ELECTRONICALLY FILED JUN 21, 2022 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA

No. 21-1651

MICHELLE VACCARO,

Plaintiff-Appellee,

v.

POLK COUNTY, IOWA and POLK COUNTY SHERIFF KEVIN SCHNEIDER,

Defendants-Appellants.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY CASE NO. CVCV060323
THE HONORABLE LAWRENCE P. McLELLAN, PRESIDING

APPELLANTS' FINAL BRIEF

JOHN P. SARCONE
Polk County Attorney

JULIE J. BUSSANMAS
Assistant Polk County Attorney
Polk County Administration Bldg.
111 Court Ave., Suite 340
Des Moines, Iowa 50309
P: (515) 286-2285
F: (515) 286-3314
Julie.Bussanmas@polkcountyiowa.gov

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

I. Whether the district court abused its discretion by ordering the Polk County Sheriff to produce the confidential investigative reports during discovery in an Iowa Code chapter 22 enforcement action.

AUTHORITIES

Mediacom Iowa L.L.C. v. Inc. City of Spencer, 682 N.W.2d 62 (Iowa 2004)

Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc., 690 N.W.2d 38 (Iowa 2004)

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Neer v. State, No. 10-0966, 2011 WL 662725, *4 (Iowa Ct. App. Feb. 21, 2011)

Iowa Code § 22.7

Iowa Code § 22.10(3)(*a*)

ROUTING STATEMENT

This case should be retained by the Iowa Supreme Court under Iowa Rule of Appellate Procedure 6.1101(2)(c) and (d). This case presents a matter of first impression and an issue of broad public importance, namely, the retained confidentiality of records withheld as confidential under Iowa Code section 22.7 during discovery in an Open Records enforcement action. The Court's decision will affect the confidentiality of any public record withheld as confidential under any provision of Iowa Code section 22.7 for every government body, including state agencies, counties, municipalities, and school districts in the state. As matter of first impression, the Court should find Plaintiffs in a chapter 22 enforcement action are not entitled to the very documents at issue through the discovery process and that requiring production of the purported confidential documents during discovery in a chapter 22 action frustrates the purpose of chapter 22 and eviscerates the confidentiality provisions of Iowa Code section 22.7.

STATEMENT OF THE CASE

Ms. Vaccaro filed an Open Records enforcement action under Iowa Code chapter 22 after the Polk County Sheriff's Office declined to produce a peace officer investigative report. During discovery, the district court ordered Polk County to produce the peace officer investigative report after Ms. Vaccaro filed a motion to compel. As a matter of first impression, the district court's order flips current law on its head. The law is clear that chapter 22 is not a barrier to discovery in civil claims. However, for the first time and with no precedential support, the court found civil discovery rules require disclosure of the records at issue in a chapter 22 enforcement action prior to a determination on whether the records were properly classified as confidential.

FACTUAL AND PROCEDURAL HISTORY

The operative facts of this case are largely undisputed. In January 2020, Ms. Vaccaro made an open records request seeking various documents from Polk County relating to a

motorcycle crash resulting in her daughter's death.[1] App. at 8; Petition at ¶ 21. Polk County provided Ms. Vaccaro with the Report of Motor Vehicle Accident, Complaint/Citation, and a redacted version of the Event Chronology. App. at 8; Petition at ¶ 22. Polk County further offered to meet with Ms. Vaccaro and her attorney to discuss the investigation and answer any questions she had.

On January 27, 2020, Ms. Vaccaro submitted another open records request. App. at 8; Petition at ¶ 23. She sought, "the entire investigative file or files concerning the incident" including thirteen subsets of information she sought and "reports, manuals, textbooks, policy sheets or other documents … consulted or reviewed as a result or in preparation for responding to these requests." Polk County previously provided Ms. Vaccaro with the Report of Motor Vehicle Accident, Complaint/Citation, and a redacted version of the Event Chronology. Polk County responded to each category of requested records, indicating whether the

[1] The driver of the motorcycle was a juvenile at the time of the accident.

documents existed and whether they were public records or confidential pursuant to Iowa Code section 22.7(5). App. at 8; Petition at ¶ 24. Polk County again offered to meet with Ms. Vaccaro and her attorney to discuss the investigation and answer any questions she had. Polk County also informed Ms. Vaccaro that while some records are confidential pursuant to Iowa Code section 22.7(5), that the confidential records she was seeking could be provided to her and her attorney pursuant to a subpoena.[2]

On March 31, 2020, Ms. Vaccaro submitted a complaint to the Iowa Public Information Board (IPIB), alleging Polk County's February 4, 2020 response was a violation of chapter 22 because the protections of Iowa Code section 22.7(5) only apply to peace officer investigative reports while an investigation is pending. Ms. Vaccaro asserted that once the investigation was concluded, the peace officer investigative reports were no longer confidential under Iowa Code section

[2] Ms. Vaccaro settled her civil claim against the juvenile motorcycle driver without ever subpoenaing the records from Polk County.

22.7(5). Ms. Vaccaro acknowledged Polk County provided her with the immediate facts and circumstances as required by section 22.7(5) but believed she was entitled to all documents because the investigation was closed. IPIB accepted Ms. Vaccaro's complaint. Polk County again communicated with Ms. Vaccaro's attorney and provided her with 911 call recordings that she had mentioned for the first time in her IPIB complaint. App. at 8; Petition at ¶ 25. Polk County also provided a detailed list of the documents it possessed as part of its investigative file and withheld as confidential pursuant to Iowa Code section 22.7. These documents include:

- Photographs of the motorcycle;
- Vehicle Damage Report that includes six (6) photographs of motorcycle;
- Measurement log;
- Diagrams, drawings of accident location (2);
- Incident/Investigative Summary Report (PSCO Cass Bollman);
- Incident/Investigation Supplemental Report (PCSO Cass Bollman);
- Incident Report (PCSO Nicholas Smith);
- Incident Supplemental Report (PCSO Haleigh Rees);
- Iowa Incident Report Supplemental (Iowa DOT Officer Justin Mack);
- Two (Witness Statements);
- In-car camera audio/video (Nicholas Smith);

- In-car camera audio/video (Haleigh Rees);
- Victim Resource Incident Report;
- Vehicle Towing and Impound Report dated 10.6.19;
- Inventory Report printed 10.28.19;
- Vehicle Towing and Impound Release Report printed 10.28.19;
- Vehicle Towing and Impound Report printed 10.28.19; and
- Polk County Sheriff's Office Property Report (Case Photos).

App. at 8-9; Petition at ¶ 26. On June 16, 2020, Ms. Vaccaro withdrew her complaint prior to a decision by the IPIB. On June 15, 2020, Vaccaro filed a Petition, pursuant to Iowa Code chapter 22, alleging Polk County violated Iowa's open records law by refusing to provide her with the complete peace officer investigative file. She sought all documents identified by Polk County as listed above. App. at 8-9; Petition at ¶ 26.

On December 2, 2020, Plaintiff served Defendants with written discovery requests, including Request for Production No. 4, which provided:

> REQUEST NO. 4: All records identified in paragraph 26 of Plaintiff's Petition. See *Mediacom, L.L.C. v. Incorporated City of Spencer*, 682 N.W.2d 62, 69 (Iowa 2004) (observing that a government party engaged in litigation cannot refuse to produce a document requested in discovery on the basis that the

> document would be exempt from production pursuant to an open records request).

App. at 19; Plaintiff's Requests for Production of Documents.

On February 19, 2021, Defendants responded with their production of documents, and provided the following response to Plaintiff's Request No. 4:

> RESPONSE: Defendants object to this Request as it exceeds the scope of allowable discovery in a Chapter 22 action. Without waiving said objection, the Defendants have provided all required immediate facts and circumstances related to this incident. Defendants have refused to produce law enforcement investigative materials expressly protected from disclosure under state and federal law including, but not limited to, Iowa Code section 22.7(5). To require production of the very documents in question prior to a ruling by the Court of its confidential status under Iowa Code would frustrate the purposes of this judicial action. Further, the Iowa Court of Appeals has expressly noted requiring production of such documents contained within law enforcement investigative materials would be contrary to Chapter 22. *See Neer v. State*, 2011 WL 662725 at 4 (Iowa Ct. App. Feb. 23, 2011); see also IPIB decision in Burlington PD/DPS DCI matter.

App. at 22-23; Defendants' Response to Plaintiff's Requests for Production of Documents.

Plaintiff sought the confidential documents as a first step of the discovery process. Plaintiff conducted no depositions.

She did not depose the investigator to answer any questions they had about the listed documents or ask questions regarding the creation or content of the documents in question. Plaintiff did not depose the individuals involved in responding to her public records request either.

On April 28, 2021, Plaintiff filed a Motion to Compel, asking the Court to compel Defendants to produce the documents listed in Paragraph 26 of the Petition. App. at 46-51; Motion to Compel. The Court ordered Polk County to produce the documents to the Court *in camera* for inspection prior to ruling on the Motion to Compel. App. at 71-74; Order Re: Motion to Compel. After reviewing the documents *in camera*, the Court issued its decision on the Motion to Compel on October 5, 2021. App. at 76-77; Order. The Court ordered Defendants to produce all documents listed in Paragraph 26 of the Petition, the documents withheld as confidential under Iowa Code section 22.7(5). App. at 77; Order. The Court ruled Plaintiff needed the documents to prosecute her case and found,

> a plaintiff who brings a chapter 22 enforcement action is [not] precluded from reviewing the documents at issue prior to trial. If that is the law a plaintiff would be severely handicapped in their ability to prosecute their case.

App. at 76-77; Order Re: *In Camera* Inspection and Production of Documents at 1-2. Polk County sought interlocutory review, which was granted. Additional facts will be set forth below as necessary.

ARGUMENT

I. THE DISTRICT COURT ABUSED ITS DISCRETION BY ORDERING THE POLK COUNTY SHERIFF TO PRODUCE THE CONFIDENTIAL INVESTIGATIVE REPORTS DURING DISCOVERY IN AN IOWA CODE CHAPTER 22 ENFORCEMENT ACTION.

A. Error Preservation and Standard of Review.

Polk County raised this issue before the district court and it was ruled upon. App. at 71-78; Order Re: Motion to Compel, Order Re: *In Camera* Inspection and Production of Documents, Defendants' Resistance to Motion to Compel. As a general proposition, the appellate court reviews a district court's discovery ruling for an abuse of discretion. *Mediacom Iowa L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004). " 'A reversal of a discovery ruling is warranted when the

grounds underlying a district court order are clearly unreasonable or untenable. A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion.' " *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d 38, 43 (Iowa 2004) (quoting *Exotica Botanicals, Inc. v. Terra Int'l, Inc.*, 612 N.W.2d 801, 804 (Iowa 2000)). However, the district court decision is also based upon the statutory interpretation of Iowa Code chapter 22 concerning burdens of proof in a chapter 22 enforcement action and section 22.7(5) concerning peace officers' investigative reports. The Supreme Court has held that "[t]o the extent [the court] … engages in statutory interpretation, [its] review is for correction of errors at law." *Willard v. State*, 893 N.W.2d 52, 58 (Iowa 2017). Thus, this Court is not bound by "either the legal conclusions or application of legal principles reached by the district court." *Rucker v. Taylor*, 828 N.W.2d 595, 599 (Iowa 2013) (citations omitted).

B. Argument.

This case stems from an Iowa Code chapter 22 enforcement action wherein Ms. Vaccaro seeks the peace

officer investigative reports concerning an accident that resulted in her daughter's death. Iowa Code section 22.7(5) makes confidential:

> Peace officers' investigative reports, privileged records or information specified in section 80G.2, and specific portions of electronic mail and telephone billing records of law enforcement agencies if that information is part of an ongoing investigation, except where disclosure is authorized elsewhere in this Code. However, the date, time, specific location, and immediate facts and circumstances surrounding a crime or incident shall not be kept confidential under this section, except in those unusual circumstances where disclosure would plainly and seriously jeopardize an investigation or pose a clear and present danger to the safety of an individual. Specific portions of electronic mail and telephone billing records may only be kept confidential under this subsection if the length of time prescribed for commencement of prosecution or the finding of an indictment or information under the statute of limitations applicable to the crime that is under investigation has not expired.

Iowa Code § 22.7(5).[3] It is important to note, this is not a case where Plaintiff is alleging Polk County failed to provide immediate facts and circumstances as required under Iowa Code section 22.7(5). Additionally, Plaintiff has never argued

[3] The investigation was into a juvenile suspect's potential criminal conduct. *See also* Iowa Code section 232.149 (regarding the confidentiality of juvenile records and files).

the documents withheld were not peace officer's investigative records. Instead, Plaintiff believes she is entitled to the documents even though they are peace officer's investigative reports.

Plaintiff sought the confidential documents as a first step of the discovery process. Plaintiff did not seek the documents as a last resort, for instance, arguing that the information needed was not available from another source. Plaintiff conducted no depositions. She did not depose the investigator to answer any questions they had about the listed documents or ask questions regarding the creation or content of the documents in question. Plaintiff did not depose the individuals involved in responding to her public records request. Plaintiff conducted no other discovery to show a particularized need for the documents and made no argument that the information she claims to need to prove her case is unavailable through alternative means. And, the district court did not make any particularized findings of need specific to this case.

Despite these undisputed facts, the district court ruled Plaintiff was entitled to the peace officer's investigative reports in discovery. It held:

> a plaintiff who brings a chapter 22 enforcement action is [not] precluded from reviewing the documents at issue prior to trial. If that is the law a plaintiff would be severely handicapped in their ability to prosecute their case.

App. at 76-77; Order Re: *In Camera* Inspection and Production of Documents at 1-2. The district court's ruling is an erroneous interpretation of the law because it ignores the burden-shifting provisions in Iowa Code chapter 22 and the grounds supporting the court's discovery ruling are clearly unreasonable or untenable. If the district court's decision is affirmed, every document withheld as confidential pursuant to the confidentiality provisions of Iowa Code section 22.7 will be open for disclosure with a simple discovery request with no showing of particularized need, eviscerating the confidentiality provisions of chapter 22.

The court's ruling completely ignores the burden-shifting framework explicitly set forth in Iowa Code chapter 22. It provides,

> Once a party seeking judicial enforcement of this chapter demonstrates to the court that the defendant is subject to the requirements of this chapter, that the records in question are government records, and that the defendant refused to make those government records available for examination and copying by the plaintiff, the burden going forward shall be on the defendant to demonstrate compliance with the requirements of this chapter.

Iowa Code § 22.10(2). The legislature requires a plaintiff to demonstrate the entity to subject to the Open Records Act, that the records are public records, and that the entity refused to produce the records. Here, the parties do not dispute Polk County is subject to the requirements of chapter 22, that the records are government records, or that Polk County refused to provide the records to Ms. Vaccaro. Accordingly, Ms. Vaccaro has already met her burden in prosecuting her enforcement action.

Once a plaintiff has established these basic principles, the burden shifts to the governmental agency. Moving forward, Polk County has the burden of proving its response to Ms. Vaccaro complied with the requirements of Iowa Code chapter 22. *Id.* *See, e.g.*, *Diercks v. Malin*, 894 N.W.2d 12, 23 (Iowa Ct. App. 2016) (holding "our courts have consistently

held the burden of proving a public record is exempt from disclosure of production is on the governmental body claiming the exemption"). Placing the burden on the governmental entity allows the entity to maintain the confidence of the record and present evidence at trial regarding its compliance with chapter 22. The burden shifts, because as the Court indicated, requiring a plaintiff to prove the records were not properly withheld without access to the documents would be a handicap. However, the district court's ruling completely and erroneously ignores this important statutory burden-shifting framework. It ignores that Polk County would have had the burden to show the court that the records withheld were properly classified as peace officer investigative reports.

Requiring disclosure of the very confidential records to the requesting party prior to a finding by the Court on whether the entity complied with chapter 22 destroys the confidentiality provisions in section 22.7. The district court's ruling, if allowed to stand, would completely eviscerate the confidentiality provisions set forth in Iowa Code section 22.7 with the simple filing of an enforcement action. The grounds

relied upon by the district court are clearly unreasonable, untenable, and based on an erroneous interpretation of law.

The district court indicated it, "made its preliminary determination whether the documents should be produced based on the requirements set forth in *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222 (Iowa 2019)." App. at 76; Order Re: *In Camera* Inspection and Production of Documents at 1. However, the district court's reliance on *Mitchell* is misplaced.

Mitchell was a discovery dispute in a civil negligence case. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d at 226. This case is not a typical discovery dispute in a civil case. This is a chapter 22 action where the sole question is whether Polk County properly withheld the documents as confidential under Iowa Code chapter 22. Ms. Vaccaro sought to obtain through discovery the very documents Polk County declined to produce as confidential under Iowa Code section 22.7. Mandating disclosure of the purported confidential documents prior to the court's decision on whether they were properly withheld, renders the final determination as moot as Plaintiff would already have the documents she seeks. Any citizen

disgruntled with a government entities' response to a public records request could simply file a chapter 22 action and obtain the confidential documents during the discovery process. Mandating disclosure of the confidential documents in discovery undermines the entire judicial process set forth in Iowa Code chapter 22, destroys the confidentiality provisions of Iowa Code section 22.7, and prejudices Defendants' position as once the documents are released they can never be "unreleased."

This Court in *Mitchell* recognized the difference between the question of whether documents are confidential under chapter 22 and whether confidential documents under chapter 22 are still available during discovery in a civil case. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d at 228- 231. In the context of a chapter 22 action, this Court held, "police investigative reports do not lose their confidential status under Iowa Code section 22.7(5) when the investigation closes." *Id.* at 232. The Court then analyzed whether the investigative reports, deemed confidential under Iowa Code section 22.7(5), were nevertheless available in civil discovery. *Id.* Nothing in

Mitchell requires disclosure of the very documents at issue in a chapter 22 enforcement action during discovery.

The Court of Appeals was confronted with this very issue when a plaintiff sought peace officer's investigative materials in an enforcement action—not a civil liability claim. *Neer v. State*, No. 10-0966, 2011 WL 662725, *4 (Iowa Ct. App. Feb. 21, 2011). In his chapter 22 action, *Neer* sought investigative materials related to his arrest including video, use of force reports, and pursuit reports. *Id.* at *2. The Court found these videos and documents were "peace officer's investigative reports" and were confidential as a matter of law under Iowa Code section 22.7(5). *Id.* at *4.

Importantly, the Court stated it did not need the records themselves to make the determination and stated,

> It is undisputed that the video recording, use of force reports and pursuit reports related to the officer's encounter with Neer just prior to his arrest. To require an item-by-item assessment of everything within a criminal investigation file, would, for all practical purposes, eliminate the investigative report exemption.

Id. at *4 (citing *State ex. rel. Shanahan v. Iowa Dist. Ct.*, 356 N.W.2d 523, 529–30 (Iowa 1984) (noting "courts have

recognized [the] important public purpose of allowing criminal investigation to be conducted in relative secrecy" and stating the "State has a very real interest in protecting the relative secrecy of much of the information its agents *gather, analyze, and record* during their investigation of criminal activity and crimes" (emphasis added)). And, as discussed above, Ms. Vaccaro has not argued any of the documents do not qualify as peace officer investigative reports. Rather, she claims she is entitled to them anyway because the criminal investigation is now closed. The district court's determination Ms. Vaccaro needed access to the documents to prosecute her chapter 22 enforcement action is contrary to the Court of Appeals' *Neer* decision and the burden-shifting framework discussed above.

At the district court, Plaintiff cited to *Mediacom Iowa, L.L.C v. Incorporated City of Spencer*, 682 N.W.2d 62 (Iowa 2004), in support of her motion to compel. *Mediacom* was a declaratory action challenging Spencer's use of tax funds to finance a communication center. During discovery, the city claimed certain requests sought information protected as confidential under Iowa Code section 22.7. The Court found

chapter 22 ordinarily has no applicability to discovery in civil cases. The County does not dispute this general proposition. As noted above, however, this is not a civil matter.

Vaccaro's reliance on *Mediacom* flips the question on its head. The question is not whether chapter 22 prevents discovery in a civil case, but whether civil discovery rules allow a plaintiff access to the very confidential documents at issue in a chapter 22 enforcement action. Vaccaro was unable to cite any case to support such a proposition, and the district court was unable to find a case supporting this proposition either. Nevertheless, the Court took the unprecedented and unsupported step of ordering production of the confidential documents in discovery, prior to the Court's determination of whether the disputed documents were properly withheld as confidential under section 22.7.

Ms. Vaccaro very well may obtain the documents at issue if a district court determines Polk County improperly withheld them under section 22.7. However, ordering disclosure of the documents at the discovery stage, prior to giving Polk County its statutory right to present evidence supporting its

determination that the documents were confidential peace officer investigative reports under section 22.7(5) is a unreasonable, untenable decision and an erroneous interpretation of Iowa Code chapter 22.

If a member of the public could subvert the confidentiality provisions of chapter 22 by simply filing an enforcement action against the records custodian and then seek the very documents through discovery, the exemptions contained in Iowa Code section 22.7 would be meaningless. Confidential documents, including student education records (22.7(1)), hospital records, medical records, and professional counseling records (22.7(2)), trade secrets (22.7(3)), attorney work product (22.7(4)), personnel files (22.7(11)), identify of persons infected with communicable diseases (22.7(16)), psychological examinations of law enforcement (22.7(19)), paternity testing (22.7(30)), social security numbers (22.7(32)), autopsy reports (22.7(41)), and other confidential records identified in section 22.7 would automatically be subject to disclosure through discovery in the very process designed to protect them. Iowa Code § 22.7. Allowing such an

interpretation of a chapter 22 would eviscerate all protections set by the legislature.

Plaintiff's discovery request is beyond the scope of allowable discovery in a chapter 22 action. There is no case, published or otherwise, that allows a plaintiff in a chapter 22 action to obtain the disputed documents through a discovery request. Compelling such production would completely subvert the entire purpose of an enforcement action. Plaintiff is only entitled to the documents as a remedy if the Court determines a violation of chapter 22 has occurred. *See* Iowa Code § 22.10(3)(*a*) (stating the Court shall issue an injunction ordering the lawful custodian to comply with chapter 22 requirements in the case if it finds the lawful custodian violated a provision of chapter 22 by a preponderance of the evidence).

For the reasons set forth above, the district court's October 5, 2021 Order mandating Polk County disclose the disputed records should be reversed and this Court should issue orders instructing the district court to deny Ms. Vaccaro's motion to compel.

CONCLUSION

For the reasons expressed above, Polk County respectfully urges this Court to find the district court's October 5, 2021 order was an erroneous interpretation of law and an abuse of discretion and for any other relief this Court deems appropriate under the circumstances.

REQUEST FOR ORAL ARGUMENT

Defendants-Appellants respectfully request to be heard in oral argument.

CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Proof Brief complies with the type-volume limitation, typeface, and the type-style requirements of Iowa Rule of Appellate Procedure 6.903. This Proof Brief was prepared in Microsoft Word using Bookman Old Style font, size 14. The number of words is 4,013, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1).

Date: June 21, 2022

/s/*Julie J. Bussanmas*

JULIE J. BUSSANMAS
Assistant Polk County Attorney

CERTIFICATE OF SERVICE

I hereby certify that on June 21, 2022, I electronically filed the foregoing document with the Clerk of Court using the electronic filing system which will send notification of such filing to the following:

Gary Dickey
Dickey Campbell
301 E Walnut St #1
Des Moines, IA 50309

/s/*Julie J. Bussanmas*