IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 16-0558

JOANNE COTE,
Plaintiff – Appellee,

v.

DERBY INSURANCE AGENCY, INC., an Iowa Corporation and KEVIN DORN, individually,
Defendants – Appellants.

APPEAL FROM THE IOWA DISTRICT COURT OF WOODBURY COUNTY

THE HONORABLE JEFFREY L. POULSON, JUDGE

APPELLANTS' REPLY BRIEF

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I. ARGUMENT IN REPLY

1. *The district court's summary judgment ruling being complete as to issues presented, a motion to preserve error was unnecessary.*

In her brief opposing this interlocutory appeal, Appellee questioned whether error was preserved on two issues, relating to the meaning of 'members of the employer's family' and what constitutes being a 'regular' employee, both raised within the context of construing Iowa Code § 216.6(6)(a). *Brief of Appellee* at p. 18. Authority cited was *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181 (Iowa 2007), where a party sought an award of common law attorney's fees pursuant to an application filed with the district court. The district court's summary judgment order did not address that claim. Citing to IRCP 1.904(2) the appeals court said that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." 728 N.W.2d at 187. But this case is unlike *Fennelly.* The district court was asked to interpret Iowa Code § 216.6(6)(a) and it did so in a manner that was complete. No ancillary issue was presented to the district court by Appellants and not ruled when summary judgment was denied.

Another case cited by Appellee, *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002) involved an interlocutory appeal. There the defendant had sought to dismiss a petition citing many grounds, one of which was that the district court lacked jurisdiction to reinstate the petition after the plaintiff dismissed the petition. The

trial court overruled the motion but the order did not address the jurisdictional argument. After the order was entered, the defendant did not ask the trial court to change its ruling, specifically by considering whether it lacked jurisdiction. Yet *Meier* is inapposite here. The district court in that case issued a ruling that was incomplete. A stone left unturned was an argument on jurisdiction that may have won the day for that defendant. Said the appeals court, by not calling "to the attention of the district court its failure to consider the issue, and to give the court an opportunity to pass upon it," the defendant waived the argument. 641 N.W.2d at 541. But the ruling of the district court in denying Appellants' motion was complete inasmuch as the trial court, construing Iowa Code § 216.6(6)(a), found that the family exception was not available to Appellants. That ruling necessarily curtailed those issues about who 'members of an employer's family' are, and what a 'regular' employee means, so asking the trial court to construe Iowa Code § 216.6(6)(a) further would not have changed the result that the trial court reached.

The trial court's ruling was confined to a legal question, involving statutory construction. Using IRCP 1.904(2) to challenge that adjudication on the points of law the trial court covered would have been a rehash of the legal question. As the court observed in *Explore Info. Servs. v. Iowa Court Info. Sys.*, 636 N.W.2d 50 (Iowa 2001), it is *necessary* to preserve error only when the district court *fails to resolve* an issue, claim, or legal theory properly submitted for adjudication. 636

N.W.2d at 57 (emphasis in original). And while *Meier* says that IRCP 1.904(2) may also be used to address a trial court's failure to make a ruling, to allow error to be preserved for appeal of a legal issue, the trial court did not fail in that regard. 641 N.W.2d at 539.

Finally, in opposition to the argument that something more to preserve error was needed, the trial court was aware of these issues. In how Iowa Code § 216.6(6)(a) was applied the judge showed these points were considered, and at a footnote he discussed his thoughts in the ruling. Clearly, asking the trial court to rule differently would have merely challenged his adjudication on law points and not brought up an issue that, if acted upon by the trial court, could have changed the outcome.

2. The trial court wrongly limited the exception for members of the employer's family to natural persons.

The Appellee does not offer a compelling argument why the legislature's use of 'employer' in modifying 'family' within Iowa Code § 216.6(6)(a) should be overridden. An 'employer' means under Iowa Code § 216.2(7) every person. A 'person' under Iowa Code § 216.2(12) includes corporations. Nothing in the Iowa Civil Right Act states - or even plausibly suggests - that the legislature meant that it is only individuals working for an employer who is a 'natural' person that shall not be counted as employees when considering subsection 216.6(6). Whether considered in subpart (a), (b) or (c) the legislature's use of 'employer' to modify

'family' cannot be differentiated from how 'employer' is used in any other part of the Iowa Civil Right Act.

Subsection 216.2(7) is not ambiguous. Defining 'employer' to include " . . . every other person employing employees with the state" showed the Iowa Legislature wanted to define 'employer' broadly. And by using 'person' it signaled that the word meant more than just a natural person. Person was defined in subsection 216.2(12) as 'individuals' and, as well, a host of unnatural persons, i.e. partnerships, associations, corporations, legal representatives, trustees, receivers, and the state of Iowa and all political subdivisions and agencies thereof." It is not the place of the trial court to substitute by interpretation the intent of the legislature.

The trial court sought to create ambiguity by saying that nowhere does this subsection state that a corporation's board or shareholders are to be considered the true employer of an employee (Ruling at 9; App. 184), but that misconstrues the law. Those members are a part of the entity that is the employer. As the United States Supreme Court observed in *Burwell v. Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014), "[c]orporations, "separate and apart from" the human beings who own, run, and are employed by them, cannot do anything at all." Just like with the other 'persons' identified in subsection 216.2(12), it takes people to run

partnerships, associations, corporations, political subdivisions and agencies of government.

To give the word "employer" is the first sentence of subsection 216.6(6)(a) the broad and expansive meaning the legislature intended it to have, but to give it a very limited meaning in the second sentence of subsection 216.6(6), is not justified by the Act or by statutory rules of construction. As the United States Supreme Court observed in *Clark v. Suarez Martinez*, 543 U.S. 371, 378 (2005), "[t]o give these same words a different meaning for each category would be to invent a statute rather than interpret one." So, the word "employer" must be read as either expansive, or as limited. To borrow from *Clark*, "[i]t cannot, however, be interpreted to do both at the same time. Id.

3. The court can decide whether Jasmine Derby was a regular employee.

Appellee conceded in the brief it filed that Kevin and Patty Dorn are family members for purposes of subsection 216.6(6)(a). See *Brief of Appellee* at 25. Thus, should the appellate court determine that the family member exception is available to a corporation, and Kevin and Patty Dorn are excluded from the count, there were just three individuals regularly employed during the last two years that Appellee was employed by Agency, unless Agency regularly employed someone to help with filing, as Jasmine Derby did in the summer of 2012.

The facts were not contested by Appellee. A helper to work with filing is not one Agency ordinarily carried. It was not a usual or customary position. It is not disputed that Jasmine Derby, being a familial relation of Patty Dorn, was hired to give her a 'first job' and spending money that summer. Further, nothing about the hours she worked, the money she earned, or the frequency with which she was used at Agency bespoke of her being a regularly employed individual. But, according to Appellee's argument, because she worked at least some amount of time each week doing filing, Jasmine Derby was a regular employee.

The analysis lacked any depth, however. The position was not one Agency carried on, publically hired for, or needed routinely. Those hallmarks of a position for which an employer is regularly hiring for are absent. If the position is not regular, and the focus is on the regularity of the individual hired, Jasmine Derby, does not fit a regular category either. Those facts show a part-time, come and go as you please, worker who ceases all employment before school begins again. Saying that working 'some amount of time' is all 'regularly employs' requires, to be counted under subsection 216.6(6)(a) renders diminishes 'regularly' to the point of meaninglessness.

As a note on the argument by Appellee, that the ICRC found that Jasmine Derby was regularly employed after a 'thorough' analysis, see *Brief of Appellee* at 25, it is not correct. The ICRC made no analysis of the facts, as they pertained to

Ms. Derby's employ, and as were presented to the trial court. Further, what the ICRC investigator thought is not properly before the appeal court. The ICRC 's relevance to this appeal is only that the ICRC apparently has believed that corporations are entitled to exclude individuals who are members of the employer's family.

4. Patricia Strawn and Jasmine Derby are members of the employer's family and not counted under Iowa Code § 216.6(6)(a).

Following the Appellee's argument that Jasmine Derby is one of four who Agency regularly employs, the question presented is whether one or both of them are family members. The Appellee's argument, after asking the court to adopt the ICRC analysis, was to assert that the association of Patricia Strawn and Jasmine Derby to Agency, by virtue of being niece and grandniece to Patty Dorn, is not 'close, intimate, personal, and constant' to be considered family members. See *Brief of Appelle*e at 27. The argument phrased another way is that Appellee believes it only is immediate family members who are not counted, which presumably are husband and wife, as conceded, and perhaps, their children. There is a disparity between the small number that Appellee contends for, or how the ICRC analysis proceeds, and the Appellants' belief that extended members of one's family is appropriate.

Extended family certainly fits using a dictionary approach, and the expansive nature of that interpretation fits Iowa Code § 216.18(1) directive. Iowa

Code § 216.6(6)(a) should be construed broadly to effectuate its purpose of excluding family members from the count. It also is consonant with how Iowa approached the exemption. Where the federal law exempted employers with less than 15 employees, in order to preserve the competitive position of small firms, see *Baker v. City of Iow*a, 867 N.W.2d 44, 52-53 (2015 Iowa), Iowa placed its focus on protecting intimate and personal relations in small businesses. *Baker v. City of Iow*a, 750 N.W.2d 93, 101 (Iowa 2008). It is as if the Iowa Legislature saw 15 employees as being too great a number to exclude, unless the employees were a part of a family business with a variety of members working under that umbrella. And, with many family businesses having aunts and uncles, nieces and nephews, and grandparents and grandchildren employed, to want to limit the number of exempts to just immediate family members, the Iowa Legislature could have said so in formulating this subsection.

5. The issue of pre-emption of the common law claims is not subject to the preservation of error rule.

As the Supreme Court of Iowa observed in *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002) at footnote 2, a rule that error must be preserved is necessary in circumstances where the lower court's failure to address an issue a party raised would result in its being waived. The issue that the defendant in *Meier* did not ask the trial court to review pertained to the court's authority to reinstate a case after its dismissal. The appeals court treated the issue as being similar to personal

jurisdiction, which is waived if not objected to initially, or in that case, if error was not preserved.

In the present case, the trial court's overruling of Appellants' summary judgment motion is not a final order. A final judgment or decision is one that finally adjudicates the rights of the parties. It must put it beyond the power of the court which made it to place the parties in their original position. A ruling or order is interlocutory if it is not finally decisive of the case. *Mid-Continent Refrigerator Co. v. Harris*, 248 N.W.2d 145, 146 (Iowa 1976). Absent it being a final order, no waiver of any issues Appellants raised can obtain.

6. Appellee has not evidenced an incident of sexual harassment within the 300-days preceding the complaint she filed with the ICRC.

In her opposition, Appellee acknowledges that at least one hostile act must occur within the 300 days preceding the filing of the complaint in the office of the Iowa Civil Rights Commission. See Brief of Appellee at p. 30. Appellee cannot point to any act, however. Her argument is because she alleged that Dorn has a harassment history, and she alleged his acts in the past personally involved her at times when she was in her work area, then his being in the work area during the 300-day period is, *ipso facto*, a harassing act. Note there was no evidence Dorn said or did anything harassing. And because Appellee never looked at him, Appellee cannot say what he was doing at any time. That is to say, Appellee cannot say if Dorn did or did not do any of the usual and customary tasks one did

in the office. Just as she cannot say he was nearby her having a 'visible erection' in his pants. What Appellee does say, as her argument, is conclusory, i.e. it was "obvious" he went there "trying to harass her again." As noted from earlier argument, conclusory assertions made in an affidavit are not evidence that can be used to oppose a summary judgment. The only factual evidence adduced is that during the 300-days preceding the filing of the complaint Appellee saw Dorn walking in the work area near her, and the other evidence is that this was a busy area that everyone in the office needed to use for a variety of work tasks, so Dorn's being there was usual and customary, so his being nearby alone is not sufficient to evidence a hostile act.

7. ***Appellee has not evidenced an incident of tortious conduct in the two years preceding the filing of the complaint in the trial court.***

As the Court will observe, Appellee contends that acts that allegedly happened more than two years after the statute of limitations expired can be evidence for a jury to conclude that the same acts must have continued into the two year window before the complaint was filed. See *Brief of Appellee* at 35. That is not Iowa law. Further, a summary judgment cannot be opposed by guesswork and conjecture. The utter lack of any evidence that Dorn committed an outrageous act within the two years preceding the Appellee's filing of her district court complaint dooms the intentional infliction of emotional distress claim. The same must be said about the claim of assault, too. No evidence of an assault having happened in

the two-year window was adduced by Appellee. Dorn's walking in the vicinity of Appellee during work hours is all Appellee can show as the bad act that she alleged in her complaint. Once again, Appellee wants to claim "pre-statute of limitations conduct" to bolster her claim, calling it a continuous tort. . See *Brief of Appellee* at 36. Iowa law did not adopt that theory, though.

To avoid the bar of the statute of limitations, Iowa requires that a tortious act must have happen within the limitations period. Appellee adduced no such evidence. And the trial court, without such evidence, cannot offer supposition about what a jury might think of evidence of prior acts, in order to overrule a summary judgment motion. The summary judgment motion should have been sustained.

II. CONCLUSION

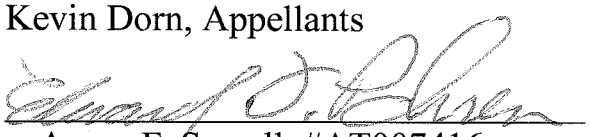
By engrafting a limit to Iowa Code § 216.6(6)(a) so it just excludes employees of sole proprietors in Iowa, the district court dealt a severe blow to family businesses that operate in Iowa as corporations, sub-S corporations, partnerships, or limited liability companies. Since it is not likely that these protections are eschewed by many small business owners, appellate examination of the lower court's ruling is necessary. And if the Appellants are successful, so the exclusion is available to all employers, examining what "regular" means and articulating the contours of "members of the employer's family" become necessary

components of an important appellate decision. If the treatment of Iowa Code § 216.6(6)(a) allows the harassment claim to remain, then the sufficiency of the evidence that Appellee propounded to overcome the summary judgment motion must be examined, and it should be found wanting.

How these issues are resolved also should illuminate which direction the court will take in regard to whether the tort claims are pre-empted. And, if the tort claims are not pre-empted, the appeals court next must decide whether the evidence that Appellee propounded as to one or both torts was sufficient to overcome the summary judgment motion. The Appeals court should determine that Appellee offered just speculation and conjecture in respect to the occurrence of a tortious act within the period of limitation, and rule that a summary judgment should have been awarded to Appellants for that reason.

Respectfully submitted,

Derby Insurance Agency, Inc.
and Kevin Dorn, Appellants

By: 

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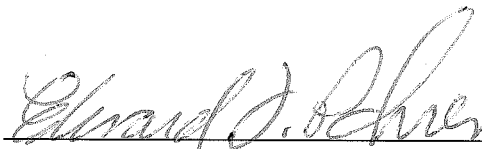
III. CERTIFICATE OF COSTS

Pursuant to Iowa Rule of Appellate Procedure 6.903(2)(j) the undersigned attorney hereby certifies that the actual cost for producing the requisite copies of the foregoing document was $0.00.

By: 

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IV. CERTIFICATE OF SERVICE

Pursuant to Iowa Rule of Civil Procedure 6.701 and 6.901 the undersigned attorney hereby certifies that on this 6th day of September, 2016, this document was served upon all parties to this appeal by electronic filing via EDMS and by US Mail:

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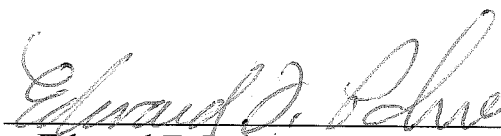
By: 
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V. CERTIFICATE OF FILING

Pursuant to Iowa Rule of Civil Procedure 6.701 and 6.901 the undersigned attorney hereby certifies that on this 6th day of September, 2016, this document was filed with the Iowa Supreme Court by electronic filing via EDMS.

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VI. CERTIFICATE OF COMPLAINCE

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 2,936 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. 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 Times New Roman, size 14 point font, in plain style except for case names and emphasis.

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September 6, 2016
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