him when he was at home with his leg in a cast and he told me about this. And I investigated it thoroughly. I came to the conclusion that one person was responsible and that was Mr. Struble.*

Andrews, 178 N.W.2d at 401. (emphasis added)

In this case, Defendants clearly did not preserve error on the complained about closing argument. Regardless, there was no objectionable closing argument. Defendants' are not entitled to a new trial.

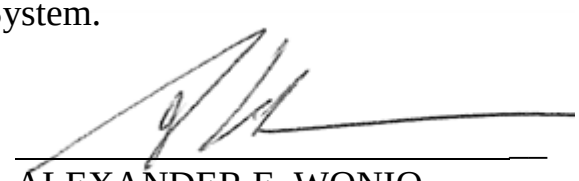
CONCLUSION

The Supreme Court of Iowa should reinstate Plaintiffs' claim for intentional interference with inheritance and deny Defendants' request for new trial on the claims already decided by the jury.

CERTIFICATE OF SERVICE

On the 29th day of June 2020, the undersigned served the within Appellant's Reply 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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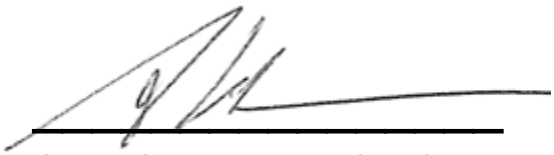

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