IN THE SUPREME COURT FOR THE STATE OF IOWA
No. 22-0790

UE LOCAL 893/IUP,
Appellee/Cross-Appellant,

vs.

STATE OF IOWA,
Appellant/Cross-Appellee.

Appeal from the Iowa District Court for Polk County,
The Honorable Paul D. Scott

Appellee/Cross–Appellant's Combined Final Brief

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ROUTING STATEMENT

Pursuant to Iowa R. App. P. 6.1101, the Iowa Supreme Court should retain this case as it presents a significant issue of public importance that should be determined by the Iowa Supreme Court. Further, the Iowa Supreme Court previously ruled on this matter.

STATEMENT OF THE CASE

The Iowa Supreme Court previously visited this matter. This case originally arose when, "On February 21, UE filed a Petition in District Court to enforce the terms of the collective bargaining agreement pursuant to Iowa Code Section 20.17(5) (2017)." *UE Loc. 893/IUP v. State*, 928 N.W.2d 51, 58 (Iowa 2019) (hereinafter "*UE I*"). The Court stated the issue this way, "In this appeal, we must decide whether the District Court correctly granted summary judgment enforcing a collective bargaining agreement between the State of Iowa and a public employee union." *Id.* at 56. This Court held the 2017–2019 collective bargaining agreements were valid and enforceable, and for those reasons, "*affirm[ed] the district court's summary judgment in favor of UE enforcing the collective bargaining agreement*." *Id.* at 68-69 (emphasis added).

The matter now before the Court involves the State's failure to abide by its contractual duties under the collective bargaining agreements this Court found to be valid and enforceable. This appeal is a review of the district court's ruling granting UE's motion for summary judgment on its claim for breach of contract, and the district court's final

judgment in favor of UE, entitling UE to damages for the State's breach of contract of the 2017–2019 collective bargaining agreements. The final judgment, in whole, was ordered as follows:

> A. Dues Deductions $1,046,835.05 with *Interest pursuant to Iowa Code § 535*
> B. Back Pay $411,967.06 with *Interest pursuant to Iowa Code § 535*
> C. FLSA Overtime Pay $486,876.37 with *Interest pursuant to Iowa Code § 535*
> D. Non-Economic Damages Implementation for two (2) consecutive years from date of Judgment
> E. Personal Leave Implementation for two (2) consecutive years from date of Judgment

(App. 130-132).

The State's appeal only challenges the order to pay dues deductions and does not challenge the district court's judgment in its entirety.

STATEMENT OF THE FACTS

UE is an employee organization as defined by Iowa Code §20.3(4), with its principal place of business in Des Moines, Polk County, Iowa. (App. 30-34). The State is a public employer under Iowa Code §20.3(10), with its principal place of business in Des Moines, Polk County, Iowa. (App. 30-34).

UE was certified by the Public Employment Relations Board (PERB) as the exclusive bargaining representative following a successful

representation election (Iowa Code §20.15(b)(2)). UE represents two bargaining units, a science unit and social services unit, comprised of State of Iowa employees. (App. 121). The inaugural collective bargaining agreement for the social services unit was negotiated and went into effect on July 1, 1984, and the first agreement negotiated for the science unit went into effect on July 1, 1995. (App. 121).

Thereafter, UE and the State negotiated two-year collective bargaining agreements for each unit, pursuant to Iowa Code §20.15(6) ("a collective bargaining agreement with the state, its boards, commissions, departments, and agencies shall be for two years."). (App. 122).

The collective bargaining agreements between UE and the State contain provisions for dues deductions, compensatory time and overtime, standby pay, call back time, wage and fringe benefits, bulletin board use, union leave, union visitation rights, union orientation time, and grievance language. (App. 155-235).

In December of 2016, UE and the State began negotiations for successor collective bargaining agreements for both units to be effective from July 1, 2017–June 30, 2019. (App. 122). The 2015–2017 collective

bargaining agreements contained the following provisions relevant to this matter:

Article II
Recognition & Union Security

Section 2 Dues and Fees Deduction

A. Upon receipt of a voluntary individual written request from any of its employees covered by this Agreement on forms provided by the Union, the Employer will deduct from the pay due such employee those dues required as the employee's membership dues in the Union, and fees for Union sponsored credit union and insurance programs.

B. An employee's request for dues deduction and deductions for fees for Union sponsored credit union and insurance programs shall be effective after the date of delivery of such authorization to the payroll office of the employing unit. Deductions shall be made only when the employee has sufficient earnings to cover same after deductions for social security, federal taxes, state taxes, retirement, health insurance, and life insurance. Deductions shall be in such amount as shall be certified to the Employer in writing by the authorized representative of the Union.

C. An employee's dues deductions shall be terminable according to the provisions of Section 70A.19, Code of Iowa.

…

F. The Employer shall submit to the Union, with each remittance of deductions, a list of all employees having such deductions, including all information presently provided by each department and agency.

(App. 155-235).

Because this is a mature bargaining relationship, neither UE nor the State sought to open bargaining on the entire contract, or make changes in many of the articles in the 2015–2017 contract and agreed they should continue in the 2017–2019 agreement. (TT1 31:7-9).

On December 6, 2016, UE made its initial offer to the State pursuant to Iowa Code §20.17(3). (App. 30-34). UE proposed all terms and conditions of the current bargaining agreement remain unchanged, except those provisions containing strikethrough deletions or bolded new language. (App. 236-248). With respect to Article II, UE expressed it wishes to maintain such provisions as the "status quo":

Article I
AGREEMENT

This Agreement made and entered into this 1st day of July **2017,** at Des Moines, Iowa pursuant to the provisions of Chapter 20 of the Iowa Code, by and between the State of Iowa (hereinafter referred to as the Employer) and UE Local 893/Iowa United Professionals, and its appropriate affiliated locals, as representatives of employees employed by the State of Iowa, as set forth specifically in Appendix A (hereinafter referred to as the Union).

Article II
RECOGNITION & UNION SECURITY

STATUS QUO

(App. 236-248).

On December 20, 2016, the State provided its proposals to UE pursuant to Iowa Code §20.17(3). (App. 30-34). Similarly, the State's

initial proposals were equally specific in requesting to maintain the provisions with the "current contract language":

ARTICLE I
AGREEMENT

This Agreement made and entered into this 1st day of July 2015~~7~~, at Des Moines, Iowa, pursuant to the provisions of Chapter 20 of the Iowa Code, by and between the State of Iowa (hereinafter referred to as the Employer) and UE Local 893/Iowa United Professionals, and its appropriate affiliated locals, as representatives of employees employed by the State of Iowa, as set forth specifically in Appendix A (hereinafter referred to as the Union).

ARTICLE II
RECOGNITION & UNION SECURITY

[Current contract language]

(App. 249-265).

On February 10, 2017, UE accepted the State's initial proposals – which had neither been withdrawn nor amended – and notified the State of their acceptance. (App. 122). The letter sent by UE stating the December 20, 2016, proposals were ratified on February 14, 2017, by the members was received by the State on February 15, 2017. (TT1 47:13-14, 22-25). Despite this letter, the 2017–2019 contracts were never reduced to writing by the State – as had always been the practices of the parties. (App. 122).

On February 21, 2017, UE filed a petition in the Polk County District Court seeking to enforce the 2017–2019 agreements. (App. 7-11). On November 28, 2017, the district court granted UE's motion for summary judgment, ruling that the 2017–2019 collective bargaining

agreements were valid and enforceable, ordering the parties to perform as required under the contract. (App. 12-19). After years of further litigation and appeals, on May 17, 2019, the Iowa Supreme Court found the contracts were valid and enforceable, and for those reasons, "affirm[ed] the district court's summary judgment in favor of UE enforcing the collective bargaining agreement." *UE I*, at 68-69.

Even after the Iowa Supreme Court ruling in 2019, the State refused to transmit to UE the dues resulting from the State's breach of the agreement. (App. 122). In order to operate and continue carrying out the essential functions of the union, UE was forced to enlist the services of a third-party vendor to collect dues. (App. 125). As a result of the State's refusal to deduct dues, UE incurred substantial expenses. (App. 122).

On July 12, 2019, following the Iowa Supreme Court's ruling in *UE I* and the State's failure to perform as required under the contract, UE filed a petition in the instant case for breach of contract. (App. 26-29).

On November 9, 2020, the district court granted UE's motion for summary judgment on its breach of contract claim. (App. 58-73). Beginning on May 11, 2021, a two-day nonjury trial was held. (App. 120).

On February 7, 2022, the district court issued its final ruling and verdict. (App. 120).

On February 22, 2022, the State moved to reconsider or enlarge the final ruling, to address an argument regarding sovereign immunity for monetary damages and clarification relating to personal leave. (App. 140-145).

On April 11, 2022, the district court issued a ruling on the State's motion, finding that State did not properly plead the issue of sovereign immunity to monetary damages, and concluded Iowa Code § 20.17(5) provides for the enforcement of the collective bargaining agreements, including the allowance of an award for monetary damages for breach of collective bargaining agreements. (App. .146-151).

On May 9, 2022, the State filed its notice of appeal and motion for partial stay. (App. 152-153, 269-270). On May 16, 2022, UE filed its resistance to the motion for partial stay, and on May 19, 2022, filed its notice of cross appeal. (App. 154, 271-176).

The State, in the instant case, does not challenge the amount of dues owed to UE, nor the State's failure to deduct dues, and argues only

that the State had no obligation to deduct dues or pay dues in any amount to the union.

The State, likewise, only challenges sovereign immunity as it relates to dues deductions and does not challenge the district court's finding that back pay and overtime are owed. The State argues only that the district court errored in the following particulars: (1) that the State breached the collective bargaining agreement when it did not deduct dues; (2) by awarding UE damages instead of ordering retroactive dues deductions; and (3) concluding that UE adequately mitigated its damages by not seeking to obtain new dues deductions authorizations from its members.

RESPONSIVE ARGUMENT

I. The District Court Properly Granted UE's Motion for Summary Judgment on its Breach of Contract Claim for Dues Deduction

A. Preservation of Error

UE agrees the State preserved error on this issue.

B. Standard of Review

Courts "review summary judgment rulings for correction of errors at law." *Peak v.* Adams, 799 N.W.2d 535, 542 (Iowa 2011). Summary judgment is appropriate when "the pleadings, depositions, answers to

interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and the moving party is entitled to judgment as a matter of law." Iowa R. Civ. P. 1.981(3). "A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of fact is presented." *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007). The court must examine the record in a light most favorable to the nonmoving party to determine if the moving party has met the burden. *Id.* An appellate court "will reverse a district court's judgment we find the court has applied erroneous rules of law, which materially affected its decision." *Falczynski v. Amoco Oil Co.*, 533 N.W.2d 226, 230 (Iowa 1995).

C. Argument

As correctly noted by the district court, "[t]here is no material factual dispute about whether the State had a contractual obligation to deduct dues and failed to do so. The Union has met its burden to show that the State is liable for dues and the State has not pled sufficient facts in its resistance to avoid liability on summary judgment." (App. 68). The

district court appropriately granted summary judgment in favor of UE, and its conclusion is supported by the text of the agreements and the law.

i. The Dues Deduction Provisions Contained in the 2015–2017 Agreement Became, by Voluntary Agreement, a Part of the 2017–2019 Agreement

The State erroneously argues the dues deduction contained in the 2015–2017 agreements did not continue into the 2017–2019 agreement. "The CBA's did not state that the dues deductions would carry over from agreement to agreement." (Appellant Br. p. 22). The agreements clearly state dues deductions would carry over from agreement to agreement. (App. 236-265). As reflected in both UE and the State's initial proposals, dues deductions were to be maintained as the "status quo" and to keep the "current contract language." (App. 249-265).

Neither UE nor the State wished to open Article II for bargaining. UE specifically stated that unless a specific proposal for change was made, all provisions of the 2015–2017 agreement would be maintained and continued into the 2017–2019 agreement.

ii. Authorizations to Deduct Dues Can Only Be Revoked by the Employee, and Can Never Be Rendered Void by the State

Further, the State argued authorizations for dues deductions expired at the end of the agreement, and UE was required to have its members reauthorize the State to continue to deduct dues. (Appellant Br. pp. 31-32).

Dues deductions, under Iowa Code Chapter 20, as it existed at all relevant times herein, constituted a mandatory subject of bargaining. Iowa Code §20.9 (2015). Specifically, "Negotiations shall also include terms authorizing dues checkoff for members of the employee organization…" *Id.* Thus, if an employee organization requests bargaining pursuant to Iowa Code §20.16, there will be a provision on dues deductions either through voluntary agreement or an arbitrator's award. *Waterloo Educ. Ass'n v. Iowa Pub. Emp. Rels. Bd.*, 740 N.W.2d 418, 421-22 (Iowa 2007); *See also* Iowa Code §20.22(10) (2017) (upon an impasse regarding a mandatory bargaining subject, the arbitrator shall select the most reasonable offer submitted by the parties, which will be binding.). Thus, as a result, if by either voluntary negotiation or an arbitrator's award pursuant to Iowa Code § 20.22(10), a dues deduction provision will exist in the agreement.

The State erroneously argues it would violate Iowa Code §70A.19 by continuing to deduct dues during the term of the 2017–2019 agreement. (Appellant Br. pp. 30-31). Such version of the statute they rely on was not enacted until after the instant agreement was formed. On February 17, 2017, after UE ratified the 2017–2019 agreements, the Iowa Legislature enacted House File 291, amending the Public Employment Relations Act. The legislature amended Iowa Code § 70A.19, effective February 17, 2017.

Prior to the 2017 amendments, §70A.19 stated:

> A state employee who elects a payroll deduction for membership dues to an employee organization pursuant to the provisions of a collective bargaining agreement negotiated under the provisions of chapter 20 shall maintain the deduction for a period of one year or until the expiration of the collective bargaining agreement, whichever occurs first.
> . . .
> With respect to state employees, this section supersedes the provisions of section 20.9 allowing termination of a dues checkoff at any time but does not supersede the requirement for thirty days' written notice of termination.

Iowa Code §70A.19 (2015).

The State does not allege any individual employee bargaining unit member of UE sought to terminate their dues deduction by giving a thirty-day notice. Further, neither UE nor the State could require an

employee to terminate their dues deductions, nor require them to sign a reauthorization card. The law clearly provides the decision is exclusively within control of the individual member of the bargaining unit.

The State attempts to apply the later enacted change in the law. The amended section provides:

> The state, a state agency...or any other public employer as defined in section 20.3 shall not authorize or administer a deduction from the salaries or wages of its employees for membership dues to an employee organization as defined in section 20.3.

Iowa Code § 70A.19 (2017).

House File 291 further provides:

> The provision of this division of this Act amending section 70A.19 does not apply to dues deductions required by collective bargaining agreements which have been ratified in a ratification election referred to in section 20.17, subsection 4, for which an arbitrator has made a final determination as described in section 20.22, subsection 11, or which have become effective, where such events occurred before the effective date of this division of this Act.

Iowa Acts 2017 (87 G.A.) ch. 2, H.G. 291, § 27, eff. Feb. 17, 2017.

The district court rejected the State's arguments and correctly interpreted the legislative changes and irrevocability of authorizations to deduct dues:

House File 291 states that the provision amending § 70A.19 does not apply to dues deductions required by collective bargaining agreements that are ratified before the effective date of the new provision. The Union ratified the 17–19 CBAs on February 14, 2017, before the effective date of the new version of § 70A.19, February 17, 2017. Therefore, the prior version, not the current version, applies.

The prior version of § 70A.19 states, "A state employee who elects a payroll deduction for membership dues . . . shall maintain the deduction for a period of one year or until the expiration of the collective bargaining agreement, whichever occurs first." § 70A.19 (2015). This provision does not mean that employees' authorizations under the 15–17 CBAs automatically expire upon the passing of one year or the expiration of the 15–17 CBAs, whichever occurs first. Instead, the provision states that a state employee "shall maintain" the deduction, meaning authorizations are irrevocable until the first of those events occur. Once one year passes or the 15–17 CBAs expire, the employee is free to withdraw and terminate their authorization. If the employee does not withdraw their authorization, the authorization continues to be effective.

The last sentence of § 70A.19 states the "section supersedes the provision of section 20.9 allowing termination of a dues checkoff at any time." *Id.* Section 70A.19 supersedes employees' ability to terminate at any time because the section makes authorizations irrevocable until one-year passes or a CBA ends. If § 70A.19 meant that authorizations expire automatically when those events occur, there would be no conflict with § 20.9 and no need to supersede it, because dues authorizations could be terminable at any time and terminate automatically after one year or the end of a CBA.

(App 65).

The State continues to argue it would have violated Iowa Code §91A.5 by deducting dues based on authorizations that were in effect under the prior 2015–2017. (Appellant Br. p. 32). These authorizations remained in effect for the 2017–2019 agreements and were irrevocable by the employer. Iowa Code §91A.5(1) provides:

> An employer shall not withhold or divert any portion of an employee's wages unless:
> *a.* The employer is required or permitted to do so by federal law or by order of a court of competent jurisdiction; or
> *b.* The employer has written authorization from the employee to so deduct for any lawful purpose accruing to the benefit of the employee.

§ 91A.5(1). As correctly noted by the district court:

> The State would not have violated this provision by deducting dues. Federal and state law permitted the State to deduct dues and employees provided written authorizations to the State to deduct dues. The written authorizations did not expire at the end of the term of the 15–17 CBAs.
>
> Unless specific members withdrew and terminated their authorizations pursuant to the 2015 version of § 70A.19, authorizations under the 15–17 CBAs continued to be effective under the 17–19 CBAs.

(App 65). The State's reliance on law not in effect at the time the contract was formed and argument that it would have violated Iowa Code §91A.5 fails.

iii. UE Met Its Burden for the District Court to Grant Summary Judgment on Breach of Contract

To prove a breach of contract claim, a party must establish:

> (1) the existence of a contract; (2) the terms and conditions of the contract; (3) that it has performed all the terms and conditions required under the contract; (4) the defendant's breach of the contract in some particular way; and (5) that plaintiff has suffered damages as a result of the breach.

Iowa Mortg. Ctr., L.L.C. v. Baccam, 841 N.W.2d 107, 111 (Iowa 2013).

There is no dispute as to whether a valid contract exists. The Iowa Supreme Court found the 2017–2019 agreements were valid contracts. *UE I*, 928 N.W.2d at 67-68.

The district court properly found, dues deductions continued from contract term to contract term, with no requirement for UE members to renew or reauthorize for dues deductions to continue. The State continued to deduct dues from contract to contract with the same authorization. This was the standard course of conduct by the parties, in light of the practical concerns in having hundreds of members re-sign an authorization each contract term with the additional time, expense and manpower it would incur when the parties previously acquiesced.

There is no dispute UE did not breach its contractual obligations. (App 64).

There is a no dispute the State did not deduct dues during the term of the 2017–2019 agreements. (App 64).

The district court properly granted UE's motion for summary judgment finding the State's liability for failing to deduct dues. Such findings are supported by the agreement between the parties, and applicable law.

II. The District Court Properly Ordered the State to Pay Union Dues as Damages

A. Preservation of Error

UE agrees the State preserved error on the issue of award of damages, but disagrees the State preserved error on its sovereign immunity argument as it relates to damages.

B. Standard of Review

The issue of damages determined at a bench trial will be reviewed to determine whether it was supported by substantial evidence or induced by an improper application of law. *Tow v. Truck Country of Iowa, Inc.*, 695 N.W.2d 36 (Iowa 2005). The Supreme Court will not disturb a damages award if there is any reasonable basis in the record to support it. *Miller v. Rohling*, 720 N.W.2d 562 (Iowa 2006).

C. Argument

The State argues several positions regarding the issue of damages: i) the award of damages was not supported by the essence of the collective bargaining agreements; ii) Iowa Code Chapter 20 does not support an award for damages; and iii) the district court lacked jurisdiction to consider or award UE's claim for monetary damages. All three arguments fail.

i. The District Court's Award for Damages was the Appropriate Remedy for the State's Breach of Contract

a. The District Court Did Not Need to Rely on the Essence of the Agreement Because the Contract Is Clear

The State lacks a basic understanding of "essence of the agreement." While "the 'essence' of a collective bargaining agreement is an extremely broad concept…[that] requires a casting aside of traditional views of contract law in favor of a multitude of other considerations, including not only the written and unwritten agreements, themselves, but also the practices of the parties[,]" it does not subvert the fundamental principles of contract law. *UE I*, 928 N.W.2d at 67. *See also Sergeant Bluff-Luton Ed. Ass'n v. Sergeant Bluff-Luton Cmty. Sch. Dist.,* 282 N.W.2d 144, 150 (Iowa 1979). Rather, the essence transcends the terms of the express agreement and provides for

an expansion of considerations generally not provided for under the traditional views of contract law. *See Sergeant Bluff-Luton Ed.*, 282 N.W.2d at 150.

When parties agree to the language and terms of a collective agreement, they are bound by them. *Excel Corp. v. United Food & Com. Workers Int'l Union, Loc. 431*, 102 F.3d 1464, 1468 (8th Cir. 1996). When the "plain text of the agreement is unmistakably clear, it is presumed to evince the parties' intent" there is no need to look further than the text which "must give full effect to the parties agreement as written." *Boise Cascade Corp. v. Paper Allied-Indus., Chem. & Energy Workers*, 309 F.3d 1075, 1082 (8th Cir. 2002).

When the contract is clear and unambiguous, there is no need to "draw from the essence." *Cedar Rapids Ass'n of Fire Fighters, Loc. 11 v. City of Cedar Rapids*, 574 N.W.2d 313, 318 (Iowa 1998). Traditionally, the "essence" of the agreement is considered by past practices of the parties. *Id.* Past practice is accepted as a tool for interpreting ambiguous contract language, but past practice is a non-factor when the collective bargaining agreement is clear. *Id.*

Here, UE nor the district court needed to rely on the essence of the agreement (past practice) because the contract is clear. The contract required the State to deduct dues, which it did not. Thus, the State's argument the district court erred by applying traditional breach of contract principles rather than considering the essence of the agreements fails, because the district court did not need to look beyond the four corners of the agreements.

As noted by the district court, "[t]he contract was a mature contract between the parties. Both parties knew their obligations." (App. 132). Under Iowa law, when a contract has been breached, the nonbreaching party is generally entitled to be placed in as good a position as he or she would have occupied had the contract been performed. *Midland Mut. Life Ins. Co. v. Mercy Clinics, Inc.*, 579 N.W.2d 823, 831 (Iowa 1998). *See also* Restatement (Second) of Contracts § 344(a) (1979); 22 Am.Jur.2d *Damages* §43 (1988). This type of damage is sometimes referred to as the injured party's "expectation interest" or "benefit of the bargain" damages. *Magnusson Agency v. Pub. Entity Nat. Co.– Midwest,* 560 N.W.2d 20, 27 (Iowa 1997) (*citing* 22 Am.Jur.2d Damages § 45). The

focus of Iowa law for this item of damages is foreseeability. *Kuehl v. Freeman Bros. Agency, Inc.,* 521 N.W.2d 714, 718 (Iowa 1994).

In *Kuehl,* the Court opined "damages based on breach of a contract must have been foreseeable or have been contemplated by the parties when the parties entered into the agreement." *Id*.

> Whether the damages were reasonably anticipated by the parties when the contract was formed may be discerned from "the language of the contract in the light of the facts, including the nature and purpose of the contract and circumstances attending its execution."

Id. (citations omitted). "Damages which a reasonable person would expect to follow from breach of a contract are direct and thus should be awarded." *Id.*

The State's argument that "[t]he district court was required to 'scrutinize the contract terms to determine whether the damages were within the contemplation of the parties'" is self-defeating. (Appellant Br. pp. 35-36). The district court did just that:

> The State had a contractual obligation to deduct dues and failed to do so.
> …
> [T]he State knew the financial impact of failure to deduct dues would have for the Union. The damages the Union suffered from the State's failure to deduct dues were foreseeable and can be expected to follow from the State's breach.

(App. 130-132).

The State seeks to avoid the repercussions of its own actions. The State argues that despite its own breach, it should be placed in the same position it would have enjoyed absent the breach, by having the dues deducted retroactively. (Appellant Br. p. 44).

b. The State's Reliance on Sauk County Is Misplaced

The State's reliance on *Sauk County v. Wisc. Employment Relations Comm'n* is misplaced. To begin, this case is not bound by agency limitations, and highlights the faulty underpinnings of the State's reliance on *Sauk County*. First and foremost, Wisconsin's statutory scheme differs from Iowa's. If *Sauk County* had arisen under Iowa law, it would have been subject to the provisions of Iowa Code 20.17(5).

Further, in *Sauk County*, the union never claimed the employer was responsible to pay dues, nor could it have argued as such. The employer and employee were parties to a collective bargaining agreement that expired at the end of 1984. *Sauk Cnty. v. Wisconsin Emp. Rels. Comm'n*, 477 N.W.2d 267, 269 (Wis. 1991). Prior to the expiration of the 1983–84 contract, negotiations began for a successor contract. *Id.*

The employer fulfilled all its obligations under the agreement until expiration at the end of December 1984. Parties were unable to come to an agreement on the successor contract, negotiations stalled, and an impasse followed. As a result, there was no contract in place from the end of 1984 until an arbitrator decision was issued in late 1985. *Id*. During that time, there was no obligation on the employer to deduct dues, and lack of timely agreement on a new contract could not be attributed anymore to the employer than to the union. An arbitrator later determined the disputed provisions should be resolved in the union's favor. *Id*. The Wisconsin court reviewing the agency action upheld its finding that the dues provision should be applied retroactively, as this was within the agency's authority and expertise requiring its decision to be given great weight. *Id*. at 271.

Here and distinguishable from *Sauk County*, UE and the State had a valid and enforceable contract, as found by the Iowa Supreme Court in *UE I*. The new 2017–2019 contract terms agreed to in February became effective on July 1, 2017, and the 2015– 2017 agreement was still in place until June 30, 2017, which included dues deduction provision. There was never a time when the State was not obligated by the dues

deduction provision of the contract, as there was never a time where parties were without a contract. The State, unlike in *Sauk*, has not fulfilled its obligations under the contract, and fault is attributable only to them. Given the procedural posture of *Sauk County* and the different statutory schemes underlying it, this decision cannot be afforded any weight.

c. Award for Damages for Breach of Collective Bargaining Agreement Is Supported by Law

Requiring the State to pay lost dues as damages is the appropriate remedy. Iowa courts traditionally recognize and utilize federal case law for interpretive guidance in cases involving enforcement of collective bargaining agreements. *UE I*, 928 N.W.2d at 63. *See also*, *Sergeant Bluff-Luton Ed.*, 282 N.W.2d at 147 (citing the Steelworkers trilogy[1]). Federal courts have awarded comparable orders in similar disputes. In *Amalgamated Meat Cutters & Allied Workers of N. Am., Loc. No. 593 v. Shen-Mar Food Prod., Inc.,* the union alleged the employer breached the collective bargaining agreement (specifically Article II) by "failing to check off from the pay of its employees regular monthly union dues and

[1] *United Steelworkers v. American Mfg. Co.*, 363 U.S. 564 (1960); *United Steelworkers v. Warrior & Gulf Navigation Co.*, 363 U.S. 574, (1960); *United Steelworkers v. Enterprise Wheel and Car Corp.*, 363 U.S. 593 (1960).

initiation fees." 405 F. Supp. 1122, 1122 (W.D. Va. 1975). In that case, forty-three employees did not revoke their authorization cards and such cards were renewed automatically "unless the employee revoked [their] authorization" during the period set forth in the agreement. *Id*. at 1125. Because the employer failed to check off dues for the employees who had not revoked their authorizations card, the Court ordered the employer to "pay to plaintiff a sum of money equalling the total union dues defendant should have been deducting for [those] forty-three employees." *Id*.

Similarly, in *In re U.S. Truck Co., Inc.*, the court concluded paying dues as damages was the appropriate remedy for violating a collective bargaining agreement. 74 B.R. 515, 541 (Bankr. E.D. Mich. 1987). While the case was before a bankruptcy court, the facts are similar to the case at hand. The union filed a proof of claim for damages resulting in the employer's failure to deduct dues from union members' paychecks and remit them to the appropriate local unions. *Id*. The union claimed not that union dues were a direct obligation owed by U.S. Truck, rather as a contractual damage claim. *Id*. The union claimed "damages in an amount equal to the full amount of dues which U.S. Truck did

not deduct for union member employees who were actively working." *Id*. Accordingly, the question before the court was "whether U.S. Truck had a legally enforceable duty to deduct dues under the rejected agreement, and what measure of damages is appropriate under 29 U.S.C. § 185." *Id*. Because the dues check off obligation was enforceable; the court concluded the union's "measure of damages [were] consistent with that used under 29 U.S.C. § 185." *Id*.

An employer's failure to deduct dues in violation of a contract is a matter of direct and peculiar concern to a labor organization. *United Mine Workers of America, District 22 v. Roncco*, 314 F.2d 186 (10th Cir.1963). "Where a local union has developed a reliance on the dues checkoff, the checkoff mechanism can effectively be its financial lifeline." *In re U.S. Truck Co., Inc.*, at 541 (emphasis added). Paying dues as damages is the appropriate remedy. The remedy sought by the State is impractical, seeks to transfer liability to its employees, and would not make UE whole. The State argues it is not obligated to pay the dues. The State, however, became obligated to pay the dues when it breached that contract. Essentially, the contractual relationship between the State and UE were as direct parties to the agreements. While UE has the duty to

fairly represent members in the bargaining unit, the individual employees, while beneficiaries of the contract, are not parties to the agreement. The contracts are between UE and the State, and pursuant to Article II of the agreements, requires the State upon receipt of a valid authorization to collect dues and transmit collected dues to UE. (App. 236-265). The State had an obligation to deduct dues. (App. 130). This obligation cannot be transferred. The obligation of the breaching party, the State, is to pay the nonbreaching party, UE.

Retroactive dues would not make UE whole, as asserted by the State. As a practical matter, many employees employed in late June 2017 in the bargaining units are no longer employed by virtue of death, illness, voluntary quit, termination, or promotions to positions outside the bargaining units. A retroactive deduction now would be unfair to those still on the payroll and would not account for those who are no longer. Further, application retroactively does not account for interest owed pursuant to pursuant to Iowa Code §535.2. It would be unreasonable to transfer the interest obligation and incurred by the State to the employees.

The State wishes to transfer the responsibility and loss to comply with the dues deduction provision of the contract from the breaching party to the non-breaching party. As the Iowa Supreme Court holds:

> It would be no favor to the State to exonerate it from contractual liability. To do so would seriously impair its ability to function. A government must finance its affairs, must contract for buildings, highways, and a myriad of other public improvements and services. It would lead to untenable results if a government, after having contracted for needed things, did not have to pay for them. The rules of economics seem to exact a terrible price from those of uncertain responsibility. The few persons or institutions willing to deal with an exempt state would necessarily factor in the cost of such a tentative chance to collect. This cost to the State would ultimately be borne by the public.

AFSCME/Iowa Council 61 v. State, 484 N.W.2d 390, 394 (Iowa 1992).

The district court's determination UE was entitled to damages was based on substantial evidence and correctly applying Iowa law. The collective bargaining agreements required the State to deduct dues. It failed to do so, breaching the contracts. The district court ordered the appropriate remedy, as allowing the State to deduct dues retroactively would put the financial burden on the union employees for the State's failure to comply with its own contractual obligations.

ii. PERB Cannot Order the Relief UE Seeks and the State's Reliance on Chapter 20 Is Inapplicable

The State again asserts an argument that has been rejected multiple times. It again seeks to refer to what remedy could have been or should have been if this case were before PERB. The Iowa Supreme Court rejected the argument this contract was to be adjudicated by PERB:

> Iowa Code Chapter 20 and PERB's regulations do not equip the agency to adjudicate contract-formation and contract-enforcement issues. …And the Iowa legislature has expressly authorized district courts to adjudicate actions to enforce public employee collective bargaining agreements without first requiring the parties to litigate the contract-formation or contract-enforcement issues in a PERB agency action.

UE I, 928 N.W.2d at 65.

In rejecting the State's argument, the Iowa Supreme Court recognized PERB could not provide the relief sought: "PERB lacks authority to enforce the collective bargaining agreement through an order for specific performance, award of damages for breach, or some other remedy." *Id*. at 66. If the relief UE could obtain was limited to what PERB could order, the Iowa Supreme Court would not have used the relief UE sought as a basis for allowing the contract claims to proceed in district court. *See Id*. ("PERB cannot order the relief UE seeks here. We

affirm the district court's ruling that UE was not required to exhaust its administrative remedies with PERB before filing its petition in district court.")

When the State enters into a collective bargaining agreement, it is subject to lawsuits enforcing provisions of such agreement. *AFSCME,* 484 N.W.2d at 394. "Terms of any collective bargaining agreement may be *enforced* by a civil action in the district court of the county in which the agreement was made upon the initiative of either party." Iowa Code §20.17(5) (2017) (emphasis added).

The State argued at the district court that there is a distinction between a lawsuit seeking to *enforce* the terms of a collective bargaining agreement and requiring the State to pay monetary damages based on such terms. (App. 146-151). The district court, correct in its analysis, rejected this argument:

> The term "enforce" is defined, in part, as "to compel a person to pay damages for not complying with (a contract)." *Enforce*, Black's Law Dictionary (11th ed. 2019). Moreover, legislative intent is "'expressed by omission as well as by inclusion.'" *Wiebenga v. Iowa Dep't of Transp.,* 530 N.W.2d 732, 735 (Iowa 1995) (quoting *Barnes v. Iowa Dep't of Transp.,* 385 N.W.2d 260, 263 (Iowa 1986)). If the legislature intends a statute to include a prohibition on certain conduct, it will specifically mentioned that conduct, but where it does not the statutory provision is deemed not to apply to that conduct.

> *Olympus Aluminum Prod., Inc. v. Kehm Enterprises, Ltd.*, 930 F. Supp. 1295, 1312 (N.D. Iowa 1996) (citing *Wiebenga*, 530 N.W.2d at 735). Here, the Court concludes if the legislature intended that a lawsuit seeking to *enforce* the terms of a CBA excluded monetary damages it would have stated such expressly. The fact it did not demonstrates this is not the case.

(App. 146-151).

The State now makes the argument there is a distinction between a lawsuit seeking to *enforce* the terms of a contract and "suits for violation of contracts." (Appellant Br. pp. 41-42). This, too, lacks merit.

Enforcement is "[t]he act or process of compelling compliance with a law…or agreement." *Enforcement*, Black's Law Dictionary (11th ed. 2019). Compel means "[t]o cause or bring about by force." *Compel*, Black's Law Dictionary (11th ed. 2019). Compliance is "[t]he state of being in conformity with...[an] agreement, or accordance." *Compliance*, Black's Law Dictionary (11th ed. 2019). The need to compel compliance, in and of itself, means nonconformity exists. Nonconformity is "[t]he failure to comply with something, such as a contract specification." *Nonconformity*, Black's Law Dictionary (11th ed. 2019). A violation is "[t]he act of breaking or dishonoring the law; the contravention of a right or duty. *Violation*, Black's Law Dictionary (11th ed. 2019).

Simply stated, the meanings are one and the same. To argue that somehow there is a distinction between a lawsuit seeking to *enforce* the terms of a contract and lawsuits for *violation* of a contract is free from reason and without logic.

The district court had the authority to order the State to pay damages resulting from its breach of contract. When the State enters a contract, it consents to be sued for breach. *Kersten Co., Inc. v. Dep't of Soc. Servs.*, 207 N.W.2d 117, 122 (Iowa 1973). To hold that Chapter 20 does not permit recovery for monetary damages would undermine the public policy set forth in *Kersten*:

> It cannot be true that a state is bound by a contract and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.

Kersten Co., 207 N.W.2d at 121.

iii. The State Waived Sovereign Immunity

The State asserts the State of Iowa enjoys immunity from claims for monetary damages absent an express or constructive waiver of its sovereign immunity, and that the district court "lacked jurisdiction to consider or award Plaintiff's claim for monetary damages." (Appellant Br. p. 47). These arguments fail for multiple reasons.

a. The Iowa Supreme Court Has Already Established the District Court Has Jurisdiction to Enforce the Collective Bargaining Agreement

The Iowa Supreme Court recognized that the district court was the proper jurisdiction to enforce the collective bargaining agreement by an award the monetary damages. "PERB lacks authority to enforce the collective bargaining agreement through an order for specific performance, *award of damages for breach*, or some other remedy." *UE I*, 928 N.W.2d at 66 (emphasis added).

It is implausible to assert the district court has jurisdiction to hear a case to enforce the terms of a collective bargaining agreement, yet cannot award damages for the breach. To assert such would effectively render suits for breach of contract useless.

b. The State Waived Sovereign Immunity by Failing to Timely Raise the Issue

The State waived sovereign immunity by failing to timely raise the issue before the district court. When the State enters into a contract it consents to be sued for breach, and in doing so, agrees to be answerable for its breach and waives its immunity from suit to that extent. *Kersten*, 207 N.W.2d at 122.

The State presents its sovereign immunity argument as a jurisdictional question. It is not. Subject matter jurisdiction addresses whether a court is empowered to "hear and determine cases of the *general class* to which the proceedings in question belong[.]" *Alliant Energy-Interstate Power and Light Co. v. Duckett*, 732 N.W.2d 869, 874-75 (Iowa 2007) (original emphasis). The State's own citation provides the same: "The issue whether the [State] intended to waive its sovereign immunity with respect to a *particular type of claim* is a matter of jurisdiction, the power of the court to hear and adjudicate a particular class of cases…." *Hyde v. Buckalew*, 393 N.W.2d 800, 802 (Iowa 1986).

Issues of sovereign immunity should be found precluded in this matter as available, material, and relevant to the 2019 action. *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92, 104 (Iowa 2011). As the validity of the contract was at the core of the 2019 litigation, the scope of any waiver by its validity was an inherent issue to be resolved at that time. It is precluded from further litigation: "[I]ssue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issued raised and resolved in the previous action." *Hunter v. City of Des Moines*, 300 N.W.2d 121, 123

(Iowa 1981). When the effect of a document is litigated it cannot be relitigated. *Soults Farms, Inc.*, 797 N.W.2d at 104. A defendant cannot raise a defense available in the first action in a subsequent action. *Spiker v. Spiker*, 708 N.W.2d 347, 354 (Iowa 2006) (*quoting* Restatement (Second) of Judgments §18, at 151-52 (1982)). Any questions as to the scope of the State's waiver of sovereign immunity were available in 2019. If such questions were to be litigated, the State was required to do so then. As it did not, such arguments have been waived here.

Rather, the question raised by the State is whether the district court has the *authority* to order the State to pay damages for its breach of contract: "Where subject matter jurisdiction exists, it does not necessarily follow that a court has authority to act in a specific case included within that general class." *Holding v. Franklin Cnty. Zoning Bd. of Adjustment*, 565 N.W.2d 318, 319 (Iowa 1997). Questions of a court's authority are waived when not raised at the first opportunity. *See Alliant Energy-Interstate Power and Light Co.*, 732 N.W.2d at 875 (Iowa 2007) (*quoting* 21 C.J.S. *Courts* §85, at 114 (2006) ("An objection to jurisdiction based on any ground other than lack of jurisdiction of the

subject matter…is usually waived by failure to raise the objection at the first opportunity, or in due or seasonable time…").

The latest the State had to raise this issue was the summary judgment stage. The district court was set to determine the State's liability for breach of contract, including its liability for resulting damages. The State did not raise any challenge to the district court's authority to act prior to concluding the State was liable for resulting damages. Because the issue was raised by the State for the first time in their post-trial brief, it is therefore untimely, and the issue has been waived.

c. By Entering Contract, the State Waived Sovereign Immunity for Breach of Contract Including Monetary Damages

"[T]he State, by entering into a contract, waives its defense of governmental immunity and consents to be sued for breach thereof." *Kersten Co., Inc*, 207 N.W.2d at 122. A valid contract exists, as decided by the Iowa Supreme Court. *UE I*, 928 N.W.2d at 68. As the State entered this contract, it waived immunity and consented to suit for breach. This breach of contract claim is within the general class of cases the district court is empowered to hear. The district court does not lack

subject matter jurisdiction as it has clearly been given the power to act in challenges to a State's breach of contract. *Holding*, 565 N.W.2d at 319.

As discussed briefly *supra*, the district court possessed the authority to order the State to pay the damages resulting from its breach of contract. When the State enters a contract, it consents to be sued for a breach. *Kersten Co., Inc.*, 207 N.W.2d at 122. In doing so, it "agrees to be answerable for its breach and waives its immunity from suit to that extent." *Id*. at 121. That this includes imposition of damages against the State is inherent in the waiver. Sovereign immunity is only implicated by damages actions:

> The law is well settled…that in the absence of specific consent by the State, it or its agencies may not be sued in an action to obtain money from the State…. [Citations omitted.] The rule is likewise well recognized that where no judgment or decree is asked against the State, but the suit is rather to require its officers and agents to perform their duty, there is no immunity recognized.

Collins v. State Bd. of Soc. Welfare, 81 N.W.2d 4, 6 (Iowa 1957). *See also Hoover v. Iowa State Hwy. Commn.*, 222 N.W. 438, 440 (Iowa 1928) (where party "does not attempt to obtain money from the state… [but] only want to protect his property from destruction by the agents of the

state" the action "is in no way derogatory to the…rule that the state cannot be sued without consent.")

Kersten explicitly overturning *Megee v. Barnes*, 160 N.W.2d 815 (Iowa 1968) further demonstrates damages for contract breach may be ordered against the State. *Id*. at 122. The facts of *Kersten* and *Megee* were different, but indistinguishable:

> In *Megee* we held a university professor who alleged her contract of employment had been breached could not maintain an action for damages against the State because of governmental immunity. In the present case the Department of Social Services (hereafter called department) entered into an oral lease with plaintiff, who alleges the terms have been breached.

Id. at 118. To grant the relief requested, *Megee* had to be overruled. *Id*. By overruling *Megee*'s prohibition against breach of contract claims for damages against the State, *Kersten* necessarily accounted for awarding damages from the breach. This can be seen in the authority *Kersten* relies on:

> To hold that the state may enter into a contract by which the other party is compelled to expend large sums…to enable it to perform its obligation, and then arbitrarily repudiate the contract relegating the injured party to the doubtful remedy of appealing to the legislature for justice…would be to sanction the highest type of governmental tyranny.'

Id. at 120 (*quoting Ace Flying Service, Inc. v. Colorado Dept. of Ag.*, 314 P.2d 278, 280 (Colo. 1957)).

> In entering into the contract (the State)…bound itself substantially as one of its citizens does when he enters into a contract. Its contracts are interpreted as the contracts of individuals are, and the law which measures individual rights and responsibilities measures, with few exceptions, those of a state…. It cannot be true that a state is bound by a contract, and yet be true that it has power to cast off its obligation and break its faith, since that would invoke the manifest contradiction that a state is bound and yet not bound by its obligation.

Id. at 120-121 (*quoting Carr v. State*, 26 N.E. 778, 779 (Ind. 1891)).

There is no question the State "expects the other contracting party to honor these obligations. It can – and does – seek redress when they fail to do so." *Id*. at 120. There can also be no question "when the State enters into a validly authorized contract, it lays aside whatever privilege of sovereign immunity it otherwise possesses and binds itself to performance, just as any private citizen would do by so contracting." *Id*. at 121 (*quoting V.S. DiCarlo Const. Co., Inc. v. State*, 485 S.W.2d 52, 54 (Mo. 1972)).

The State's reliance on *Lee v. State*, 815 N.W.2d 731 (Iowa 2012) is misplaced as "Lee did not bring a breach-of-contract claim, and she never sought to establish that the handbook created a contract." *Id.* at 742. This distinguishes *Lee* from *Kersten* "because the State in [*Kersten*] did not dispute the existence of a contract, but only asserted it should be immune from suit for breach of contract." *Id.* The focus of *Lee*'s claims "was the FMLA constituted federal law that state employers were required to follow" with implied waiver of immunity asserted only "in response to the State's legal defense that it was immune from suit because Congress never intended to abrogate states' immunity in enacting the FMLA." *Id.* at 742 n.3. The Iowa Supreme Court never considered the existence of a contract in *Lee*. *Id.*

The claim in *Lee* was brought specifically under the federal statute implementing FMLA's self-care provision. *Id.* at 734. This statute did not validly abrogate state immunity from suit. *Id.* at 740 (*citing Coleman v. Ct. of Appeals of Maryland*, 566 U.S. 30, 33 (2012)). This left only the claim for implied waiver based not on contract, but on other State conduct. *Id.* None of the conduct alleged was sufficient. First, plaintiff failed to establish the State's inclusion of the provision in the employee

handbook was voluntary rather than to comply with federal law. *Id*. at 743. Nor was any evidence presented to show the handbook language was designed to waive immunity. *Id*. Finally, "[k]nowledge of the federal supremacy doctrine does not make implementation of a federal statute prima facie proof of a voluntary offer to pay money damages for the statute's violation." *Id*. Neither these circumstances nor the Iowa Supreme Court's analysis of them has any bearing on the State's waiver-by-contract issue here. *Lee* is as distinguishable from the present case as it is from *Kersten*.

That the State is as liable for damages from its breaches of contract as any other party would be is true for collective bargaining agreements. In 1974, approximately fifteen months after *Kersten*, Iowa Code Chapter 20 became law. *AFSCME*, 484 N.W.2d at 395. It required public employers to negotiate with employee organizations on numerous issues, including "terms authorizing dues check off for members of the employee organization…" Iowa Code §20.9 (1974). This was the law at the time of contract here. Iowa Code §20.9 (2015).

The State's agreement to the dues deduction provision of the contract resulted in an enforceable collective bargaining agreement:

"…[I]tems agreed upon by the public employer and the employee organization, shall be deemed to be the collective bargaining agreement between the parties." *Compare* Iowa Code §20.22(12) (1974); Iowa Code §20.22(10) (2015); Iowa Code §20.22(11) (2017). The contract is enforceable "by a civil action in the district court of the county in which the agreement was made upon the initiative of either party." *Compare* Iowa Code §20.17(5) (1974); Iowa Code §20.17(5) (2015); Iowa Code §20.17(5) (2017).

In *AFSCME*, the Iowa Supreme Court rejected multiple State constitutional claims, including sovereign immunity: "In 1974 the State enacted Iowa Code Chapter 20…expressly making itself bound by its contracts. The State negotiated and became liable under these contracts pursuant to the Chapter." *Id*. at 395. When a State negotiates a contract and then attempts to shirk its obligations, "the State in effect tells its employees it did so only as an employer but that, as the government of those same employees, it now prefers other options and thus considers itself unbound by the contracts." *Id*. To restate, "[i]t would be no favor to the State to exonerate it from contractual liability… [and] [i]t would lead

to untenable results if a government, after having contracted for needed things, did not have to pay for them." *AFSCME,* 484 N.W.2d at 394.

This is in line with the public policy underlying *Kersten*, which remains viable today: "it would be abhorrent to permit the State to enter into contracts with no corresponding obligation to perform its promises under the contract." *Lee*, 815 N.W.2d at 741.

This approach to collective bargaining agreements makes sense as the legislature knew the impact of *Kersten* on State contracts at the time it enacted Chapter 20. *See Jahnke v. Inc. City of Des Moines*, 191 N.W.2d 780, 787 (Iowa 1971) (legislature assumed to know existing state of law and judicial interpretation when it enacts statutes). The same assumption applies when the State enters contracts. *See Myers v. Iowa Bd. of Regents*, 458 F.Supp.3d 1075, 1083 (S.D. Iowa 2020) (*citing Simon Seeding & Sod, Inc. v. Dubuque Human Rights Comm'n*, 895 N.W.2d 446, 467 (Iowa 2017)).

The State voluntarily entered the contract and its provisions. The statutory requirements in place at the time further demonstrate the State consenting to the obligation and the commensurate liability for damages for breach. Dues deductions were a mandatory subject of

bargaining. Iowa Code §20.9 (2015). Though required to negotiate, the State was under no obligation to agree: "If an agreement provides for dues checkoff.…Such obligation to negotiate in good faith does not compel either party to agree to a proposal or make a concession." *Id*. Thus, if bargaining is requested on said subject, there will be a provision on dues deductions either through voluntary agreement or an arbitrator's award. *Waterloo Educ. Ass'n,* 740 N.W.2d at 421-22. The result was an agreement to continue the current contract language as to dues deduction for the 2017–2019 agreement. Once the collective bargaining agreement was formed and ratified for the 2017–2019 contract period, the State incurred an obligation to continue the dues deduction through the end of the contract period, June 30, 2019.

By consenting to the obligation, the State consented to the consequences for its breach. *Kersten Co., Inc.*, 207 N.W.2d at 121. This is bolstered by the inconsistency of the State's position. It raises the claim of immunity to monetary damages for the dues deduction, but not with respect to its obligation to award back pay and overtime compensation for which the State has not based their appeal on. The State's internal inconsistency undercuts its own argument.

In summation, the State waived its sovereign immunity argument by failing to raise such in a timely manner. Even if this Court were to find otherwise, "the State, by entering into a contract, waives its defense of governmental immunity and consents to be sued for breach thereof." *Kersten Co., Inc.*, 207 N.W.2d at 121. Therefore, the State's contention that the district court had jurisdiction to hear the case, but rather lacked jurisdiction to award relief is without merit.

III. UE Properly Mitigated its Damages

A. Preservation of Error

The Union agrees the State preserved error on this issue.

B. Standard of Review

The issue of damages determined at a bench trial will be reviewed to determine whether it was supported by substantial evidence or induced by an improper application of law. *Tow,* 695 N.W.2d 36. The burden of proof in asserting that a party has failed to mitigate damages is on the party asserting that claim. *Id.*

C. Argument

While the State has alleged UE failed to mitigate its damages, said defense is not applicable here. Iowa courts have found "a mitigation

defense was 'not applicable where the damages sought consist of a specific payment unconditionally due under the terms of a contract.'" *Beal v. I.G.F. Ins. Co.,* No. 20-0361, 2003 WL 556238, *4 (Iowa Ct. of App. 2003).

Even if UE was required to mitigate its damages, it did so. "In determining whether a party has failed to mitigate damages, the defendant has the burden of demonstrating that the failure to mitigate was unreasonable under the circumstances." *Kirk v. Union Pacific R.R.*, 514 N.W.2d 734, 737 (Iowa 1994) (*citing Tanberg v. Ackerman,* 473 N.W.2d 193, 195–96 (Iowa 1991)). The "obligation under the mitigation of damages doctrine is one of reasonable diligence." *Waters v. Wolfe*, No. 07-0619, 2008 WL 238617 *4 (Iowa Ct. of App. 2008) (*citing R.E.T. Corp. v. Frank Paxton Co.,* 329 N.W.2d 416, 422 (Iowa 1983)).

UE took reasonable steps to mitigate its damages by collecting dues from the individual members via cash, check, credit card, and checking accounts to recover as much of its lost dues as possible. (App. 130-132). UE also retained the services of UnionTrack, a third-party vendor, to collect dues. (App. 130-132). UE had to put forth substantial

efforts to collect dues for the union to continue functioning. (App. 130-132).

Despite its efforts, the State alleges because UE did not "obtain employee consent for renewed dues deductions, UE failed to mitigate its damages as required by Iowa law." (Appellant Br. p. 50). The State asserts they would have reinstated dues deduction if individual members of the bargaining unit, represented by the Union, would have signed reauthorization cards on or after March 9, 2018, during the term of the 2017–2019 collective bargaining agreement. (Appellant Br. p. 16). This argument was correctly rejected:

> It was common practice between the Union and the State to continue the dues deduction authorizations from contract term to contract term without members having to re-sign authorizations. In the negotiations for the 17–19 CBAs, the State did not request that Union members reauthorize dues deductions. Obtaining reauthorizations from every member would have cost the Union and the State a great amount of time and manpower. (Pl.'s Reply App. 23). The parties would not have wanted to have to collect new authorizations for each CBA term or in the middle of any CBA term. The parties' course of dealing indicates they did not expect that authorizations would automatically expire upon the passing of one year or the expiration of any CBA.

(App 66).

The authorization cards, once signed, can only be revoked by the employee, never by the employer. Iowa Code §70A.19 (2015). The State already had the authorization to do so, and the employees were not required to reauthorize. The district court has explained this and adopted this reasoning in all prior rulings. (App 66, 131-132).

The State admits dues deductions had never been terminated in prior contract years, nor that reauthorization was necessary after each contract year. (Appellant Br. p. 29; TT1 13:15-16).

In its brief, the State references a letter that was not brought into evidence, to reinforce its argument UE did not mitigate its damages. (Appellant Br. pp. 50-51). The district court ruled the State's March 9, 2018 offer letter was inadmissible as an offer to compromise under Iowa Rule of Evidence 5.408. (App. 266-268). The State claims the letter was an offer to reinstate dues. However, this letter does not help the State. It states simply that in order to continue to get the dues deductions, you have to get new authorization cards.

As stated, UE was not required to have each member sign new authorizations and could not legally be compelled to by the State.

CROSS-APPEAL ARGUMENT

I. The State Willfully and in Bad Faith Refused to Comply with the Iowa Supreme Court Ruling and the Union is Entitled to Attorney's Fees

A. Preservation of Error

Error was preserved on this issue when Appellee raised it in its 8/27/2019 Petition and 9/24/2020 Motion for Summary Judgment. The district court, in its final ruling, denied UE's request for attorney's fees. (App 137-138).

B. Standard of Review

Appellate courts review the denial of attorney fees for an abuse of discretion. We reverse the district court's ruling only when it rests on grounds that are clearly unreasonable or untenable. A ruling is clearly unreasonable or untenable when it is "not supported by substantial evidence or when it is based on an erroneous application of the law." *In re Marriage of Erpelding*, 917 N.W.2d 235, 238 (Iowa 2018).

C. Argument

In requesting attorney fees, UE asserts the actions of the State in failing to act in accordance with the May 17, 2019 Opinion and finding that there was a valid and enforceable collective bargaining agreement shows the State acted in bad faith, vexatiously, wantonly and for

oppressive reasons in their failure to implement the agreement, knowing the agreement was valid and items were owed to UE members.

In *Baldwin v. City of Estherville*, the Iowa Supreme Court found attorney fees can be required under common law as an exception to the general rule against awarding such fees. 929 N.W.2d 691, 716 (2019). Awarding attorney fees is permissible under the common law exception when the "opposing party 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons.'" *Baldwin*, 929 N.W.2d at 716; quoting *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993); quoting *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 258-59 (1975). A party's conduct "must rise to the level of oppression or connivance to harass or injure another." *Hockenberg Equip. Co.*, 510 N.W.2d at 159-160. "Oppressive" conduct "denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Id.* at 159. " 'Connivance" is defined as 'voluntary blindness [or] an intentional failure to discover or prevent the wrong.'" Id. (citation omitted). "These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. Such

conduct lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another.'" *Id.*

Here, the State knew the money was owed. (TT1 136:9-137:17). They calculated what was owed. (TT1 136:9-137:17). The State knew of the non-monetary terms in the collective bargaining agreement yet failed to adhere to them. (TT1 74:21-75:11; 170:6-12). The State knew this caused UE to suffer. The State's refusal to comply with the Supreme Court's ruling on May 17, 2019 permit an award of attorney's fees from the date of the Supreme Court's ruling to the present. The court ordered the State to implement the agreement and failed to do so. But for the State's actions in disregarding the rights of UE under the contract, even after the Iowa Supreme Court award, shows a disregard and lack of care. Therefore, the State's blatant disregard and intentional failure to abide by the agreements warrants UE's collection of its attorney fees.

CONCLUSION

For the foregoing reasons, UE respectfully requests the Court affirm the district court's conclusion on summary judgment that the State breached the terms of the collective bargaining agreements by not deducting dues, affirm the district court's ruling ordering damages and

award attorney fees for UE's efforts before the district court and on this appeal.

REQUEST FOR ORAL ARGUMENT

Appellee requests to be heard in oral argument in this matter.

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CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE STYLE REQUIREMENTS

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 14,000 words) because this brief contains 10,689 words, excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, and certificates.

This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P.6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 MSO in font size 14, Century Schoolbook.

/s/ Christopher Stewart Date: October 19, 2022
Christopher Stewart

CERTIFICATE OF FILING AND SERVICE

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I certify that on October 19, 2022, the Appellee's Final Brief was served on Appellant/Cross-Appellee State of Iowa.

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