IN THE SUPREME COURT FOR THE STATE OF IOWA
NO. 17-0183

STATE OF IOWA,
Plaintiff-Appellee

vs.

ABRAHAM K. WATKINS,
Defendant-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT
FOR VAN BUREN COUNTY,
HONORABLE JAMES A. DREW

DEFENDANT/APPELLANT'S FINAL REPLY BRIEF AND REQUEST FOR ORAL ARGUMENT

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CERTIFICATE OF FILING AND SERVICE

I hereby certify that I e-filed the Defendant-Appellant's Final Reply Brief with the Electronic Document Management System with the Appellate Court on June 16, 2017.

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I. "HOME RULE" DOES NOT AUTHORIZE THE BOARD OF SUPERVISOR'S RETENTION OF A HIRED GUN TO PROSECUTE A REMOVAL ACTION

When it filed the petition seeking Mr. Watkins' removal from office, the Van Buren County Board of Supervisors invoked both Iowa Code §§ 331.754 and 66.3 to justify its exercise of power. (App. 5, 8). The petition made no mention of "home rule" authority. Yet the State now argues the Board of Supervisors was exercising its inherent home rule powers by appointing Mr. Brown to act as County Attorney for purposes of prosecuting a removal.

It is only logical that, if the Board invokes chapter 66, it must abide by the requirements of chapter 66. The State seems to suggest a Board of Supervisors may tweak the rules of chapter 66 at its whim, invoking home rule authority. Yet this is a suggestion that raises serious due process concerns. If the State were correct, a Board of Supervisors could shift the standard of proof to probable cause or deprive an elected official of the right to cross-examine witnesses. Having chosen the game, the Board of Supervisors must play by the rules of this game. Otherwise, an elected official would be chasing a moving target. When the procedures of chapter 66 are invoked, the rules of

chapter 66 must apply. A Board of Supervisors does not get to make up its own "chapter 66-plus-some-minus-some" rules.

The question presented in Issue I of Mr. Watkins' appeal is simply whether Iowa Code §§ 66.3 and 66.12 trump Iowa Code § 331.754 when initiating a removal action. These are the code sections implicated by the petition for removal. This issue does not implicate home rule authority principles.

Even if the Court does view this case through a home-rule-authority lens, Iowa Code § 66.3 still governs based on field preemption principles. A municipality cannot "act in a matter inconsistent with the laws of the General Assembly." *City of Des Moines v. Master Builders of Iowa*, 498 N.W.2d 702, 704 (Iowa 1993) (internal quotation marks omitted). "Preemption may be express or implied. Both forms of preemption find their source in the constitution's prohibition of the exercise of a home rule power 'inconsistent with the laws of the general assembly.'" *Goodell v. Humboldt Cty.*, 575 N.W.2d 486, 492 (Iowa 1998). "Implied preemption . . . occur[s] when the legislature has 'cover[ed] a subject by statutes in such a manner as to demonstrate a legislative intention that the field is preempted by state law.'" *Id.* at 493.

Here, the legislature has covered the subject of removal by adopting the comprehensive procedures of Iowa Code chapter 66. Specifically, the legislature has covered the subject of who may file a removal action through the enactment of Iowa Code § 66.3. Therefore, the Board of Supervisor's authority to appoint an attorney via Iowa Code § 331.754(4) to initiate a removal proceeding has been preempted by Iowa Code § 66.3.

Mr. Watkins pointed out in his opening brief that Iowa Code § 66.12 (which allows a court to appoint the count attorney to prosecute a removal) was rendered superfluous in this case because the State purported to act under Iowa Code § 331.754(4). (Watkins Br. at 15). The State responded that Iowa Code § 66.12 is not rendered superfluous because it may be invoked when removal is initiated by the attorney general, Iowa Code § 66.3(1), or five registered voters, Iowa Code § 66.3(3). Herein lies the problem. This case *should have* been initiated by the attorney general or five registered voters, in which case Iowa Code § 66.12 could have been invoked. Instead, it was initiated by the Board of Supervisors via Mr. Brown. By initiating the action as they did, the Board of Supervisors and Mr. Brown attempted an end-run around Iowa Code § 66.3. This Court should hold such a maneuver is prohibited by Iowa Code §§ 66.3 and 66.12.

II. THE COURT SHOULD UTILIZE EMPLOYMENT LAW STANDARDS

The State does not address Mr. Watkins' argument that employment law standards provide the appropriate framework to analyze this case, and that the Iowa Rules of Professional Conduct do not govern. The closest the State comes is a footnote stating, "Mr. Watkins' sexually harassing acts constituted willful misconduct or maladministration . . . regardless of whether his sexually harassing acts violated the Iowa Civil Rights Act and/or the Iowa Rules of Professional Conduct." (State Br. at 39 n.14). The State provides no legal authority or argument in support of that proposition.

III. DE NOVO REVIEW REQUIRES CONSIDERATION OF THE LARGER CONTEXT

The State treats this appeal as if it is subject to a sufficiency of the evidence review, wherein the evidence would be viewed "in the light most favorable to the state, regardless of whether it is contradicted, and every reasonable inference that may be deduced therefrom must be considered to supplement that evidence." *State v. Harris*, 891 N.W.2d 182, 186 (Iowa 2017) (internal quotation marks omitted). The State fails to address any of the contradictory evidence Mr. Watkins outlines in his brief, instead recounting only the inculpatory evidence. But the standard is not sufficiency of the evidence; it is of course de novo. *State v. Bartz*, 224 N.W.2d 632, 634 (Iowa

1974). The entire record must be reviewed to "determin[e] the case anew." *Id.* It therefore is not enough to ignore the larger picture and focus only on Mr. Watkins' missteps.

This has been Mr. Watkins' point all along: his behavior cannot be viewed out of context. Out of context, an employee appearing at the office in his boxers seems highly inappropriate; in context, Mr. Watkins' office was indistinguishable from his home. Out of context, a person could believe Mr. Watkins sexually harassed Ms. Wallingford; in context, it becomes clear Ms. Wallingford "hostile work environment" label was divorced from anything sexual.[1] Out of context, it could seem Mr. Watkins aimed to make others uncomfortable; in context, he believed those in his office to be his friends and consequently let his guard down with them. Mr. Watkins may have naively expected others to understand his conduct as jovial, but he certainly never acted with an evil intent.

[1] The State relies heavily on Ms. Wallingford's affidavit as evidence Mr. Watkins sexually harassed Ms. Wallingford. (*See* State's Br. at 13, 39). But that affidavit was written by Thomas H. Miller, not Ms. Wallingford. (TT 153:18–19, 238:11-22). The best evidence of Ms. Wallingford's relationship and experiences with Mr. Watkins is her testimony. When given the opportunity to recount what occurred in her own words, Ms. Wallingford does not identify sexual harassment as an issue that motivated her to resign. (*See* Watkins' Br. at 23–28 (discussing Ms. Wallingford's testimony)).

No one disputes that Mr. Watkins' home and social life became entangled with his work life to the point where it became unhealthy. But Mr. Watkins recognized this long before the petition for removal was filed. He then took serious steps to remedy the situation. His remedial actions shed light on his intent, or lack thereof. *Cf. Iowa Supreme Court Attorney Disciplinary Bd. v. Barnhill*, 847 N.W.2d 466, 486 (Iowa 2014) ("We agree corrective measures to address previous misconduct are a mitigating factor").

The Court must recognize that this case is not just about the evidence the State highlights. This case is much more complex than that. The Court should examine *all* of the evidence to develop a full understanding of the relationships and events that led up to September 29, 2016. Mr. Watkins appreciates that the Court will not view each accusation individually in determining whether the State has proven Mr. Watkins committed maladministration, intentionally, with an evil motive. But before the Court can weigh the evidence in that ultimate calculus, the Court *should* examine each accusation individually to determine if the State has proven 1) if it occurred; 2) if it occurred while Mr. Watkins was County Attorney; and 3) if

it occurred within the context of the County Attorney's office, or in a personal context.[2]

The State compares Mr. Watkins' actions to those of the sheriff in *State v. Callaway*, 268 N.W.2d 841 (Iowa 1978). (State Br. at 43). In that case, the sheriff:

> 1) kicked a subdued detainee in the chest, knocking the suspect into a twelve-foot ditch, *id.* at 843;
>
> 2) ordered a deputy to shoot at a fleeing vehicle to "mark it," *id.*;
>
> 3) struck a subdued detainee in the chest several times with his fist and neck, *id.* at 844;
>
> 4) grabbed a subdued detainee by the hair, threw him to the floor, and punched him several times, *id.*;
>
> 5) backhanded a subdued detainee and then punched him repeatedly, *id.* at 5;
>
> 6) sprayed a restrained detainee in the face with mace twice, kicked the detainee in the buttocks, struck the detainee in the face with a ticket book, pushed the detainee against a wall by his neck, and kneed the detainee in the groin, *id.* at 6;

[2] Testimony from Christopher Kauffman is a prime example of evidence that should be excluded from the Court's analysis because Mr. Kauffman was a social friend of Mr. and Mrs. Watkins. For instance, Mr. Kauffman testified he once visited Mr. Watkins at home in the morning and Mr. Watkins was wearing underwear and a dress shirt. (TT 61:10). Mr. Kauffman never testified that this occasion occurred during the work day or in the presence of anyone besides Mrs. Watkins. (TT 61:16). There is no evidence this was anything but a social call.

7) allowed two prisoners to drive a patrol car with loaded weapons by themselves, *id.* at 847;

8) armed a prisoner with a loaded shotgun and used him to assist in an arrest, *id.*;

9) struck a 15-year-old runaway girl, *id.*; and

10) kicked and hit a handcuffed runaway boy, *id.*

Mr. Watkins' conduct is not equivalent. Perhaps if Mr. Watkins had repeatedly fondled employees, a comparison could be drawn between his conduct and the *Callaway* sheriff. Or perhaps if the *Callaway* sheriff had merely made verbal threats he could be compared to Mr. Watkins. Unlike the *Callaway* sheriff's conduct, Mr. Watkins' conduct simply is not severe enough to allow the Court to draw an inference that he intended to sexually harass Ms. Wallingford—or anyone else.

IV. MR. WATKINS' ARGUMENTS ARE PRESERVED FOR APPELLATE REVIEW

The State argues Mr. Watkins did not preserve error on his third, fourth, and fifth appellate arguments because the district court did not consider those arguments and Mr. Watkins did not file a motion to enlarge. (State Br. at 46, 51, 53).

To begin, the State is incorrect in its assertion that the district court did not consider Mr. Watkins' arguments. The district court was well-aware of Mr. Watkins' arguments that the removal action was flawed because 1) it was

not instigated by an independent, impartial investigator; 2) Mr. Swanson and Mr. Salmons had a conflict of interest; and 3) the Board of Supervisors did not explore less drastic options. (*See, e.g.*, TT 2 (Mr. Parrish: "We would like to present some brief testimony with regard to conflict of interest."); TT3 at 129–133 (testimony regarding impartial investigator requirement)). Each of these arguments was developed through testimony. Mr. Watkins' arguments then were all raised clearly in his post-trial brief. (*See generally* 12/16/16 Def. Post-Trial Brief, App. 87). Each of his arguments was separately labeled with a heading, which was represented in the brief's table of contents. *Id.* The State responded to each of Mr. Watkins' arguments, likewise separating each argument under its own heading. (*See* 12/21/16 State's Reply at 7–8).

In its removal order, the district court stated:

> The court has given full consideration to the testimony and exhibits offered during trial. The court's findings of fact, based on the evidence, are set forth below. Any matters asserted by a party not listed below are considered by the court to be immaterial, irrelevant or unproven.

(App. 161).

This broad language serves as a comprehensive ruling against all of Mr. Watkins' arguments, despite the district court's decision not to specifically address each of those arguments. Each argument was raised and rejected by the district court, though the ruling "contains incomplete findings or

conclusions." *Meier v. Senecaut*, 641 N.W.2d 532, 539 (Iowa 2002); *see also Lamasters v. State*, 821 N.W.2d 856, 865 (Iowa 2012) (finding argument preserved when district court listed argument and then denied entire application). Moreover, based on the clarity with which these arguments were presented to the district court, it strains credibility to believe the district court did not consider them. *See Lamasters*, 821 N.W.2d at 865 (ultimate question is whether district court considered issue). Accordingly, on appeal it must be "assume[d] the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling." *Meier*, 641 N.W.2d at 539.

Second, the purposes of error preservation were fully served in this case. Questions of error preservation must be viewed in light of the purpose of error preservation rules:

1) Opposing counsel must have "notice and an opportunity to be heard on the issue and a chance to take proper corrective measures or pursue alternatives in the event of an adverse ruling." *State v. Mann*, 602 N.W.2d 785, 790 (Iowa 1999).

2) An appellate court must have the benefit of a full record. *Meier*, 641 N.W.2d at 537.

Here, the record was fully developed at the district court level, Mr. Watkins' fully briefed his arguments, and the State had a full opportunity to respond. *See Mann*, 602 N.W.2d at 791 (stating, "in applying our error-

preservation rules, we must keep their underlying purpose in mind" and considering appellate argument where the parties and the district court had an opportunity to consider the argument at the district court level).

Finally, de novo review obviates any preservation issue. *See In re Marriage of Allebach*, 705 N.W.2d 340 (Iowa Ct. App. 2005) (unpublished) (noting party did not file motion to enlarge filings but addressing argument nonetheless because review was de novo); *cf. Local Bd. of Health, Boone Cty. v. Wood*, 243 N.W.2d 862, 868 (Iowa 1976) ("[S]o long as objections are made and noted in the record in equity actions, error as such is preserved."). With respect to Mr. Watkins' argument that the evidence was insufficient to justify removal, the State comments, "Mr. Watkins does not state that error was preserved." (State Br. at 23). The State does not, however, content that this argument is not preserved. No doubt this is because the State recognizes this issue is preserved automatically by Mr. Watkins' appeal. The rest of the State's preservation arguments fail for the same reason. On this de novo review, where Mr. Watkins' arguments were fully raised and resisted at the district court level, no more was necessary to preserve the issues for appeal.

V. THE STATE'S UNCLEAN HANDS SHOULD BAR REMOVAL

Mr. Watkins argues that the removal action was flawed because 1) it was not instigated by an independent, impartial investigator; 2) Mr. Swanson

and Mr. Salmons had a conflict of interest; and 3) the Board of Supervisors did not explore less drastic options. On each of these issues, Mr. Watkins has identified the flaws in the procedure used by the Van Buren Board of Supervisors.

Underlying each of these arguments is the equitable maxim of clean hands, which

> "expresses the principle that where a party comes into equity for relief he or she must show that his or her conduct has been fair, equitable, and honest as to the particular controversy in issue. A complainant will not be permitted to take advantage of his or her own wrong or claim the benefit of his or her own fraud or that of his or her privies." 27A Am.Jur.2d Equity § 126, at 605 (1996).
>
> The maxim means "that whenever a party who seeks to set the judicial machinery in motion and obtain some equitable remedy has violated conscience or good faith, or another equitable principle in prior conduct with reference to the subject in issue, the doors of equity will be shut, notwithstanding the defendant's conduct has been such that in the absence of circumstances supporting the application of the maxim, equity might have awarded relief." *Id.*

Opperman v. M. & I. Dehy, Inc., 644 N.W.2d 1, 6 (Iowa 2002).

Mr. Watkins' basic proposition is that the Board of Supervisors committed several wrongs in its process to initiate the action against him. The action was hasty, poorly investigated, and influenced by confidences Mr. Watkins shared with Mr. Swanson and Mr. Salmons. These flaws should bar this equitable removal action.

On the issue of Mr. Swanson's and Mr. Salmons' conflict of interest, the State's summation of the facts warrants correcting. (State Br. at 53). Contrary to the State's assertion that Mr. Swanson and Mr. Swanson exclusively represented the County, they *did* represent Mr. Watkins. County officials are provided coverage under Mr. Swanson's contract with Van Buren County. (TT2 39:24-25, 54:11–25). Mr. Swanson provided advice to Mr. Watkins regarding the issues underlying this removal. (TT 69:14-16). It was Mr. Watkins who contacted Mr. Swanson and Mr. Salmons on August 18, 2016 regarding Ms. Wallingford's resignation. (App. 200; TT2 40:17). Mr. Watkins e-mailed Ms. Wallingford's resignation to Mr. Swanson and Mr. Salmons with a note stating he would be calling to ask questions. (App. 224; TT2 40). Mr. Swanson spoke to Mr. Watkins about that issue twice on August 18, 2016. (App. 200; TT2 41, 46-47). Mr. Watkins discussed with Mr. Swanson the possibility of terminating Ms. Barchman. (TT2 46:13-20). Mr. Swanson also discussed with Mr. Watkins issues relating to Mr. Watkins' drinking and personal and marital life. (TT2 43:10, 47:3-16).

Mr. Swanson spoke with Mr. Watkins for 18 minutes on August 22, 2016 and again for 30 minutes on August 23, 2016. (App. 200). On August 24, 2016, Mr. Swanson met with Mr. Watkins for 12 minutes. (App. 201). On August 25, 2016, Mr. Swanson prepared a letter and email for Mr. Watkins to

send to Ms. Wallingford. (Ex. 9 at 2). Mr. Swanson spoke with Mr. Watkins again for 12 minutes on August 26, 2016. (Ex. 9 at 2). On August 30, 2016, Mr. Watkins forwarded Mr. Swanson the letters he had sent Ms. Wallingford. (App. 202).

Unbeknownst to Mr. Watkins, Mr. Swanson was concurrently researching the possibility of a removal action and had met with the Board of Supervisors on August 29, 2016. (App. 201; App. 272). The State asserts Mr. Swanson shared only "procedural and ministerial" information regarding Ms. Wallingford's resignation. This is absolutely false. The transcript of the closed session reveals Swanson relayed privileged information to the Board of Supervisors. (App. 274 lns. 2-11, 280 lns. 15-17, 281 lns. 23-25, 282 lns. 3-7, 283 lns. 19-25).

VI. THE ISSUE OF ATTORNEY FEES IS REVIEWED DE NOVO

The district court's decision not to award attorney fees was based on its interpretation of Iowa Code § 66.23. Questions of statutory interpretation are reviewed de novo. *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65, 73 (Iowa 2011). The State is incorrect that review is for abuse of discretion. (State Br. at 56).

The State points out that the United States Supreme Court in *Hensley v. Eckerhart*, 103 S. Ct. 1933, 1940 (1983) analyzed reasonable attorney fees

due the "prevailing party." This is because *Hensley* was applying 42 U.S.C. § 1988, which grants fees to the "prevailing party" in a federal § 1983 action.

Mr. Watkins cites *Hensley* solely for its interpretation of what fees are "reasonable." Both Iowa Code § 66.23 and 42 U.S.C. § 1988 allow for "reasonable" attorney fees. The "prevailing party" language in *Hensley* is immaterial to this case because Iowa Code § 66.23 does not limit the award of fees to the "prevailing party." Instead, the award of fees is triggered by dismissal. Iowa Code § 66.23. Because a removal action is equitable and the purpose of Iowa Code § 66.23 is equitable, Mr. Watkins should be awarded 80% of his total legal to compensate him for his success against 80% of the State's petition for removal. This is a "reasonable" fee given the nature and the facts of this case.

VII. CONCLUSION

It must be remembered that the procedural protections of a removal action are intended to safeguard the democratic process: the voters of Van Buren County chose Mr. Watkins as their county attorney. This was no small feat for a young lawyer, especially one running with no party affiliation. Mr. Watkins has always been an out-spoken, less-than-politically-correct person, and that is the person the voters elected. The voters' choice should not be undone short of willful misconduct/maladministration, undertaken with an

evil or corrupt motive, proven by clear and satisfactory evidence. A close examination of the full context of this case will reveal the State has not carried this burden of proof. Mr. Watkins thus should be reinstated to his position of County Attorney. The voters of Van Buren County should be the ones to decide in the next election whether they wish to be represented by Mr. Watkins.

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CERTIFICATE OF COMPLIANCE AND SERVICE

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) (no more than 7,000 words); excluding the parts of the brief exempted by Rule 6.903(1)(g)(1), which are the table of contents, table of authorities, statement of the issues, and certificates. This brief contains 3,517 words.

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 Office Word 2010 in font size 14, Times New Roman.

I hereby certify that on June 16, 2017, I did serve Defendant-Appellant's Final Reply on Appellant by e-mailing one copy to:

Abe Watkins
Defendant-Appellant

___/S/ *Gina Messamer*_____

Dated: June 16, 2017
Gina Messamer