

**The IN THE SUPREME COURT OF IOWA**

**NO. 19-0981**

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**STATE OF IOWA,**

**Plaintiff- Appellee**

**vs**

**MICHAEL BUMAN,**

**Defendant - Appellant**

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**APPEAL FROM THE IOWA DISTRICT COURT FOR  
PLYMOUTH COUNTY**

**HONORABLE STEVEN J. ANDREASEN**

**PLYMOUTH COUNTY CASE NO. FECR017373**

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**APPELLANT'S FINAL BRIEF**

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CERTIFICATE OF SERVICE

I hereby certify that on the 19th day of February, 2020, I served this final brief on all parties of record by EDMS and to Appellant via United States Postal Service.

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

**Issue 1. The Court abused its discretion in admitting Exhibit 15, a portion of Iowa Administrative Code Section 655-6.2(5) dealing with the practice of nursing because it was irrelevant and confusing and the prejudice of the exhibit outweighed any probative value**

*State v Osborn*, 929 N.W.2d 275 (Iowa App. 2019)  
Iowa Administrative Code ( IAC) 655-6.2(5)

**Issue 2. The Court erred in giving Instruction 17 which contained a part of Exhibit 15 and a limiting instruction which was insufficient to remove the prejudice that resulted to the defendant from the admission and use of Exhibit 15 during Trial.**

*State v Coleman*, 907 N.W.2d 124, 138 (Iowa 2018)  
*State v Robinson*, 927 N.W.2d 672 (Iowa App 2019)  
*State v Murray*, 796 N.W.2d 907, 908 (Iowa 2011)  
*State v Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)

**Issue 3. There was insufficient evidence to convict the defendant of Wanton Neglect of a Resident of a Healthcare Facility**

*State v Liggins*, 524 N.W. 2d 181 (Iowa 1994)  
*State v Thornton*, 498 N.W. 2d 670,673 (Iowa 1993)

## ROUTING STATEMENT

Because this case involves the application of existing legal principles, therefore transfer to the Court of Appeals would be appropriate. Iowa R.

App. P. 6.1101(3)(a).

## STATEMENT OF THE CASE

**Statement of the Case:** This is an appeal from conviction and sentence following a jury trial on the charge of Wanton Neglect of a Resident of a Healthcare Facility, Causing Serious Injury in violation of Iowa Code §§726.7(1) and 726.7(2), a class C Felony. The jury convicted the defendant of the lesser included offense of Wanton Neglect of a Resident of a Healthcare Facility in violation of Iowa Code §§726.7(1) and 726.7(3), an aggravated misdemeanor.

**Course of the Proceedings:** On July 9, 2018, a Trial Information was filed in Plymouth County District Court charging Buman with one count of Wanton Neglect of a Resident of a Healthcare Facility Causing Serious Injury in violation of Iowa Code Sections 726.7(1) and 726.7(2) a Class C Felony. (Appx. p. 5). On July 12, 2018, Buman filed a Written Arraignment and Plea of Not Guilty.

After several continuances, a jury trial was scheduled for April 23, 2019. On April 22, 2019, a pretrial hearing was held, addressing some motions not relevant to this appeal and procedures during trial (Transcript of Pretrial Hearing).

On April 23-25, 2019, a jury trial was held. The defendant's motion

for judgement of acquittal following the State's case was deferred by the Court to the end of all evidence (Trial Tr. Vol 2 p. 213 ) At the close of evidence, the Court denied the Defendant's motion for a directed verdict/judgment of acquittal (Trial Tr. Vol. 3, pp. 74-75). On April 25, 2019 the jury returned a verdict of guilty to the lesser included offense of Wanton Neglect of a Resident of a Healthcare Facility (Appx. p.16).

On May 30, 2019, a sentencing hearing was held. The court sentenced the defendant to 365 days in jail, suspended 320 days and placed the defendant on probation for a period of two years. The defendant was granted work release and ordered to pay restitution, and costs. (Sent. Tr. pp.11-12). On June 11, 2019, the defendant timely filed a Notice of Appeal (Appx. p. 24) and on June 19, 2019 posted an appeal bond in this case.

### **STATEMENT OF FACTS**

The defendant, Michael Buman, began his career in the medical field when he became an Emergency Medical Technician in 1977. His nursing career in 1980 and he became a registered nurse since 2004.(Trial Tr. Vol. 3 p. 29). In November of 2015, Buman began working at the Pride Group facility in Le Mars, Iowa (Trial Tr. Vol. 3 p. 29). During his time at Pride Group there was no formal orientation other than computer modules that

were completed as the nurse was working at the Pride Group (Trial Tr. Vol. 3 p. 31). There was a manual that could be referred to from time to time as necessary.

Mr. Buman exclusively worked the night shift at Pride Group, from 6:00 pm to 6:00 am (Trial Tr. Vol 3. p 34). His duties were either to be the medicine passer - distributing medications to residents or to handle direct care with the residents (Trial Tr. Vol 3. p. 34). For the relevant portion of October 2015, Buman worked on October 9-11, 14, 19, 22-23, 26-28 (Appx. p. 9).

In October 2015, Joe Lenz was a resident of the Pride Group and had been living there for 20 years or more (Trial Tr. Vol 1, p.40). Joe was diagnosed with chronic paranoid schizophrenia with catatonic features, obsessive compulsive disorder and mild intellectual disability (Trial Tr. Vol 2 p. 59). Joe was prescribed a number of medications for his diagnoses (Trial Tr. Vol. 2, p. 64-66).

At Pride Group, the doctor's orders for medications were issued by an off site psychiatrist or medical doctor. In the case of Mr. Lenz, a Psychiatric Physicians Assistant, Albert Okine, and the prescriptions were filled by L & M Pharmacy. (Trial Tr. Vol. I p.162 ) The pharmacy delivered a two

week supply of medications at a time. The medications were on trays for each resident with individual drawers for each medication that patient was taking. (Trial Tr. Vol 3 p.4).

Nurse Jane Ream testified that Joe Lenz had been taking a number of medications including Clozapine. The Clozapine was available for her to give to him on October 12 and 13, 2015, but on October 15, 2015 it was not there (Trial Tr. Vol 3. p 6). Nurse Ream testified that she first became aware that the medication was not there when the supply of medications arrived on October 13, 2019 (Trial Tr. Vol 3. p. 7). As per protocol at Pride Group, Nurse Ream reported that the medication was missing to the day shift nurse so that she could contact the pharmacy (Trial Tr. Vol 3 p 9). She then marked "NA" on Joe Lenz' medication administration record (MAR) on October 15 and 16, 2015, as it was still not there (Trial Tr. vol. 3 p. 9-10) (Appx. p.10). On October 17, 2015, the initials AW for Alex Westergard, a med passer appear on Joe Lenz' MAR (Trial Tr. Vol 3 p 40) (Appx. p. 10) however, Mr. Westergard did not testify and there was not testimony regarding whether the clozapine was actually present.

On October 18, 2015, Mr. Buman was working. He testified that he initialed Joe Lenz' MAR indicating that he administered the Clozapine, but

he was in automatic mode with his initials, and the Clozapine was not really present (Trial Tr. Vol 3, pp 40-41). Buman testified that Joe Lenz asked him why he hadn't been receiving it and Buman searched to see if the medication had been misplaced, but did not find it (Trial Tr. Vol. 3, p.43).

Buman testified that he checked the records available and talked to Joe Lenz. He believed that the medication must have been discontinued, but no one marked the chart, so he made the notation DC'd on Mr. Lenz' MAR (Trial Tr. Vol. 3, p. 42). Chelsea Clay, administrator of the Pride Group Facility testified that DC would tell the other medicine passers not to administer the drug, but it wouldn't impact the pharmacy delivering the drug because they wouldn't see the MAR after they had printed it and delivered it to the facility (Trial Tr. Vol 1 p. 88, Vol. 2 p.. 28). There was no evidence presented as to whether or not the pharmacy had delivered clozapine for Joe Lenz after the DC was placed on the MAR.

On October 27, 2016, Joe Lenz had a psychotic episode. He believed the building was on fire and ran out into the night. Law enforcement arrived to assist, and Joe Lenz was taken to the hospital (Trial Tr. Vol 1, pp 72-78). Albert Okine, Joe Lenz' psychiatric physicians assistant, testified over objection by the defense, that he believed that Joe not receiving his

Clozapine led to the psychotic break on October 27,2016 (Trial Tr. Vol 2 p 146).

During trial, Exhibit 15 was admitted over objection by the defense. Exhibit 15 is a portion of the Iowa Administrative Code for the practice of nursing by registered nurses. It includes a number of duties from supervising others to delegating tasks to determining nursing care and executing the regime set out by the physician. (Appx. p. 13). The court also gave an instruction that included a portion of Exhibit 15 along with limiting language on how that instruction could be used. (Appx. p.15).

After deliberation, the jury found the defendant guilty of the lesser included offense of Wanton Neglect of a Resident of a Healthcare Facility, thus finding that any actions by Buman did not cause serious injury to Joe Lenz (Appx. p. 16).

Further relevant facts will be discussed as part of the argument. The jury verdict did not find that serious injury resulted, therefore, the issue of resulting serious injury will not be addressed in this brief.

## ARGUMENT

**Issue 1. The Court abused its discretion in admitting Exhibit 15, a portion of Iowa Administrative Code Section 655-6.2(5) dealing with the practice of nursing because it was irrelevant and confusing and the prejudice of the exhibit outweighed any probative value**

**Standard of Review:** The Court reviews evidentiary rulings for abuse of discretion, *State v Osborn*, 929 N.W.2d 275 (Iowa App. 2019) *citing State v Huston*, 825 N.W.2d 531, 536 (Iowa 2013) “We reverse a ruling that the district court makes in the balancing process under rule [5.403] only if the district court has abused its discretion” *Id* (*citing McClure v Walgreen Co.* 613 N.W.2d 225, 235 (Iowa 2000)).

**Preservation of Error:** Defense counsel objected to the admission of Exhibit 15 as being “irrelevant and immaterial and improper encroachment on the duty of the Court to instruct the law in this matter and no proper foundation was laid for it” The district court overruled the objection without comment (Trial Tr. Vol.2 p. 187 lines 13-21). The objection was based on Iowa R. Evid 5.403 regarding relevant evidence.

**Discussion:**

The defendant in this case was charged with Wanton Neglect of a Resident of a Healthcare Facility. The elements of the offense are: 1) that

the defendant knowingly acted in a manner likely to be injurious to the physical or mental welfare of the resident, 2) resulting in serious injury. Iowa Code Sections 726.7(1) and 726.7(2). The jury verdict did not find that serious injury resulted, therefore, the issue of resulting serious injury will not be addressed.

Exhibit 15 is Iowa Administrative Code ( IAC) 655-6.2(5). The first sentence of the exhibit states “The registered nurse shall recognize and understand the legal implications of accountability. Accountability includes but need not be limited to the following;...” (Appx. p. 12). Clearly, this sentence seems to say that whatever follows makes the person who may not have adhered perfectly to the standard legally accountable. The exhibit includes such things as performing or supervising activities, assigning and supervising persons, using professional judgment, delegating tasks etc. None of these were at issue in this trial, but were included in Exhibit 15.

6.2(5)(e) explains executing the regimen prescribed by a physician and sets out that if the regimen isn't or can't be followed, a nurse must timely notify the physician who prescribed the medical regimen and document the medical record that the physician was notified and the reasons that the regimen wasn't carried out. This was, to a large extent, the basis of

the entire case presented by the state and was used not to show that the defendant knowingly acted in a manner likely to be injurious to a resident, but rather to say that he didn't follow this standard as written, therefore he is guilty. In effect this exhibit changed the law of the case and made it a strict liability offense, which it is not.

Mr. Buman made a clerical notation. He did not discontinue a medication. He did not notify the pharmacy and ask them to stop sending it, he did not change a doctor's order to eliminate the medication. While most of the medications for Mr. Lenz were there, the Clozapine was not. Buman couldn't find it. He noticed that it had not been there for a number of days, assumed it had been discontinued and wrote "DC'd" on the (MAR). (Trial Tr. Vol 3 pp. 41-42). Nurse Ream testified the Clozapine wasn't there when she changed over the new medication from the pharmacy several days before the notation was made on the MAR by Buman. She followed the protocols of the facility and notified the day nurse so the day nurse would follow up. (Trial Tr.3 Vol 3 pp.8-9). It is unknown if the day nurse followed up after she received this information. Nurse Reams's actions were the protocols of the facility

When questioned by the prosecutor whether Buman told the director

of nursing that the medication wasn't available or had been discontinued, Buman stated that he did tell her that, and when questioned about whether he told the administrator that the medication wasn't present so he entered discontinued, he testified that he did tell her that (Trial Tr. Vol 3, p. 62 lines 13-25).

Both Buman and Nurse Ream believed they had followed the protocols of the Pride Group Residential Facility. These protocols are different from Exhibit 15 but neither the Pride Group protocols nor the IAC standard in Exhibit 14 meets the standard of knowingly acting in a manner likely to be injurious because they have no mens rea requirement. By admitting Exhibit 15, the jury was presented with a document that stated there is legal accountability for not following the IAC standards which could easily lead them to believe if you don't follow the standards you are guilty of this offense. Other than the specific portion of Exhibit 15 that was contained in Instruction 17, there was no instruction to the jury on how to use the Administrative Code Sections contained in Exhibit 15.

The Iowa Administrative Code does not trump the elements of an offense in a criminal case. Because it was possible to violate the standards on Exhibit 15 without knowingly acting in a manner likely to be injurious to

a resident of a residential facility, the exhibit is misleading, irrelevant and gave the jury a different standard to follow than the elements of the offense as set out in the jury instructions.

The State used the standards of Exhibit 15 throughout the trial and throughout his closing statement. While the standards may be relevant to a license revocation hearing, they are not the same as the elements of the offense. Using them so extensively was misleading and it was an abuse of discretion for the court to admit them. Therefore, Buman's conviction should be reversed based on the admission of Exhibit 15.

**Issue 2. The Court erred in giving Instruction 17 which contained a part of Exhibit 15 and a limiting instruction which was insufficient to remove the prejudice that resulted to the defendant from the admission and use of Exhibit 15 during Trial.**

**Standard of Review:** “[W]e review challenged to jury instructions for correction of errors of law.” *Alcala v Marriott Int’l, Inc.* 880 N.W. 2d 699, 707 (Iowa 2016) (quoting *Anderson v State*, 692 N.W.2d 360, 363 (Iowa 2005)). Erroneous jury instructions warrant “reversal when prejudice results.” *State v Coleman*, 907 N.W.2d 124, 138 (Iowa 2018), Prejudice results when jury instructions mislead the jury or materially misstate the law. *Id.* We also “review refusals to give a requested jury instruction for correction of errors at law.” *Alcala*, 880 N.W.2d at 707. In doing so, we

consider the jury instructions as a whole rather than in isolation to determine whether they correctly state the law, *State v Harrison*, 914 N.W.2d 178, 188 (Iowa 2018) ; *State v Benson*, 919 N.W.2d 237, 241-242 (Iowa 2018).

“Errors in jury instructions are presumed prejudicial unless ‘the record affirmatively establishes that there was no prejudice.’” *State v Robinson*, 927 N.W.2d 672 (Iowa App 2019) *citing State v Murray*, 796 N.W.2d 907, 908 (Iowa 2011)(*quoting State v Hanes*, 790 N.W.2d 545, 551 (Iowa 2010)

**Preservation of Error:** During the discussion regarding jury instructions, the Court specifically addressed the limiting instruction and noted that the instruction was resisted and objected to by the defense. (Trial Tr, Vol 3 p. 71-72)

**Discussion:**

The court recognized the potential misuse of a portion of the Iowa Administrative Code Section contained in Exhibit 15. During the jury instruction conference, there was a discussion of Instruction 17 which included part of the Administrative Code standard relating to a nurse’s responsibility in carrying out a physicians treatment regimen. The Court

stated, “...Otherwise, the Court believes it is important to the jury to avoid confusion and potential prejudice to Mr. Buman to add that further explanation so that the jury understands that the state is required to prove more than simply that Mr. Buman did something in violation of this standard in order for it to raise to the level of the criminal act that is charged” (Trial Tr. Vol. 3 p 72 lines 13-20)

While the intent of the Court was in the right place, the instruction doesn't really clear up the confusion. It states:

In accordance with the standards in Iowa Administrative Code, a registered nurse is required to follow a medical regimen prescribed by a physician, If a medical regimen prescribed by a physician is not carried out by a registered nurse, the registered nurse is required to timely notify the physician who prescribed the medical regimen and also document on the medical record that the physician was notified and the reason for not executing the physician's order. A violation of this standard, in and of itself, is not a criminal act. You may consider this standard only in determining whether the State has proven beyond a reasonable doubt the elements of the charge set forth in Instruction 15 <sup>1</sup> (Appx. p.15)

So, Exhibit 15 tells them that there is legal accountability for not following a whole host of standards. Instruction 17 highlights one of the standards in evidence and while it says a violation of this standard in and of itself is not a criminal act, the jury can use it to determine if the State has

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<sup>1</sup>Instruction 15 sets out the elements of the offense.

proven the elements. What Jury Instruction 17 does not do is specify which of the elements this goes to, it does not explain that although Exhibit 15 says there is legal accountability for not following the standards , that is not criminal accountability in this case without having all the elements of the offense proven and it doesn't explain whether the nurse must follow only the standard or if following the protocol of the Pride Group Facility (the night nurse notifying the day nurse)(Trial Tr. Vol 3 p. 9) is sufficient to meet the standard.

The combination of Exhibit 15 and Instruction 17 is confusing and creates more questions than it answers. Instruction 17 is part a statement of standards and partially a cautionary instruction. While the courts have said, "Only in extreme cases will a cautionary instruction be deemed insufficient to remove the danger of prejudice", *State v Conner*, 314 N.W.2d 427,429 (Iowa 1982) *citing State v Belieu*, 288 N.W. 2d 895, 901 (Iowa 1980), this does appear to be that kind of case.

Much of the testimony in this trial focused on the serious injury the state alleged occurred after Mr. Lenz did not receive his medication. The alleged injury included a psychotic break (Trial Tr. Vol I p. 90) and the expert testimony was that this was indeed an injury believed to be caused by

Mr. Lenz not receiving his medication (Trial Tr. Vol II p. 100). The jury did not find that a serious injury resulted from Mr. Buman's actions (Appx. p. 16). For the jury to find that there was no serious injury in this case, but to find that Mr. Buman knowing acted in a manner likely to be injurious only makes sense if the jury thought a violation of the standard was enough to convict the defendant of wanton neglect. The court abused its discretion in admitting Exhibit 15 and erred in giving Jury Instruction 17. Therefore, Mr. Buman's conviction for Wanton Neglect of a Resident of a Healthcare Facility should be reversed.

**Issue 3. There was insufficient evidence to convict the defendant of Wanton Neglect of a Resident of a Healthcare Facility**

**Standard of Review:** Challenges to sufficiency of the evidence supporting a guilty verdict is for errors at law. Iowa R. App. P. 6.4, *State v Randle*, 555 N.W. 2d 666, 671 (Iowa 1995) "A jury verdict is binding upon this court, and we must uphold the verdict unless the record lacks substantial evidence to support the charge. Substantial evidence is evidence which 'Would convince a rational trier of fact that the [defendant is] guilty of the crime charged beyond a reasonable doubt.'" *State v Liggins*, 524 N.W. 2d 181 (Iowa 1994) citing *State v Thornton*, 498 N.W. 2d 670,673 (Iowa 1993).

“When reviewing the sufficiency of the evidence for a guilty verdict, we view the evidence in the light most favorable to the State, including all legitimate inferences and presumptions which may be fairly and reasonably deduced from the evidence in the record. We must consider all of the evidence and not just the evidence supporting the verdict.” *Id*

**Preservation of Error:** The issue of sufficiency of the evidence was raised in a motion for judgment of acquittal which the Court deferred hearing and ruling on until the close of all the evidence (Trial Tr. Vol. 2, p. 213) At the close of all evidence the motions were argued based on sufficiency of the evidence. (Trial Tr. Vol 3. p 74) The Court denied the motions. (Trial Tr. Vol 3. p.74).

**Discussion:**

In this case, it was not contested that Joe Lenz was a resident of the Pride Group Residential healthcare facility. Thus, the only real issue was if the defendant knowingly acted in a manner likely to be injurious to Mr. Lenz.

The State’s entire case centered around the defendant, a registered nurse working the night shift at the Pride Group, not being able to find one of Mr. Lenz’ medications. According to the MAR (Appx. p. 10) Mr Lenz’

medication Clozapine had not been available on October 15 and 16, 2016. While there are initials on October 17 indicating the medication was given, no one testified as to whether they were actually given or if the medicine passer that night had simply gone down the list and initialed everything. On October 18, 2016, Mr. Buman testified that he initialed the MAR, but in fact, the medication was not available (Trial Tr. Vol 3. p.). After doing some investigation, he concluded that the medication must have been discontinued and not noted on the MAR, so he wrote “DC’d” on Mr. Lenz’ MAR on the Clozapine line. (Trial Tr. Vol 3. p.42).

The state argued that this meant he discontinued the medication without authorization, something only the treating physician can do. However, the evidence was that the MAR is printed by the pharmacy and sent with the refills of the medications. The refills are separated into resident and each medication that the resident takes by the pharmacy and delivered to the facility. The pharmacy wouldn’t see the MAR after it initially printed and delivered it. Thus, there was no evidence that anyone told the pharmacy not to deliver the Clozapine to the Pride Group Facility for Mr. Lenz. The “DC’d” would be a indication to other nurses that the medication had been discontinued, but the medication had not been

delivered by the pharmacy so it wasn't there before he placed those initials on the chart.

Nurse Ream testified that she had notified the day nurse that the medication was missing as per the protocol of Pride Group. (Trial Tr. Vol. III, p. 8-9) This would have happened several days before Mr. Buman made the notation on the chart. (Trial Tr. Vol III p.14 )

The jury had to find that Mr. Buman acted knowing that his entering of "DC'd" would likely be injurious to Mr. Lenz. There was no evidence presented that Mr. Buman knew this. The evidence showed that the medication wasn't delivered. It wasn't there when Nurse Ream worked several days earlier. (Trial Tr. Vol III p.8-9). There is no evidence that the pharmacy ever delivered the Clozapine or that the nursing staff talked to the pharmacy after Nurse Ream told the day nurse it was missing (Trial Tr. Vol III p. 8-9 ) and Mr. Buman told the Director of Nursing it was missing (Trial Tr. Vol III p 62 line 16-17). There was testimony that the pharmacy would never have seen the notation DC'd on the MAR because they didn't look at it after it was filled out. (Trial Tr. Vol II p. 28) Therefore, there was no evidence that Mr. Buman actually discontinued Mr. Lenz' medication.

The jury found that Mr. Buman's actions did not cause serious injury

to Mr. Lenz, by acquitting Mr. Buman of the greater offense of Wanton Neglect of a Resident of a Residential healthcare Facility and finding him guilty only of Wanton Neglect of a Resident of a healthcare facility.

The state had to prove beyond a reasonable doubt that Mr. Buman knowingly acting in a manner likely to be injurious to Mr. Lenz. The only thing the State proved was that Mr. Buman put the initials DC'd on the MAR days after Mr. Lenz' Clozapine was not delivered by the pharmacy. He believed that the medication had been discontinued so he believed he was simply completing a clerical process that hadn't been finished. He didn't think he was doing anything that would harm Mr. Lenz. There was no evidence to the contrary presented during the trial. Thus, the state did not meet it's burden, there was insufficient evidence to convict Mr. Buman and his conviction should be reversed.

### **CONCLUSION**

For the reasons set forth above, the Defendant, Michael Buman respectfully requests that the Court reverse his conviction for Wanton Neglect of a Resident of a Healthcare Facility.

## ORAL ARGUMENT NOT REQUESTED

Appellant does not request oral argument.

## COST CERTIFICATE

I hereby certify that the cost of printing Appellant's Final Brief was the sum of \$5.20.

/s/ Priscilla E. Forsyth  
Priscilla E. Forsyth  
Attorney for Appellant

## CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1) or (2) because:  
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