IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 19-0672

LORALEE FISHER, Appellant, vs. PRINCIPAL LIFE INSURANCE COMPANY, Appellee.	On appeal from the Iowa District Court for Johnson County (Johnson County Case No. LACV080105) The Honorable Andrew B. Chappell, Presiding Judge

APPELLANT LORALEE FISHER'S FINAL BRIEF

L. Craig Nierman AT0005754
Thomas E. Williams AT0012176
Phelan Tucker Law LLP
321 E. Market St.
Iowa City, Iowa 52240
Phone: (319) 354-1104
FAX: (319) 354-6962
E-mail: nierman@phelantuckerlaw.com
williams@phelantuckerlaw.com

ATTORNEYS FOR LORALEE FISHER

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ROUTING STATEMENT

This appeal should be transferred to the Iowa Court of Appeals because it presents issues regarding the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a) (2019).

STATEMENT OF THE CASE

NATURE OF THE CASE: This case concerns the wrongful denial by Principal Life Insurance Company ("Principal") of a claim for benefits under a life insurance policy purchased by LoraLee Fisher ("LoraLee") on the life of her late husband, Gregory Lee Fisher ("Greg").

COURSE OF PROCEEDINGS: The case is before this Court for review of the District Court's Order, dated February 5, 2019, granting summary judgment for Principal as well as the District Court's Order, dated April 4, 2019, enlarging the District Court's summary judgment order. (App. 158-68; 179-83). These orders are a final decree and subject to appellate review under Iowa R. App. P. 6.103(1).

STATEMENT OF THE FACTS

Introduction

This case concerns Principal's wrongful denial of life insurance benefits after it retained premium for ten months on a policy that it claims was never effective. In denying LoraLee these benefits, Principal relied on a policy condition that did not apply to the policy LoraLee purchased and, even if it did apply, was a condition that Principal clearly waived.

In October 2017, LoraLee purchased a dependent life insurance policy written on the life of her husband, Greg, during the Open Enrollment Period

offered under a group life insurance policy sponsored by LoraLee's employer, the University of Iowa (the "Policy"[1]). (Affidavit of LoraLee Fisher (Fisher Aff.) ¶ 3; App. 192). LoraLee's Policy went into effect on January 1, 2018 and, tragically, Greg died the following day. (Affidavit of Plaintiff's Counsel ("Counsel Aff."), Ex. 3; App. 211). Principal's claim that LoraLee's Policy is void *ab initio* is undermined by the clear language of the Policy as well as the fact that Principal retained LoraLee's premium for ten months after it asserted the policy was never effective.

Principal's denial, and the District Court's Order granting Principal's motion for summary judgement ("MSJ Order"), is based solely on a clearly erroneous reading of the Policy's provision that applies to dependent life insurance generally (contained within Part III, Section B, Article 2) and ignores a separate Article that addresses policies purchased during the Open Enrollment Period (Part III, Section B, Article 3); the latter clearly states that (a) the effective date for a policy purchased during an Open Enrollment Period is not subject to any health related conditions, and (b) a dependent

[1] LoraLee uses the term "Policy" to refer to the text of the "Group Policy for University of Iowa." *See* Policy (App. 37-100). The terms of the Policy govern the dependent life insurance policy purchased by LoraLee on the life of her husband, Greg, which is referred to herein as "the Policy" or "LoraLee's Policy."

need not be in good health for a policy purchased during an Open Enrollment period to issue.

Even if Principal could prevail on its technical interpretation of the Policy, Principal contends that—despite 150 years of Iowa precedent to the contrary—it is entitled to both deny that a policy is in force while retaining what it asserts is unearned premium with knowledge of an alleged policy defense. Principal denigrates LoraLee's efforts to exercise her rights under Iowa law by claiming she is seeking "a windfall." (Defendant's Brief in Support of Motion for Summary Judgment, filed Oct. 4, 2018 (Def. Br.), at 1). However, the reality is that Principal wants to have its cake (deny LoraLee's claim) and eat it too (keep LoraLee's premium). The law does not allow Principal to have it both ways. Iowa law does not allow Principal to have it both ways; by eating the premium, Principal waived its ability to deny LoraLee's claim on the basis that LoraLee's policy was not in force. Because Principal knew or should have known that its denial was unreasonable (i) pursuant to the policy language it drafted and (ii) based on the fact it was retaining her premium while denying the existence of the policy, it acted in bad faith.

Factual Background

Throughout this case, LoraLee was employed as a custodian at the University of Iowa ("UI"). (Fisher Aff. ¶ ¶ 2, 3; App. 192). During the Open Enrollment Period, on October 19, 2017, LoraLee elected to purchase a dependent life insurance policy on the life of her husband, Greg, from Principal as part of her employer-sponsored benefits package. (Fisher Aff. ¶ 3; App. 192). The effective date was January 1, 2018. (Fisher Aff. ¶ 4; App. 192). There was no information suggesting that there could be any circumstances under which the policy would not be effective on January 1, 2018. (Fisher Aff. ¶ 5; App. 192). Accordingly, it was LoraLee's reasonable expectation, based upon the information provided to her during the Open Enrollment Period, that there were no conditions that would prevent the policy from being effective on January 1, 2018. (Fisher Aff. ¶ 6; App. 192). Principal's act of deducting her premium for the policy from her December 2017 paycheck underscored the activation of the policy at the start of the year. (*See* Fisher Aff. ¶ 7; App. 193); LoraLee Fisher Payroll Record, Pay End Date 12/31/2017, Counsel Aff., Ex. 3; App. 206).

Even Principal's records confirm the January 1, 2018 effective date. (*See* Policy, Part III, Section B, Article 3; App. 73; Counsel Aff., Ex. 3 (Principal's Notes on Policy: "EDOC is 1/1/18"); App. 211). Sadly, Greg

died the following day after a hospitalization that started in late December, i.e., more than two months after LoraLee elected coverage during Open Enrollment. (Fisher Aff. ¶ 8. App. 193).

LoraLee timely and appropriately completed her claim paperwork, but Principal denied the claim on February 9, 2018. (Principal Denial Letter; App. 186-88). This forced her to retain counsel, who appealed the denial in counsel's June 4, 2018 letter detailing several of the reasons that the claim was wrongfully denied ("Initial Appeal Letter"), including the fact that LoraLee's premium had not been returned. (Counsel Aff., ¶ 3; Ex. 3; App. 203-11). The Initial Appeal Letter also included additional payroll records demonstrating her premium had not been returned. (*Id*., Ex. 3; App. 206-10). LoraLee's attorney sent a second letter on June 25, 2018 reiterating many of the same facts. (*Id*., ¶ 4; Ex. 4; App. 212-14). Despite having all relevant facts before it, Principal persisted in its denial. (Answer, ¶ 22). LoraLee filed the Petition on July 27, 2018, Principal answered on September 17, 2018, and Defendant's Motion for Summary Judgment (Defendant's Motion) followed on October 4, 2018.

Principal spent much of the summer changing its mind on whether to refund LoraLee's premium. On June 15, 2018—only eleven days after the Initial Appeal Letter (Counsel Affidavit, Ex. 3; App. 203-11)—Principal's

senior claim analyst, Teresa Washington, requested information from LoraLee's employer (UI) on whether LoraLee's January premium had been refunded to her. (Aff. of Rebecca Olson, p. 7; App. 221). UI responded that the premium was taken out in January and not refunded. *Id*. The next business day on June 18, 2018, Principal's Ms. Washington then directed UI to "refund her premiums since a life claim wasn't paid." (*Id*., p. 6; App. 220). Accordingly, LoraLee's initial premium was withheld until July. (*Id.* at 3; App. 217).

However, after receiving LoraLee's attorney's second letter (Counsel Affidavit, Ex. 4; App. 212-14), *Principal realized that it waived any right to deny the claim* and endeavored to essentially undo the denial. On July 19, 2018, Principal's Ms. Washington stated that "*the decision has been made to pay this claim* so please have the premiums paid for the Dep souse VTL back to Principal." [sic] (*Id*., p. 5; App. 219) (emphasis added). In other words, when Principal was caught denying a claim on a policy for which it was holding premium, it announced it was going to pay the claim and *withdrew another $12.71 from LoraLee*. *Id*. Nevertheless, contrary to its proclamation to UI, Principal changed its mind again and maintained its denial. (Answer, ¶ 22).

For all of August and September—*even while Principal was filing its Answer asserting that there was no waiver*—it retained LoraLee's premium again. Principal belatedly realized that holding the alleged unearned premium despite claiming an asserting a policy defense posed great risk so it ineffectively tried to gloss over its waiver. It emailed UI on September 7, 2018 (i.e., after the Petition was served (*see* Return of Service; App. 5)), stating that Principal's prior request for UI to re-charge LoraLee the premium "was in error, as was the [July 19, 2018] email stating that *the decision was made to pay the claim*." (emphasis added) (Aff. of Rebecca Olson, p. 14-15; App. 228-29). It continued, "Principal has never made a decision to pay the claim . . . Because Mr. Fisher was not eligible for coverage, we are requesting that you refund the premium as soon as possible." (*Id*., p. 15; App. 229). The premium was not refunded until October 1, 2018. (*Id*., p. 10; App. 224). In other words, except for July, *Principal kept what it labels as unearned premium from January to October of 2018*.

APPEAL ARGUMENT

I. THE DISTRICT COURT ERRED WHEN IT RULED, CONTRARY TO THE POLICY, THAT THE PERIOD OF LIMITED ACTIVITY CONDITION APPLIED TO POLICIES PURCHASED DURING AN OPEN ENROLLMENT PERIOD.

Preservation of Error. LoraLee has preserved error for review by resisting Defendant's Motion for Summary Judgment (filed October 22, 2018) (Resistance), briefing this issue to the District Court within Plaintiff's Brief in Resistance to Defendant's Motion for Summary Judgment (filed Oct. 31, 2018) (Plaintiff's Brief) at pages 7-17, and filing her Motion to Reconsider, Enlarge, or Amend Pursuant to Iowa R. Civ. P. 1.904(2) (filed Feb. 19, 2019) (Motion to Reconsider) at pages 1-4. This issue was also covered by LoraLee's counsel during the Hearing on Defendant's Motion for Summary Judgment. (Tr. at 14-16; App. 243-45).

Standard of Review. The standard of review on a ruling granting summary judgment is for correction of errors at law. *Green v. Racing Ass'n*, 713 N.W.2d 234, 238 (Iowa 2006). In addition, review of the interpretation of the language of an insurance policy is for correction of errors at law. *Otterberg v. Farm Bureau Mut. Ins. Co*., 696 N.W.2d 24, 27 (Iowa 2005). In ruling on a summary judgment motion, the facts must be viewed in a light most favorable to the party resisting the motion. *Green*, 713 N.W.2d at 238. The Court must consider on behalf of the nonmoving party every legitimate

inference that can be reasonably deduced from the record. *McIlravy v. N. River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002) (citations and quotation marks omitted).

A. The District Court Ignored the Plain Language of the Policy When It Concluded that the Period of Limited Activity Condition Applied to a Dependent Life Insurance Policy Purchased During the Open Enrollment Period.

1. Iowa Law Guiding the Interpretation of Insurance Contracts.

The Iowa Supreme Court has given clear guidance on the interpretation of a contract for insurance. Iowa courts focus on the particular liabilities for which coverage was sought to evaluate coverage expectations. *See, e.g. Ide v. Farm Bureau Mut. Ins. Co*., 545 N.W.2d 853 (Iowa 1996). "The question is not, 'What did the insurer intend or mean by the clause in question?' but 'What did the assured, as a reasonable person, understand the policy to mean?'" *Umbarger v. State Farm Mut. Auto. Ins. Co.*, 218 Iowa 203, 254 N.W. 87, 88 (1934) (internal quotation marks added). The policy "should be interpreted from the viewpoint of an ordinary person, not a specialist or expert." *Benzer v. Iowa Mut. Tornado Ins. Assn.*, 216 N.W.2d 385, 388 (Iowa 1971); *Qualls v. Farm Bureau Mut. Ins. Co.*, 184 N.W.2d 710, 712 (Iowa 1971). A court must determine the intent of the parties at the time the policy was sold, the surrounding circumstances, the situation of the parties, and what the parties attempted to achieve. *Ferguson v. Allied Mut.*

Ins. Co., 512 N.W.2d 296, 299 (Iowa 1994); *LeMars Mut. Ins. Co. v. Farm & City Ins. Co.*, 494 N.W.2d 216, 218 (Iowa 1992).

2. The District Court Completely Ignored the Plain Language of the Policy.

The District Court erroneously ruled that the Period of Limited Activity condition, found in Part III, Section B, Article 2 of the Policy, applies to Dependent Life Insurance Policies purchased during the Open Enrollment Period, which is governed by Part III, Section B, Article 3 of the Policy. In the District Court's construction of the Policy, the Period of Limited Activity condition is incorporated into *every* Dependent Life Insurance policy, regardless of whether purchased during an Open Enrollment Period or purchased outside an Open Enrollment Period (such as for a new employee who starts in March of a given policy year). This is true, in the District Court's reading, even though there is no reference within Article 3 to the Period of Limited Activity condition. (MSJ Order at 5-6; App. 162-63).

In other words, the District Court's opinion reasons that the "ordinary person" should *know* to read a limiting provision into an Article of an insurance policy even though there is no indication within that Article that such a limiting provision applies. This is, in the District Court's reasoning, the proper application of the Iowa Supreme Court's mandate that "limits in

coverage are construed strictly against the insurer" and that insurers "define any limitations or exclusionary clauses in clear and explicit terms." *Otterberg*, 696 N.W.2d at 27 (*quoting Westfield Ins. Cos. v. Econ. Fire & Cas. Co.*, 623 N.W.2d 871, 875–76 (Iowa 2001) (internal quotations omitted)); *Benzer*, 216 N.W.2d at 388. However, Part III, Section B, Article 3 of the Policy is clearly titled "Open Enrollment Period" and unequivocally communicates to the (prospective) policyholder the "Eligibility" (subpart a.) and "Effective Dates" (subpart c.) for policies like LoraLee's purchased during an Open Enrollment Period. It states—without qualification—that "[t]he effective date for any such individual requesting insurance during the Open Enrollment Period will be the Policy Anniversary that next follows the date of completion of the Open Enrollment Period." (Policy at Part III, Section B, Article 3(c); App. 73). It makes no mention, no reference, no indication of a Period of Limited Activity condition, or that such a condition could apply to alter the coverage purchased during an Open Enrollment Period.

The lack of reference within Article 3 to the Period of Limited Activity condition is sufficient for the Court to determine that the Period of Limited Activity condition does not apply to policies purchased during an Open Enrollment Period. Even more compelling, Principal *actually makes*

cross-references back to the Period of Limited Activity condition in two other Articles within the Policy. (*See id.*, Part III, Section E, Article 1 (in the event of policy reinstatement, the "Period of Limited Activity provision discussed in PART III, Section B, will apply."); App. 79; *see also id.* at Policy, Part III, Section E, Article 2 (noting that reinstatement of a policy in accordance with the provisions of the Federal Family and Medical Leave Act is "subject to the . . . Period of Limited Activity provision discussed in PART III, Section B."); App. 79)). Because Principal did not create a cross-reference with regard to the "Open Enrollment Period" Article, Principal shows that its original intent was that the Period of Limited Activity condition would not apply to policies purchased during the Open Enrollment Period.

The District Court attempted to rationalize why such cross-references were necessary in the two aforementioned circumstances but not with respect to the Open Enrollment Period Article. (MSJ Order at 5-6; App. 162-63). However, the explanation provided by the District Court to excuse Principal's failure to provide any meaningful reference to the Period of Limited Activity condition rises to interpretive heights far exceeding the capacity of the "ordinary person." Indeed, most attorneys would need to read and reread that portion of the District Court's opinion to fully

understand it. It is hardly the favorable interpretation the Iowa Supreme Court affords to policyholders, as detailed in Section I(A)(1).

3. The District Court Failed to Apply the Rules of Contract Interpretation.

The District Court failed to properly apply standard contract interpretation principles to its interpretation of the Policy. Nowhere does the Policy state that headings are not to be used in interpreting its meaning. As a consequence, the headings are instructive when interpreting the Policy. Where a contract does not expressly prohibit the use of headings and titles in interpreting the contract, Iowa courts use headings and titles to discern a contract's meaning. *See Hawkeye Land Co. v. City of Iowa City*, 918 N.W.2d 503, 2018 WL 1858401, at *9 (Iowa Ct. App. 2018) (table decision) (relying on contract heading to interpret contract); *Biermann Elec. v. Larson & Larson Const., LLC*, 843 N.W.2d 478, 2014 WL 69672, at *5 (Iowa Ct. App. 2014) (table decision) (refusing to interpret a contract without reference to contract headings); *accord Mazzaferro v. RLI Ins. Co.*, 50 F.3d 137, 140 (2d Cir. 1995) ("A contract of insurance must be read as a whole, including any introductory clause or heading, to determine the intent of the parties.") (internal citations and quotations omitted). Moreover, the Iowa Supreme Court is clear that "when a contract contains both general and specific provisions on a particular issue, the specific provisions are

controlling." *Iowa Fuel & Minerals, Inc. v. Iowa State Bd. of Regents*, 471 N.W.2d 859, 863 (Iowa 1991).

Principal's specific use of the heading "Open Enrollment Period" as the title for Article 3, combined with its use of the subheadings "Eligibility" and "Effective Dates" within Article 3, gives the ordinary person cause to expect that Article 3 contains the relevant provisions governing eligibility for, and the effective dates of, a policy purchased during an Open Enrollment Period. (Policy at Part III, Section B, Article 3; App. 72-73). The fact that Article 2 contains provisions addressing eligibility for, and the effective dates of, Dependent Life Insurance actually *further supports* LoraLee's interpretation. (*Id.* at Part III, Section B, Article 2; App. 71-72). Because Article 3 calls out those very topics under the *specific* circumstance of the Open Enrollment Period (*Id.* at Part III, Section B, Article 3; App. 72-73), rather than the *general* provisions in Article 2 (*Id.* at Part III, Section B, Article 2; App. 71-72), "the specific provisions [of Article 3] are controlling." *See Iowa Fuel & Minerals, Inc.*, 471 N.W.2d at 863. Consequently, an insured is justified in reading the more specific section heading "Open Enrollment Period" and its subheadings "Eligibility" and "Effective Dates" as encompassing all of the provisions relevant to the determination of eligibility and effective dates for a policy purchased during

the Open Enrollment Period. Nevertheless, the District Court regarded that an ordinary person would somehow read the Period of Limited Activity condition as more specific than the Open Enrollment Period Article because the Period of Limited Activity condition was an exception to coverage. (Order on Plaintiff's Motion to Reconsider, and Large or Amend Pursuant to Iowa R. Civ. P. 1.904(2) ("Order M. Reconsider") at 1-2; App. 179-80).

Collectively, the provisions of the "Open Enrollment Period" Article communicate that the policy effective date for a policy purchased during an Open Enrollment Period is not subject to any conditions. Thus, the Policy's clear structure and language give no cause for a "reasonable" or "ordinary" person, such as LoraLee, to think otherwise. *See Umbarger*, 254 N.W. at 88; *Benzer*, 216 N.W.2d at 388. Accordingly, the District Court erred, as a matter of law, in ruling that the Policy is properly constructed to read the Period of Limited Activity condition as applying to policies purchased during the Open Enrollment Period and granting Principal's Motion for Summary Judgment on LoraLee's breach of contract claim.

B. The District Court Failed to Appropriately Apply the Principles for Interpreting an Ambiguous Contract.

Because the District Court erroneously ruled that the Policy, on its face, made policies purchased during the Open Enrollment Period subject to a condition not found within that Article of the Policy, the District Court

failed to consider LoraLee's arguments concerning ambiguity. (MSJ Order at 6; App. 163).

1. Any Ambiguity within the Policy Must be Interpreted Against Principal.

If the Court determines that the Policy is ambiguous with respect to whether the Period of Limited Activity condition applies to policies purchased during an Open Enrollment Period, Iowa law still dictates that the Policy be read as proffered by LoraLee. As the Iowa Supreme Court has declared, "'[d]ue to the nature of an insurance policy, the benefit of the doubt in the drafting is interpreted against the insurance company. As such, limits in coverage are construed strictly against the insurer.'" *Otterberg*, 696 N.W.2d at 27 (*quoting Westfield*, 623 N.W.2d at 875–76).

As already discussed, because the Period of Limited Activity condition (Policy at Part III, Section B, Article 2; App. 71) appears within an Article *other than* the one addressing the "Open Enrollment Period," (*Id.* at Part III, Section B, Article 3; App. 72-73), the Policy *cannot* be read to unequivocally communicate to a reasonable or ordinary person that the Period of Limited Activity condition applies to policies purchased during an Open Enrollment Period. This is especially true where there is no reference back to the Period of Limited Activity condition within the more specific "Open Enrollment Period" Article, even though such cross-references to the

condition were included elsewhere in the Policy (see, e.g., *id*. at Part III, Section E, Article 1; App. 79; *see also id.*, Part III, Section E, Article 2; App. 79).

"Ambiguity exists if, after the application of pertinent rules of interpretation to the face of the instrument, a genuine uncertainty results as to which one of two or more meanings is the proper one." *Cairns v. Grinnell Mut. Reinsurance Co.*, 398 N.W.2d 821, 824 (Iowa 1987) (internal quotations omitted). Iowa courts "construe ambiguous insurance policy provisions in a light favorable to the insured because insurance policies constitute adhesion contracts." *Id.*; *see Umbarger*, 254 N.W. at 89 ("Just what meaning was intended by the company by the language used is by no means certain and definite. . . . The language employed was chosen by the company and must be construed most strongly against it and in favor of [the insured]."). "It is therefore incumbent upon an insurer to define clearly and explicitly any limitations or exclusions to coverage expressed by broad promises." *Id*. "An insurer, having affirmatively expressed coverage through broad promises, assumes a duty to define any limitations or exclusionary clauses in clear and explicit terms." *Benzer*, 216 N.W.2d at 388. Still, Iowa courts "avoid straining the words and phrases of the policy

to impose liability that was not intended and was not purchased." *Cairns*, 398 N.W.2d at 824 (internal quotations omitted).

Iowa courts also ignore policy exclusions that eviscerate terms explicitly agreed to or eliminate the dominant purpose of the transaction. *C & J Fertilizer, Inc. v. Allied Mut. Ins. Co.*, 227 N.W.2d 169, 176 (Iowa 1975); *Rodman v. State Farm Mut. Auto. Ins. Co.*, 208 N.W.2d 903 (Iowa 1973). "The objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Rodman*, 208 N.W.2d at 906 (internal citations omitted); *C & J Fertilizer, Inc.*, 227 N.W.2d at 176 (*quoting Rodman* with approval).

As explained previously, Iowa courts use headings and titles to discern a contract's meaning. *See Hawkeye Land Co*, 2018 WL 1858401, at *9; *Biermann*, 2014 WL 69672, at *5; *accord Mazzaferro*, 50 F.3d at 140 ("A contract of insurance must be read as a whole, including any introductory clause or heading, to determine the intent of the parties."). In some cases, the headings themselves can be the cause of an ambiguity. *See Car Wash Consultants, Inc. v. Belanger, Inc.*, 777 N.W.2d 128, 2009 WL 3775101, at *5 (Iowa Ct. App. 2009) (table decision).

For all of the reasons set forth previously, LoraLee's reading of the Policy is not strained. It is perfectly reasonable—and does not strain the words and phrases of the Policy—for an individual considering the purchase of dependent life insurance during an Open Enrollment Period to refer to the Article heading titled "Open Enrollment Period" (which includes subheadings titled "Eligibility" and "Effective Dates"), and conclude that the language in that Article applies to policies purchased during the Open Enrollment Period without incorporating conditions contained in other Articles. Under such a reading, neither LoraLee nor any other individual purchasing dependent life insurance under this Policy would come away with the conclusion that there was any limitation on the effective date of such a policy.

To the extent that Principal's attempt to bootstrap language from Article 2 into Article 3 ("Open Enrollment Period") creates an ambiguity, that ambiguity must be evaluated "in a light favorable to the insured." *Cairns*, 398 N.W.2d at 824. Thus, an Iowa court cannot impose upon the insured a requirement to read into Article 3's broad and unconditioned promise of coverage a cross-reference to the Period of Limited Activity condition within Article 2 when the insurer itself failed to include any such cross-reference or suggestion of applicability in Article 3—especially since

it did so in other Articles in the Policy. As the Iowa Supreme Court has stated: *"*[a]n insurer, having affirmatively expressed coverage *through broad promises*, assumes a *duty* to define any limitations or exclusionary clauses in *clear and explicit terms*." *Benzer*, 216 N.W.2d at 388 (emphasis added). Principal failed to meet that duty by not clearly and explicitly applying the Period of Limited Activity condition to the broad promises of coverage made within Article 3. Accordingly, it is Principal (and subsequently the District Court) that is straining the words and phrases of the Policy to read Period of Limited Activity conditions where they do not exist.

2. The Context of the Policy Dictates that the Period of Limited Activity Condition Does Not Apply to LoraLee's Policy.

The Iowa Supreme Court has recognized that "the meaning of a contract can almost never be plain except in a context." *Pillsbury Co. v. Wells Dairy, Inc.*, 752 N.W.2d 430, 436 (Iowa 2008), *reh'g denied* (Aug 28, 2017) (internal quotations omitted). "Words and other conduct are interpreted in the light of all the circumstances, and if the principal purpose of the parties is ascertainable it is given great weight." *Id.* For that reason, where an ambiguity exists, Iowa courts "allow extrinsic evidence to aid in the process of interpretation[.]" *Id.*

An objective view of the commercial realities influencing Principal's drafting of the Policy language (i.e., the context) demonstrates the error in

the District Court's reasoning. There is a world of difference to a life insurance company between a policy purchased during an Open Enrollment Period and one that is not. An individual for whom a policy was purchased during an Open Enrollment Period does not present the same level of anti-selection risk as a dependent added outside of the Open Enrollment Period. Those purchasing during the Open Enrollment Period must wait for time to pass between the Open Enrollment Period and the effective date of the policy (during which time illnesses may resolve or arise), whereas an individual purchasing a policy outside of an Open Enrollment Period begins coverage immediately (at which time the state of an illness is known). It is not surprising, then, that Principal did not express the Period of Limited Activity condition as applying to those policies purchased during the Open Enrollment Period; the health condition of an individual during the Open Enrollment Period simply is not determinative of the risk that individual may pose to Principal on the effective date. By contrast, a person who is in poor health or hospitalized at the time when a policy is purchased outside of an Open Enrollment Period poses an *immediate* risk of loss to the insurance company, which is why Principal would impose (and did impose) the Period of Limited Activity condition in the case of dependent life insurance purchased outside of the Open Enrollment Period.

In other words, Principal drafted the Policy language to communicate to the purchaser during an Open Enrollment Period that Principal bore the risk of the insured individual becoming ill between the Open Enrollment Period and the effective date of the Policy. In fact, not only did Principal communicate that it was willing to bear the risk abstractly, it drafted a policy through which it bore the risk *explicitly*. Principal consciously chose to include within the "Open Enrollment Period" Article the statement that "No Proof of Good Health will be required for Member or Dependent insurance purchased during the Open Enrollment Period." (Policy, Part III, Section B, Article 3(c); App. 73). The Policy defines "Proof of Good Health" as "[w]ritten evidence that a person is insurable under the underwriting standards of The Principal." (*Id.* at Part I, "Proof of Good Health"; App. 53).

By not including the Period of Limited Activity condition within the "Open Enrollment Period" Article, and simultaneously excluding the "Proof of Good Health" requirement, Principal made clear to prospective policyholders that it was willing to bear the risk of loss for health conditions (known or unknown) arising prior to the effective date on dependent life insurance policies purchased during the Open Enrollment Period. In other words, Principal opened the door by offering life insurance coverage to

people with known health conditions that might die soon when it allowed customers to unconditionally purchase dependent life insurance policy during an Open Enrollment Period.[2] Now it attempts to shut the door on LoraLee simply because its marketing gamble proved unprofitable. Ratifying Principal's behavior would endorse that kind of bait-and-switch behavior.

II. THE DISTRICT COURT ERRED WHEN IT RULED THAT LORALEE DID NOT SATISFY THE ELEMENTS NECESSARY TO SUCCEED ON HER DOCTRINE OF REASONABLE EXPECTATIONS CLAIM.

Preservation of Error. LoraLee has preserved this error for review by filing her Resistance, fully briefing this issue to the District Court within Plaintiff's Brief at pages 17-22, and further addressing it within her Motion to Reconsider at pages 4-6.

Standard of Review. The standard of review on a ruling granting summary judgment is for correction of errors at law. *Green*, 713 N.W.2d at 238. In addition, review of the interpretation of the language of an insurance policy is for correction of errors at law. *Otterberg*, 696 N.W.2d at 27. This

[2] There is no evidence in the record that Greg was in ill health during the Open Enrollment Period or that his health factored in any way in LoraLee's purchase. Even if that was the case, it would be irrelevant since Principal decided to offer its product during Open Enrollment with no underwriting restrictions.

includes a review under the doctrine of reasonable expectations. *See Boelman v. Grinnell Mut. Reinsurance Co.*, 826 N.W.2d 494, 500-01 (Iowa 2013). In ruling on a summary judgment motion, the facts must be viewed in a light most favorable to the party resisting the motion. *Green*, 713 N.W.2d at 238. The Court must consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *McIlravy*, 653 N.W.2d at 328 (citations and quotation marks omitted).

A. The District Court Improperly Applied the Doctrine of Reasonable Expectations and Failed to View the Facts in a Light Most Favorable to the Non-Moving Party.

The District Court initially rejected LoraLee's doctrine of reasonable expectations claim on the grounds that "[t]he doctrine of reasonable expectations is only available when the contract at issue is ambiguous." (MSJ Order at 7; App. 164). Because the District Court determined that the Policy language was not ambiguous, it refused to apply the doctrine of reasonable expectations to the Policy. (MSJ Order at 7; App. 164). Following LoraLee's Motion to Reconsider, in which she reminded the District Court that the Iowa Supreme Court had previously ruled that the doctrine is "an independent and fundamental approach to insurance policy interpretation," the District Court "accept[ed] Plaintiff's invitation to enlarge its ruling[.]" (Motion to Reconsider p. 4) (*quoting Rodman*, 208 N.W.2d at

906; Order M. Reconsider at 2; App. 180). The District Court then ruled that the doctrine of reasonable expectations could not apply because, in the District Court's view, it had already interpreted the Policy as a layman would (or should), so LoraLee could not possibly have a reasonable basis for expecting any result other than what the Court had already determined. (Order M. Reconsider at 3; App. 181). For reasons already discussed, LoraLee disagrees that the District Court's facial interpretation of the Policy language would be so obvious and evident to a salt-of-the-earth Iowan.

Moreover, rather than interpreting the evidence in a light most favorable to LoraLee, the District Court construed her Affidavit with every possible negative inference against her, concluding that she failed to provide sufficient proof of her expectations. (Order M. Reconsider at 3; App. 181). For instance, the District Court concluded "it appears [LoraLee] either did not read the insurance contract or at least did not read the exclusionary clause." (Order M. Reconsider at 3; App. 181). But there was no evidence before the District Court that could inform such a conclusion, and such an inferential conclusion cannot be squared with the District Court's obligation to review the evidence in the light most favorable to LoraLee and to afford her the benefit of every legitimate inference that can be reasonably deduced from the record. *McIlravy*, 653 N.W.2d at 328.

Because the District Court erred in both its construction of the Policy and its application of (un)reasonable inferences against LoraLee, the District Court's granting of Principal's Motion for Summary Judgment on LoraLee's doctrine of reasonable expectations claim should be reversed.

B. Proper Evaluation of LoraLee's Doctrine of Reasonable Expectations Claim Requires a Denial of Principal's Motion for Summary Judgment on that Claim.

Viewed in its proper context, the Iowa Supreme Court recognizes the doctrine of reasonable expectations as an interpretive method to ensure that "[t]he objectively reasonable expectations of applicants and intended beneficiaries regarding the terms of insurance contracts will be honored even though painstaking study of the policy provisions would have negated those expectations." *Rodman*, 208 N.W.2d at 906 (internal quotations omitted). For the doctrine to apply, an insured "must prove circumstances attributable to the insurer that fostered coverage expectations or show that the policy is such that an ordinary layperson would misunderstand its coverage." *Boelman*, 826 N.W.2d at 506 (internal quotations omitted). Once that condition has been satisfied, the doctrine will be invoked if a policy exclusion is, among other things, "bizarre or oppressive." *Id.* The doctrine also applies where a policy contains "ambiguous language" or a "hidden exclusion." *Id.*

LoraLee reemphasizes that she has already demonstrated that the Policy language is clear that no condition applies to the effective date for a policy purchased during an Open Enrollment Period. A reasonable or ordinary person would interpret the Policy in such a way as to expect that no conditions would exist to limit the effective date of a policy purchased during the Open Enrollment Period. If that expectation were misplaced, the responsibility would be "attributable to the insurer," Principal, since it drafted the Policy. *See id.; Cairns*, 398 N.W.2d at 824 (insurance policies interpreted against the insurer "because insurance policies constitute adhesion contracts").

Moreover, when purchasing the Policy, it was LoraLee's understanding, based upon the information provided to her during the Open Enrollment Period, that the Policy would be effective as of January 1, 2018. (Fisher Aff., ¶ 4; App. 192). Principal did not provide any information that there could be any circumstances that would cause the Policy not to be effective on January 1, 2018. (Fisher Aff. ¶ 5; App. 192). Accordingly, it was LoraLee's expectation that there were no conditions that would cause the Policy not to be effective on January 1, 2018. (Fisher Aff. ¶ 6; App. 192). Thus, LoraLee satisfied the first condition required for application of the doctrine of reasonable expectations.

The second condition requires LoraLee to prove that the Policy exclusion—in this case, the Period of Limited Activity condition—is "bizarre or oppressive." Although on its own the Period of Limited Activity condition may not seem out-of-the-ordinary, as applied in these particular circumstances, it creates bizarre and oppressive results that are disassociated from any rational business objective of Principal.

LoraLee has already addressed in Section I.B.2. how the specific exclusion of the "Proof of Good Health" requirement from a policy purchased during the Open Enrollment Period signaled Principal's willingness to insure an individual with known health conditions at the point the policy was purchased during the Open Enrollment Period.

But *now* Principal tries to undue its clearly expressed intent by applying the Period of Limited Activity condition to such policies. According to Principal, while it did not care when drafting the Policy language if a policy was purchased for a person who may not be able to pass its underwriting requirements, it *did* care whether the insured was "confined in a Hospital *for any cause* or confined in a Nursing Facility . . . or Home

Confined"[3]—but only on the effective date of the policy.[4] (Policy at Part I, "Period of Limited Activity,"; App. 51-52 (emphasis added); *see id.* at Part III, Section B, Article 2, subpart (b); App. 71).

Applying the Period of Limited Activity condition without the Proof of Good Health leads to bizarre and oppressive results. As noted above, a dependent life insurance policy purchased during an Open Enrollment Period for a terminally ill patient would be effective on January 1, so long as that person was not in a hospital, nursing home, or home confined on that date. In other words, Principal agreed unequivocally to take a loss on such policies when it drafted the Policy language. But, if an otherwise healthy person on whose life a dependent life insurance policy was purchased was in the hospital on December 30 for a routine surgery, held overnight and released the morning of January 1, only to be hit by a car that same day, the Policy would not cover the claim, according to Principal's interpretation.

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[3] "'Home Confined' means that, due to sickness or injury, the person is unable to carry on the regular and usual activities of a healthy person of the same age and sex and unable to leave his or her home except to receive medical treatment." (Policy, Part I, "Period of Limited Activity"; App. 52).

[4] The provision within Article 2 on which Principal relies only postpones the effective date of the issued policy. Any confinement in a hospital, nursing home, or in the home after the effective date has no bearing on the coverage. (*See* Policy, Part III, Section B, Article 2, subpart (b); App. 71) (a policy "will not be in force . . . until the Period of Limited Activity ends.").

Apparently, *that* was the kind of risk Principal wanted to guard against. This is, indeed, a bizarre combination of results when a very sick person is able to get coverage and their beneficiary paid out on a claim while a healthy person's beneficiary may have their claim denied—all because of *where* the insured was on January 1. In other words, there is no rational business interest associated with the interpretation Principal advances because the Policy does not explicitly require good health for individuals for whom policies were purchased during an Open Enrollment Period.

Finally, the doctrine of reasonable expectations *also* applies where a policy contains "ambiguous language" or a "hidden exclusion." *Boelman*, 826 N.W.2d at 506. LoraLee has already set forth her arguments regarding the ambiguity of the Policy language and the necessary resolution of such ambiguity in favor of her as the insured in Section I.B. and she incorporates those arguments by reference here. She has also already demonstrated that Principal's failure to include a cross-reference to the Period of Limited Activity condition within Article 3 "Open Enrollment Period," while including a cross reference to that condition within other Articles of the Policy, reveals that Principal never intended that the Period of Limited Activity condition to apply to policies purchased during the Open Enrollment Period. It is for reasons such as these that the Iowa Supreme

Court has stated that "when . . . an exclusion acts in technical ways to withdraw a promised coverage, it must do so forthrightly, with words that are, *if not flashing*, at least sufficient to assure that a reasonable policy purchaser will not be caught unawares." *Clark-Peterson Co., Inc. v. Independent Ins. Associates, Ltd.*, 492 N.W.2d 675, 679 (Iowa 1992) (emphasis added). Consequently, the Period of Limited Activity condition acts as a "hidden exclusion" triggering application of the doctrine of reasonable expectations.

For the reasons stated herein, the District Court erred when granting Principal summary judgment on LoraLee's reasonable expectations claim.

III. THE DISTRICT COURT ERRED WHEN IT RULED THAT PRINCIPAL'S CONDUCT IN RETAINING LORALEE'S PREMIUM AFTER DENYING HER POLICY CLAIM DID NOT CONSTITUTE WAIVER UNDER IOWA LAW.

Preservation of Error. LoraLee has preserved error for review by filing her Resistance, fully briefing this issue to the District Court within Plaintiff's Brief at pages 22-31, and further addressing it within her Motion to Reconsider at pages 6-7. This issue was also covered by LoraLee's counsel during the Hearing on Defendant's Motion for Summary Judgment. (Tr. at 17-20; App. 246-49).

Standard of Review. The standard of review on a ruling granting summary judgment is for correction of errors at law. *Green*, 713 N.W.2d at 238. In

addition, review of the interpretation of the language of an insurance policy as well as whether the insurer committed a waiver is for correction of errors at law. *See Westfield*, 623 N.W.2d at 875–76. In ruling on a summary judgment motion, the facts must be viewed in a light most favorable to the party resisting the motion. *Green*, 713 N.W.2d at 238. The Court must consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *McIlravy*, 653 N.W.2d at 328 (citations and quotation marks omitted).

A. It is Well-Established Under Iowa Law that an Insurer Waives A Condition When It Retains Premium After Issuing a Denial Based on that Condition.

For 150 years, the Iowa Supreme Court has held that insurance companies can waive policy conditions by their conduct. *Viele v. Germania Ins. Co.*, 26 Iowa 9, 52-57 (1868). Waiver is the "intentional relinquishment of a known right." *Scheetz v. IMT Ins. Co. (Mut.)*, 324 N.W.2d 302, 304 (Iowa 1982) (internal quotations omitted); *Cont'l Cas. Co. v. G. R. Kinney Co., Iowa*, 258 Iowa 658, 660, 140 N.W.2d 129, 130 (1966); *Hemmings v. Home Mut. Ins. Ass'n of Iowa*, 199 Iowa 1311, 203 N.W. 818, 821 (1925). Intent "may be shown by affirmative act of the party charged therewith, or it may be inferred from such conduct as warrants the conclusion that a waiver was intended." *Cont'l Cas. Co.*, 140 N.W.2d at 130. Proof of prejudice is

not necessary. *Id. at 132; Hemmings*, 203 N.W. at 821. Similarly, waiver exists without consideration. *Cont'l Cas. Co.*, 140 N.W.2d at 132; *Mettner v. Nw. Nat. Life Ins. Co*., 127 Iowa 205, 103 N.W. 112, 115 (1905). Once an insurance company relinquishes a known right, it cannot be reclaimed. *Scheetz*, 324 N.W.2d at 305.

Conditions "are provided by the insurer for its own protection, and it may waive any or all of them, if it shall so elect." *McDonald v. Equitable Life Assur. Soc. of the U.S.*, 185 Iowa 1008, 169 N.W. 352, 355 (1918). "A waiver of a contract right by an insurance company is an election not to take advantage of a technical defense and should be looked upon with liberality." *Scheetz*, 324 N.W.2d at 304-305. Even "slight and comparatively trivial circumstances will be sufficient to constitute a waiver[.]" *Mettner*, 103 N.W. at 115.

Building on this foundation, Iowa law is clear that a carrier waives a policy condition when it retains premium while asserting that it has a policy defense. "Where the insured fully performed the terms of a contract of insurance, *and the insurer had received and retained a premium paid*, the latter cannot evade performance on the ground that the contract was *ultra vires.* . . . It would be improper for the insurer to be permitted to defend upon the ground of its own lack of power to enter into a contract when it has

received all the agreed benefits thereunder." *Brown Twp. Mut. Ins. Ass'n v. Kress*, 330 N.W.2d 291, 296 (Iowa 1983), *reh'g denied* (March 10, 1983) (*quoting* 16C Appelman, Insurance Law and Practice § 9142 (1981)) (emphasis added); *see also Mettner*, 103 N.W. at 114 ("Receipt *and retention* of premiums after forfeiture is a waiver thereof.") (emphasis added).

Furthermore, in *McDonald*, the Iowa Supreme Court declared that waiver applied when the carrier unreasonably delayed refunding the premium after discovery of an alleged breach. As the Court explained:

> One who receives and retains money which is sent to him to be kept on certain terms *must be deemed to assent to those terms if he keeps the money*, unless he makes it known to the sender that he will only keep the money on some other and different terms; and, if he seeks to establish different terms while keeping the money, it rests upon him to make that fact known.

McDonald, 169 N.W. at 358 (*quoting Shea v. Massachusetts Ben. Ass'n*, 160 Mass. 289, 294, 35 N.E. 855, 856 (1894)) (emphasis added). "Retention of the money an unreasonable length of time without giving such notice will necessarily work a waiver[.]" *Id.* at 358. The Iowa Supreme Court has already declared that a two-month retention is unreasonable. *Id.*; *see also Mettner*, 103 N.W. at 113-15.

The fact that only a relatively small amount of premium is involved is irrelevant. *Venz v. State Automobile Ins. Ass'n of Des Moines*, 251 N.W. 27,

30 (Iowa 1933) ("It is true that the amount accepted by way of premium in this case is not large. It was but 20 cents. But, this was the amount of the premium which the appellant company fixed as the charge they would make under the terms of the contract they entered into[.]"). Similarly, courts around the country have ruled that retention of premium with knowledge of a breach constitutes waiver. *State Farm Mut. Auto. Ins. Co. v. Bockhorst*, 453 F.2d 533, 535-36 (10th Cir. 1972) (one month and eight day retention of premium with knowledge of a breach constituted waiver); *Van Hulle v. State Farm Mutual Automobile Ins. Co.*, 254 N.E.2d 457 (Ill. 1969), *reh'g denied* (Jan. 28, 1970) (holding premium for just over one month deemed waiver); *Cullen v. Valley Forge Life Ins. Co.*, 589 S.E.2d 423, 428 (N.C. App. 2003) (holding that conduct—namely a three month retention—that is inconsistent with an intent to enforce life insurance policy waives the right to enforce the policy provision).

Mettner provides an early and clear exposition of Iowa law that retention of premium by an insurer after denying coverage results in waiver. In fact, in that case, the Iowa Supreme Court regarded the law as so clear that it imputed knowledge upon the insurer of the law of waiver:

> Receipt and retention of premiums after forfeiture is a waiver thereof. *This defendant knew.* It also knew that plaintiff was insisting there had been no valid forfeiture. Under the circumstances, *it was defendant's duty* to be on the alert to see

> that no premiums were received and retained after the declaration of forfeiture for more than a reasonable time within which to return them. *It knew or should have known that, if it kept them for more than this reasonable time, the forfeiture would be waived*.

Mettner, 103 N.W. at 114 (emphasis added).

The *Mettner* Court also noted that premium was retained by the company first for two months, then returned to the insured who subsequently sent it back to the company. *Id.* at 113. The company then sent it back to the insured two days later. *Id.* Undeterred, after nine days the insured returned the premium and enclosed an additional premium payment, which the company held for another *fourteen days* before once again returning the payments. *Id.* Even in the face of that company's efforts to *actually return premium*—which are notably distinguishable to Principal's lack of effort to return premium after its denial of LoraLee's claim—the Court expressed its confusion about why the insurer did not "return[] the money at once." *Id.* at 113-14. "The delay was not long in either case, it is true; but the circumstances were such as to require prompt action on the part of the company, and *it has offered no excuse whatsoever for its conduct*. It planted itself squarely on a technical forfeiture and *is in no position to complain of a technical rule as to waiver*." *Id.* at 115 (emphasis added).

B. The District Court Erred by Disregarding the Iowa Law on Waiver of Condition Precedents.

Regrettably, the District Court entirely disregarded the aforementioned line of cases and *Mettner*. In its Order on Defendant's Motion for Summary Judgment, it attempted to distinguish *Mettner* as "inapposite." (MSJ Order at 9; App. 166). However, as pointed out by Plaintiff within her Motion to Reconsider, the Court's analysis of *Mettner* was based on a faulty factual reading of that case. (Motion to Reconsider at 6-7). Nevertheless, within its Order on Plaintiff's Motion to Reconsider, the District Court entirely dismissed *Mettner* as having any relevance, *without even addressing its error in interpretation*, because it had already decided, based on *Pierce v. Homesteaders Life Ass'n*, 272 N.W. 543 (Iowa 1937), as well as language quoted from *Pierce* within *Westfield*, 623 N.W.2d at 879, that the "doctrine of waiver . . . cannot be successfully invoked to create liability for benefits not contracted for at all." (MSJ Order at 7-8; App. 164-65; Order M. Reconsider at 3-4; App. 181-82). While it is true that *Pierce* stands for the proposition that certain kinds of policy provisions (coverage provisions) are not subject to waiver, it does *not*, as shown by the cases set forth in Section III.A, stand for the proposition that *no* policy provisions may be waived. Thus, the District Court made clear that it ignored the entire line of case law related to waiver of conditions in favor of the "contracted

for" analysis, thereby allowing the language in *Pierce* to supersede case law so fundamental that the Iowa Supreme Court in *Mettner* deemed it common knowledge. *See Mettner*, 103 N.W. at 114 (The company "knew or should have known that, if it kept [premium] for more than this reasonable time, the forfeiture would be waived.")

Simply put, the District Court erred in its reading of the facts and thereby misapplied the law with regard to *Pierce*. The policy in *Pierce* provided that the insured was not eligible for life insurance after she reached the age of sixty on March 3, 1933, *which occurred in the middle of the policy term*. *Pierce*, 272 N.W. at 543-44. As the Court noted:

> Some time in March, 1933, the defendant company mailed a check for one-half of this premium to the insured . . . advising her that her certificate had expired by its terms on March 3, 1933, and that the premium paid in September previous was in excess of the amount due under the certificate up to the time of its expiration.

Id. at 544. In other words, unlike Principal, the carrier in *Pierce refunded the premium immediately after it became aware that the condition was unmet*.

Moreover, the basis for the waiver argument in *Pierce* was fundamentally different from the one the LoraLee brought before the District Court. The plaintiff in *Pierce* argued that because the insured paid for an entire year of coverage, even though the insured was only eligible under the

policy terms for the first half-year of coverage, that the insurer should be held to have waived the policy age limit. *Id.* at 546. In other words, the plaintiff in *Pierce* argued that it effectively bought up a six-month extension of the policy beyond its stated limits.

But that situation is completely different from LoraLee's situation, where Greg was already deemed eligible for the policy by virtue of there being no good health requirement and no underwriting requirement. Accordingly, the condition that Greg not be hospitalized on the effective date of the policy was a condition precedent.

Established authority confirms that "[c]onditions precedent in a life policy may be waived." 6 Couch on Ins. § 85:1. "An insurer may have waived or be estopped to deny liability where it issues a policy without any requirement of a medical examination or any inquiry of the applicant as to health despite a 'sound health' clause in the policy." 6 Couch on Ins. § 87:32. Simply put, conditions precedent that may delay the effective date of a policy (such as the Period of Limited Activity condition) are fundamentally different than the type of hard and fast coverage-period limitation (such as a maximum age limit) presented in *Pierce*.

Thus, when the Iowa Supreme Court in *Pierce*, and subsequently *Westfield*, wrote that waiver cannot "create a liability for benefits not

contracted for," (*Westfield*, 623 N.W.2d at 879 (*quoting Pierce*, 272 N.W. at 546)) it was saying that waiver could not create a liability that was clearly outside the scope of coverage expressed in the policy, *not* that waiver could not apply where the insurance company's denial related to a condition precedent. For the District Court to expand that principle to cover *any* limitation in coverage is to completely disregard the law of waiver with respect to conditions precedent despite established authority to the contrary. When properly analyzed within the context of Iowa law of waiver of conditions, it becomes evident that the Period of Limited Activity provision is a *condition* that may be waived, and was in fact waived by Principal when it retained LoraLee's premium for so many months *after* invoking that same condition to deny her coverage.

C. The Period of Limited Activity Is a Waivable Policy Condition, Thus, Principal had the Ability to Waive It.

Drawing on case law previously discussed in Section III.A. concerning waiver of policy conditions, the crux of the issue is: assuming, *arguendo*, that the Period of Limited Activity condition applies to dependent life insurance policies purchased during the Open Enrollment Period, is the Period of Limited Activity a coverage provision or a waivable policy condition? The District Court concluded that the Period of Limited Activity condition is a coverage provision.

However, *as the Policy language itself states*, the Period of Limited Activity provision is a *waivable condition* rather than a *non-waivable coverage provision*. The Policy states that "*this Period of Limited Activity requirement may be waived*[.]" (Policy at Part III, Section B, Article 2(b); App. 71) (emphasis added). Thus, there is no denying that the Period of Limited Activity provision is a *waivable condition***.** The District Court attempted to suggest that the Policy language setting forth specific conditions under which the Period of Limited Activity condition may be waived undercuts LoraLee's arguments. (MSJ Order at 5; App. 162). But that misses the point entirely—by establishing *any* conditions under which the Period of Limited Activity provision can be waived, and indeed by saying the provision "*may be waived*," the Policy makes clear that the Period of Limited Activity provision is a waivable condition rather than a *non-waivable coverage provision*.

Insurance companies generally do not provide mechanisms for waiver of coverage provisions. In *Pierce*, for example, the Court was not presented with policy language that stated the coverage period lasted until age sixty and could be extended if certain conditions were met. Sixty was an absolute *coverage* rule—no exceptions. However, by contrast, Principal made clear that the Period of Limited Activity condition was waivable—even Principal

admits there are exceptions. LoraLee's waiver argument is not dependent on whether or not the provision was waived in accordance with the specific conditions under the Policy; the law of waiver is not so constrained. The fundamental question is, "can the condition be waived?" If it can, then, based upon the authorities already cited, the insurer can be held to have waived it by retaining premium after denying coverage based on the condition.

Nevertheless, Principal attempted to cover up its waiver of the Period of Limited Activity condition by routinely referring it as a "good health requirement" before the District Court, thereby wrongly suggesting the Period of Limited Activity is a *coverage* provision (or eligibility requirement) rather than a *condition*. (*See* Def. Br. at 6, 8, 9, and 10). Moreover, Principal erroneously couched the issue as whether Greg was "eligible" for insurance, or whether his hospitalization made him "ineligible." (*See id.* at 6, 7, 9).

However, the Policy definitions make clear that the Period of Limited Activity is *not* an eligibility requirement—in other words, it does not determine whether a liability was "contracted for." *See Westfield*, 623 N.W.2d at 879. The Policy states:

> If a Dependent spouse or Domestic Partner is in a Period of Limited Activity on the date Dependent Life Insurance or an

> increase in Dependent Life Insurance Scheduled Benefit due to a change in the Member's Annual Budgeted Salary or insurance class *would otherwise be effective*, such insurance or increase *will not be in force* for that Dependent spouse or Domestic Partner *until the Period of Limited Activity ends*.

(Policy, Part III, Section B, Article 2, subpart (b); App. 71) (emphasis added). As the italicized text shows, the Period of Limited Activity does not determine *whether* someone is eligible for insurance under the Policy—it simply delays when a policy that "would otherwise be effective" (i.e. eligible) will become in force. In other words, the Policy language makes clear that Principal contracted for and intended that the Policy would be effective as of January 1, 2018, and the only reason that coverage would not apply is if the *conditions* set forth in the Period of Limited Activity provision applied.

That the Period of Limited Activity is a *condition* rather than a *coverage* provision (eligibility requirement) becomes even more clear when one considers the *actual good health requirement* contained in the Policy. The Policy defines "Proof of Good Health" as "[w]ritten evidence that a person is insurable under the underwriting standards of The Principal. This proof must be provided in a form satisfactory to The Principal." (*Id.* at Part I, "Proof of Good Health"; App. 53). In other words, the term "Proof of Good Health" addresses whether a person is *eligible* for insurance under the Policy

based on his or her ability to meet Principal's underwriting requirements; i.e., it determines whether Principal is willing to *contract for* the liability.

Thus, there is a critical distinction in the Policy between provisions such as the Period of Limited Activity, acting as a *condition*, and the Proof of Good Health provision, acting as a *coverage* provision (eligibility requirement). They are not one-and-the-same. Moreover, the Period of Limited Activity condition is not a "good health requirement", as demonstrated by the Policy language and the fact that the Policy contains an *actual* good health requirement. Additionally, even if it were a "good health requirement," that argument would be nullified by the Policy, which states that "No Proof of Good Health will be required for Member or Dependent insurance purchased during the Open Enrollment Period." (*Id.* at Part III, Section B, Article 3(c); App. 73).

Accordingly, the Period of Limited Activity provision is a *condition*, which Principal waived under established Iowa law by retaining premium for months while asserting that the condition nullified the coverage the premium paid for.

D. Principal Waived the Period of Limited Activity Condition by Retaining LoraLee's Premium While Asserting a Policy Defense.

In sum, LoraLee has demonstrated that: (A) Iowa law is clear that policy conditions may be waived by an insurer by retaining premium; and (B) the Period of Limited Activity was a waivable policy condition.

When Principal denied LoraLee's claim on February 9, 2018 claiming that the policy never went in force because Greg was hospitalized, it became *obligated* under Iowa law to return LoraLee's premium. *See Mettner*, 103 N.W. at 115. When it retained LoraLee's premium for nearly four months after the denial without any hint of litigation on the horizon, it waived its right to deny her claim based on the argument that LoraLee's Policy was not in force. *See id.* Principal accepted premium for an in force policy and by keeping such premium it confirmed, under Iowa law, its intent to waive any right it may have had to deny her claim based upon the Period of Limited Activity condition. *Brown Twp. Mut. Ins. Ass'n*, 330 N.W.2d at 296 (*quoting* 16C Appelman, Insurance Law and Practice § 9142 (1981)) ("Where the insured fully performed the terms of a contract of insurance, *and the insurer had received and retained a premium paid*, the latter cannot evade performance on the ground that the contract was *ultra vires.* . . . It would be improper for the insurer to be permitted to defend upon the ground of its

own lack of power to enter into a contract when it has received all the agreed benefits thereunder.") (emphasis added).

The District Court attempts to excuse Principal's wrongful retention of premium by erroneously relying on *Rubes v. Mega Life and Health Ins. Co., Inc.* 642 N.W.2d 263 (Iowa 2002). In *Rubes*, the insured claimed that his health insurance company waived its denial of coverage because it withheld his premiums until after he underwent a surgery. However, not only did the Supreme Court find that his assertion was unsupported by the evidence, but

> the parties were engaged in unresolved litigation over what the insurer knew about [the insured's] history based on his [allegedly fraudulent] application. That litigation extended for nearly nine months in advance of surgery, and [the carrier] had refused payment of benefits for more than a year before that. It was in [the insured's] interest to keep making monthly premium payments so as not to give the company an independent ground to cancel the policy. Company officials testified that judgments about rescission are never made hastily, given their potential impact on the insured and company alike.

Id. The *Rubes* court contrasted that case with *Venz*, 251 N.W. at 29-30, where it applied waiver when "an insurer knowingly retained an additional premium for an underage driver and then, when the driver was involved in an accident, refused to honor coverage *or* return the insured's premiums." *Id*. Nevertheless, the District Court took the distinct fact pattern in *Rubes* and applied it to LoraLee's situation, where Principal kept LoraLee's

premium for months after denying her claim and before there was any indication from LoraLee that litigation may ensue. Moreover, there is no concern of fraudulent activity in this case or ongoing premium payments like *Rubes* presented. Thus, the District Court's reliance on *Rubes* was misplaced.

Moreover, Principal's own conduct betrays that it was aware of and *knew* that it had committed a waiver. As Principal admitted in its emails, once Principal realized that LoraLee had counsel and litigation may be imminent, it began the process of reaching out to LoraLee's employer and seeking to have her premium refunded. (Aff. of Rebecca Olson at 6-7; App. 220-21). Principal then reversed course twice more, first recharging LoraLee the premium and then, when it realized its fallacy of retaining premium on a policy it was asserting was never effective, ordering it refunded once more. (Aff. of Rebecca Olson at 5, 12-15; App. 226-29).

Principal's flip-flopping presents a fact pattern essentially identical to that in *Mettner*, 103 N.W. at 113, where the insurer returned premium to the insured, then received additional premium, and once again returned it. In *Mettner*, the insurer only kept the additional premium received for *fourteen days* before once again returning it. *Id*., at 114. Even holding the premium for two weeks was sufficient "upon which to base a finding of waiver . . ."

Id. The Supreme Court criticized the insurer's delay, admonishing that "the circumstances were such as to require prompt action on the part of the company, and *it has offered no excuse whatever for its conduct*. It planted itself squarely on a technical forfeiture, and *is in no position to complain of a technical rule as to waiver*." *Id*., at 115 (emphasis added).

When Principal's conduct is viewed in a light most favorable to LoraLee and, drawing all legitimate inferences in her favor, the facts paint a picture that, by June 2018, Principal was aware that it had committed a waiver, but was unwilling to pay LoraLee's claim of $40,000 on account of having kept a $12.71 premium. (Tr. at 19-20; App. 248-49). In Principal's view, that would be a "windfall" (Def. Br. at 1), but Principal's conduct demonstrates the exact kind of "affirmative act" and "inferred . . . conduct" that "warrants the conclusion that a waiver was intended." *Cont'l Cas. Co.*, 140 N.W.2d at 130. Of course, once an insurance company relinquishes a known right, it cannot be reclaimed. *Scheetz*, 324 N.W.2d at 305. Principal committed a waiver by retaining LoraLee's premium after denying her claim, and once it did so, it could not go back.

The Court should reverse the District Court's ruling granting summary judgement to Principal on LoraLee's waiver claim.

IV. THE DISTRICT COURT ERRED WHEN IT FAILED TO CONSIDER LORALEE'S BAD FAITH CLAIM DUE TO ITS RULINGS ON LORALEE'S CONTRACT AND WAIVER CLAIMS.

Preservation of Error. LoraLee has preserved error for review by filing her Resistance, fully briefing this issue to the District Court within Plaintiff's Brief at pages 32-42, and further addressing it within her Motion to Reconsider at page 7. This issue was also covered by LoraLee's counsel during the Hearing on Defendant's Motion for Summary Judgment. (Tr. at 11-20; App. 240-49).

Standard of Review. The standard of review on a ruling granting summary judgment related to a bad faith claim is for correction of errors at law. *Green*, 713 N.W.2d at 238; *see also Galbraith v. Allied Mut. Ins. Co.*, 698 N.W.2d 325, 327 (Iowa 2005). In ruling on a summary judgment motion, the facts must be viewed in a light most favorable to the party resisting the motion. *Green*, 713 N.W.2d at 238. The Court must consider on behalf of the nonmoving party every legitimate inference that can be reasonably deduced from the record. *McIlravy*, 653 N.W.2d at 328 (citations and quotation marks omitted).

A. The District Court Failed to Consider LoraLee's Bad Faith Claim.

Because the District Court erred in ruling in favor of Principal on LoraLee's breach of contract, reasonable expectations, and waiver claims,

the District Court also erred in determining that Principal had a reasonable basis for denying LoraLee's claim and retaining her premium payments at the same time. (MSJ Order at 9-10; App. 166-67; Order M. Reconsider at 4; App. 182).

B. Principal Acted in Bad Faith.

Iowa recognizes an action for bad faith

> because traditional damages for breach of contract will not always adequately compensate an insured for an insurer's bad faith conduct. . . . Insurance policies are contracts of adhesion, exemplifying inherently unequal bargaining power between the insurer and insured, which persists throughout the parties' relationship and becomes particularly acute when the insured sustains a physical injury or economic loss for which coverage is sought. *We viewed the contractual relationship between the insurer and insured as sufficiently special to warrant providing the insured with additional protection*.

Thornton v. Am. Interstate Ins. Co., 897 N.W.2d 445, 462 (Iowa 2017), *reh'g denied* (June 22, 2017) (citations and quotations marks omitted; emphasis added).

The elements of bad faith in Iowa are that (1) the insurer lacked a reasonable basis for denying the claim and (2) it knew (or should have known) that it lacked a reasonable basis. *Dolan v. Aid Ins. Co.*, 431 N.W.2d 790 (Iowa 1988); *Galbraith*, 698 N.W.2d at 328. Principal does not contest the fact that it had sufficient knowledge regarding LoraLee's claim, meaning that the second element is satisfied. (Def. Br. at 10 (Principal moved for

summary judgment only on the objective requirement, apparently conceding that the fact that it drafted the Policy and that it had the detailed letters sent by LoraLee's counsel internally appealing the denied claim apprised it of all relevant evidence); *see also* Counsel's Aff., ¶ ¶ 3-4; Ex. 3 and 4; App. 203-14)).

It is reversible error to grant a motion for summary judgment without concluding that the insured "demonstrated that no genuine issue of material fact existed on [the] two essential elements of his bad-faith claim." *Thornton*, 897 N.W.2d at 465. Since LoraLee demonstrated that there were sufficient disputed facts as to preclude summary judgment, Principal's Motion should have been denied. (*See* Plaintiff's Statement of Disputed Facts; App. 113-16).

1. The Meaning of a "Reasonable Basis" Under Iowa Bad Faith Law.

There was some debate between the parties below on what constitutes a "reasonable basis" for an insurer's denial of a claim under Iowa bad faith law. (Def. Br. at 10-11; Plaintiff's Brief at 33-34; Defendant's Reply Brief in Support of Motion for Summary Judgement, filed Nov. 21, 2018 (Def. Rep.), at 15-16. Principal relied on *Bellville v. Farm Bureau Mut. Ins. Co.*, 702 N.W.2d 468, 473 (Iowa 2005) to argue that a reasonable basis means that an insurer must only have "any logical basis" for denying the claim.

(Def. Br. at 11; Def. Rep. at 15). However, that interpretation would effectively overturn every Iowa case recognizing the bad faith tort. Indeed, Principal gives itself complete license to deny any claims without consequence as long as it can muster a *reasonable sounding* argument rather than one resting on a *reasonable basis*. Principal's position has been rejected:

> *Bellville* does not stand for the proposition that the existence of any quantum of evidence, however minute, that supports denial of a claim is sufficient to make that claim "fairly debatable," as [the carrier] contends. Rather, *Bellville* stands for the proposition that the evidence upon which the denial is based must be sufficient to provide "an objectively reasonable basis for denial of a claim."

Niver v. Travelers Indem. Co. of Illinois, 412 F.Supp.2d 966, 988 (N.D. Iowa 2006) (*quoting Bellville*, 702 N.W.2d at 473). As LoraLee has shown in Sections I, II, and III herein, all of the pretexts Principal has offered seeking to justify denying her valid claim do not rise to the level of "objectively reasonable."

Additionally, unlike here, the main issue in *Bellville* was an inherently subjective one, namely, what a jury would award a surviving spouse in a wrongful death case. *Bellville*, 702 N.W.2d at 481 ("The discrepancy among the expert opinions simply illustrates the obvious: it is difficult, if not impossible, to determine with any precision how the jury will value such a

claim, particularly the loss-of-consortium component."). By contrast, LoraLee's life insurance claim is straightforward.

Moreover, because LoraLee *could*, on remand, potentially obtain a directed verdict on the underlying contract claim, the summary dismissal of her bad faith claim was error. *Id*., at 474 (*quoting* Stephen S. Ashley, *Bad Faith Actions Liability & Damages* § 5:04, at 5–17 to 5–18 (2d ed. 1997). In other words, "if the insured is entitled to a directed verdict on the policy claim . . . then the insured should also receive a directed verdict on his [sic] bad faith claim." Ashley, § 5:04 (repeatedly quoted with approval in *Bellville*).

Furthermore, the *Bellville* court acknowledged that there are cases with disputed facts that do not automatically establish the issue as fairly debatable. *Bellville*, 702 N.W.2d at 474 (*citing Reuter v. State Farm Mut. Auto. Ins. Co.*, 469 N.W.2d 250, 254 (Iowa 1991) and *Chateau Chamberay Homeowners Ass'n v. Associated Int'l Ins. Co.*, 90 Cal.App.4th 335, 108 Cal.Rptr.2d 776, 785, 787 (2001)). As Judge Mark Bennett ruled,

> the court's conclusion that there are genuine issues of material fact defeating a motion for summary judgment or directed verdict on [the insured's] *bad faith* claim does not mean, as [the carrier] suggests, that [the carrier] is necessarily entitled to summary judgment on that claim. Rather, what is or may be relevant to the first element of a *bad faith* claim is whether a directed verdict *could* be granted on [the insured's *contract*] claim.

Niver, 412 F.Supp.2d at 988 (emphasis on "could" added). Because LoraLee *could* be entitled to a directed verdict on her contract claim, summary judgment was inappropriate.

2. Principal's Specific Bases for Denying LoraLee's Claims Are Not Reasonable.

LoraLee has already demonstrated, as a matter of law, that:

a. Greg was enrolled during the Open Enrollment Period and, pursuant to the Policy language, his health or hospitalization was not relevant to the effective date; and

b. Principal knew or should have known that.

In that scenario, LoraLee has a valid bad faith claim. Period. Even if Principal could muster a reasonable sounding argument for challenging LoraLee's reasonable expectations count, that would be irrelevant since the objective analysis of the plain language of the Policy would render Principal's reasonable expectations as irrelevant. Thus, LoraLee only needs to prove that Principal was objectively[5] wrong in denying her claims pursuant to *any one theory* (e.g. plain reading, ambiguity, reasonable expectations, *or* waiver).

[5] Principal conceded below that the subjective prong of bad faith is met. (Def. Br. at 10)

3. It Was Not Objectively Reasonable to Deny LoraLee's Claim Based on a Plain Reading of the Policy.

As detailed in Section I.A. of this brief, Principal clearly breached the plain language of the contract it drafted. In the alternate, there is significant potential for LoraLee to obtain a directed verdict on that issue after substantial discovery has been completed. Thus, summary disposition was in error.

The same is true with LoraLee's other theories, including the ambiguity Principal wrote into its own contract. *See* Argument Section I.B., herein. No doubt, Principal will argue that it can escape bad faith liability by drafting an ambiguous contract. Not only does this cut against the laws governing adhesion contracts and the purpose of creating the bad faith tort to address the issues inherent in "contracts of adhesion, exemplifying inherently unequal bargaining power between the insurer and the insured," but it also rewards Principal for sloppy work. *Thornton*, 897 N.W.2d at 462 (*quoting Dolan*, 431 N.W.2d at 794) (quotation marks omitted). Thus, LoraLee's bad faith action based on the breach arising from the Policy language alone remains viable and Defendant's Motion should have been denied.

4. It Was Not Objectively Reasonable to Retain LoraLee's Premium with Knowledge of the Alleged Policy Defense While Denying Her Claim.

Principal's distortion of Iowa law is even greater in the context of waiver. First, as explained in Section III, herein, Principal waived any defense it had to LoraLee's policy claim when it withheld her premium for months with knowledge of the asserted policy defense. Accordingly, she *could* prevail on a directed verdict on remand; thus, summary disposition in favor of Principal is barred.

Second, as discussed in Argument Section III, herein, the Iowa Supreme Court made clear long ago through *Mettner* that insurers are held to understand how retention of premium effects a waiver, making it unreasonable to deny LoraLee's claim in light of withholding her premium. *See Mettner*, 103 N.W. at 114.

Furthermore, Principal's conduct in refunding, recharging, and then refunding LoraLee's premium in the prelude to this litigation constitutes an *admission* that it *knew* it was wrongful for it to withhold LoraLee's premium while denying her claim. This is in line with *Mettner*'s imputed knowledge of waiver upon an insurer. Thus, Principal had knowledge that retaining the premium while simultaneously denying LoraLee's claim would constitute waiver of any policy defenses. Accordingly, Principal lacked a reasonable

basis for its ongoing denial of LoraLee's policy claim and, therefore, the elements of LoraLee's bad faith claim are met.

Moreover, Principal's assertion below that there is not "a single Iowa case holding that a bad faith claim can be established where there is no coverage under the policy merely because of a subsequent waiver"[6] is false as well as a red herring. (Def. Br. at 12). First, as set forth in Section I.A., LoraLee disputes the contention that "there is no coverage under the policy." Second, a century ago, in 1918—even before the Iowa Supreme Court established the tort of bad faith—it held that not returning unearned premium in light of a claim demonstrates bad faith (as well as fraud). "To keep the money, and insist on different uncommunicated terms, would savor of *fraud*. *Good faith* required that the defendant should not remain passive, but should do something[.]" *McDonald*, 169 N.W. at 358 (1918) (*quoting Shea*, 35 N.E. at 856) (emphasis added). Thus, Principal knew (or should have known) that if it gambled on retaining premium on the Policy that it

[6] More precisely, Principal asserts that LoraLee's counsel could not find such a case, which was part of Principal's subtle effort to shift its high burden of proof in its summary judgment motion. Its statement is really a backwards way of saying that it could not find authority to escape liability for breaching the contract by denying LoraLee's claim and then refusing to pay it.

considered void *ab initio*, it would not only lose any asserted policy defense, but would be acting in bad faith.

Additionally, *McDonald* sets out Principal's *duty* regarding premium that it considers unearned. "The rule of law, as well as of reason, required the company, if it proposed to assert a forfeiture of the insurance, to return the money at once[.]" *McDonald,* 169 N.W. at 357. It then rejected the insurer's argument that some courts did not apply the waiver law as strictly:

> No case goes to the extent of saying that the company may so retain the money as a matter of right without the consent, express or implied, of the person insured who pays it. Every principle of law and fair dealing requires that, if the company proposes to reject the payment of the premium and hold the money for another purpose, it shall promptly notify the insured of that fact and give him opportunity to say for himself whether he desires the money to be so used. *Retention of the money an unreasonable length of time without giving such notice will necessarily work a waiver of the forfeiture.*

Id. at 358 (emphasis added).

Given the Iowa Supreme Court's imputation of knowledge of the law of waiver upon the insurer, and Principal's undisputed retention of LoraLee's premium after denying her policy was in force, it follows that:

(i) Principal lacked a reasonable basis for denying [LoraLee's] claim because "[i]t knew or should have known that, if it kept [the premium] for more than [a] reasonable time, the [policy

condition underpinning Principal's denial of LoraLee's claim] would be waived"; and

(ii) because the Court already determined Principal "knew or should have known . . . the [policy condition underpinning Principal's denial of LoraLee's claim] would be waived", Principal lacked a reasonable basis for its ongoing denial.

See Mettner, 103 N.W. at 114.

As detailed in Sections I, II, and III, Principal had no legal justification to deny LoraLee's claim based on the explicit language of the Policy and in light of Principal retaining what it argues is unearned premium despite its knowledge of an alleged defense. Accordingly, the District Court's Order granting Principal summary judgment was in error and this Court should rule that LoraLee's bad faith claim shall survive.

CONCLUSION

For the reasons provided herein, this Court should rule that the District Court erred as a matter of law in granting Principal's Motion for Summary Judgment on each of LoraLee's claims and remand for continued proceedings.

REQUEST FOR SUBMISSION WITH ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.903(2)(i), Appellee requests oral argument.

DATED on October 22, 2019.

/s/ L. Craig Nierman

L. Craig Nierman # AT0005754
Thomas E. Williams #AT0012176
PHELAN TUCKER LAW LLP
321 East Market Street
P.O. Box 2150
Iowa City, IA 52244
(319) 354-1104
(319) 354-6962 Fax
nierman@phelantuckerlaw.com
williams@phelantuckerlaw.com
ATTORNEY FOR PLAINTIFF

CERTIFICATE OF COST

I hereby certify that the foregoing Brief was e-Filed, and therefore incurred no printing costs.

/s/ L. Craig Nierman
L. Craig Nierman

PROOF OF SERVICE AND CERTIFICATE OF FILING

I, L. Craig Nierman, attorney for Appellant, certify that I filed this Final Brief with the Clerk of the Supreme Court via EDMS/e-Filing on the 23rd day of October, 2019.

I further certify that I served this document on all parties in this matter via EDMS/e-Filing on the 23rd day of October, 2019.

/s/ L. Craig Nierman
L. Craig Nierman

CERTIFICATE OF COMPLIANCE

WITH TYPE-VOLUME LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

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/s/ L. Craig Nierman — October 23, 2019
L. Craig Nierman — Date

IN THE SUPREME COURT OF IOWA

No. 18-0827

DAVID CHARLES ARCH,
Plaintiff-Appellant,

vs.

JARED MICHAEL WHITE,
Defendant-Appellee.

APPLICATION FOR FURTHER REVIEW OF COURT OF APPEALS DECISION FILED FEBRUARY 20, 2019

L. Craig Nierman AT0005754
Phelan, Tucker, Mullen, Walker, Tucker & Gelman, L.L.P.
321 East Market Street, Suite 200
PO Box 2150
Iowa City, IA 52244-2150
T: 319-354-1104
F: 319-354-6962
nierman@ptmlaw.com
ATTORNEY FOR PLAINTIFF-APPELLANT

QUESTIONS PRESENTED FOR REVIEW

I. Did the Court of Appeals err by ruling as follows:

> When Appellee/Defendant willfully refused to perform its only contract obligation until Appellant/Plaintiff knowingly made a false statement in conjunction with an insurance claim, there was no material breach.

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STATEMENT SUPPORTING FURTHER REVIEW

Pursuant to Iowa R. App. P. 6.1103, Appellant/Plaintiff David Charles Arch (Arch) respectfully makes this Application for Further Review of the Court of Appeals decision of February 20, 2019 (Decision), which is annexed hereto.

The Decision misapplied *Maytag Co. v. Alward*, 112 N.W.2d 654 (Iowa 1962) when it ruled that Appellee/Defendant Jared Michael White (White)—through his insurance carrier (Carrier)—did not materially breach the settlement contract by intentionally refusing to tender the required payment until Arch knowingly made a false statement.

While the law favors settlements, they are not impervious to the consequences of a material breach. In *Alward,* the Supreme Court stated that rescission of a settlement contract is warranted when the breach is "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Alward*, 112 N.W.2d at 660 (quoting *Callanan v. Powers*, 92 N.E. 747, 752 (N.Y. 1910)). More specifically, *Alward* held that a material breach occurs when there is a "failure of consideration [or] repudiation of the contract or an essential part thereof . . ." *Id*. Accordingly, rescission was warranted

when White, through his Carrier, intentionally refused to perform his only contract obligation.

Moreover, rescission is available when a breach "substantially defeats [the] purpose" of the settlement contract. *Id*. Not only was the purpose of the agreement between the parties to compensate Arch, but it was also to allow the parties to resolve all matters related to the tort. Depriving Arch of settlement proceeds and leaving the dispute unresolved would be the antithesis of the settlement's purpose.

Further, because the Carrier demanded that the false, written statement be surrendered as part of an insurance claim, acquiescing to the Carrier's demand could have exposed Arch to prosecution for insurance and wire fraud. In other words, letting the Decision stand would so dramatically alter the negotiating power between tort claim parties that it would actually have a profound chilling effect on settlements; increased litigation would result.

Wherefore, Arch requests this Court grant further review and reverse the Decision.

ARGUMENT

I. THE COURT OF APPEALS ERRED WHEN IT HELD THAT THE INTENTIONAL WITHHOLDING ALL CONSIDERATION DID NOT CONSTITUTE A MATERIAL BREACH.

This Court has stated,

> [w]hile it is and should always be the policy of the courts to encourage the amicable settlement of all controversies, it is even more a matter of good policy and good morals to stamp the law's disapproval upon settlements which bear the taint of fraud and undue advantage.

Kelly v. Chicago, R.I. & P. Ry. Co., 114 N.W. 536, 539 (Iowa 1908); *see also* 15A C.J.S. Compromise & Settlement § 61 (stating that the courts' preference for settlements "does not mean that courts must interpret settlement agreements to forever bar the revival of original claims even if breached.").

Rescission is justified when a breach is "material and willful, or, if not willful, so substantial and fundamental as to strongly tend to defeat the object of the parties in making the contract." *Alward*, 112 N.W.2d at 660 (quoting *Callanan*, 92 N.E. at 752; quoted in the Decision at p. 7). The evidence demonstrates that White's breach was both willful and material; it also defeated the object of the contract.

A. THE BREACH WAS WILLFUL.

Following a motor vehicle collision, the parties agreed to a settlement via exchange of correspondence. Defendant's Motion, Ex. A, App. 16; Affidavit of L. Craig Nierman (Affidavit), Ex. 3, p. 1, App. 26; Affidavit ¶ ¶ 1-4, App. 20-21. The Carrier *intentionally* withheld the payment of settlement funds until Arch signed a false statement that he had received the settlement check. *Id.* This new condition constituted a breach of the settlement agreement. "The defendant's attempt to attach new conditions to the original contract of settlement and a refusal to deliver the plaintiff's property unless the plaintiff meet[s] these new conditions constitutes a refusal to perform according to the terms of the settlement." 15A C.J.S. Compromise & Settlement § 61 (citations omitted). Even the Decision acknowledges that "Arch's refusal to execute the release prior to receipt of the settlement draft is understandable." Decision, p. 8.

Not only was there a breach, but it was intentional. There is nothing in the record to rebut the fact that, prior to the rescission, Arch, through his attorney, repeatedly advised the Carrier that its course of action would materially breach the settlement. *See, e.g.*, Affidavit, Ex. 3, p. 1, App. 26;

Affidavit ¶ ¶ 1-4, App. 20-21. Accordingly, White, through his Carrier, had actual notice of the breach, but persisted.

The Decision seeks to justify the Carrier's breach by asserting that the Carrier "could very well have sent Arch's attorney the settlement draft and the release with instructions that the draft not be negotiated until Arch signed the release and returned it to [Carrier]." Decision, p. 8. Yet, the fact that the Carrier did not do that is precisely the point; it *could* have avoided a material breach, but *chose* not to. Thus, the breach was intentional.

B. THE BREACH WAS MATERIAL.

i. White's Withholding of Consideration Is a Per Se Material Breach Justifying Rescission.

Rescission "is permitted for failure of consideration . . ." *Alward*, 112 N.W.2d at 660 (quoting *Callanan v. Powers*, 92 N.E. 747, 752 (N.Y. 1910)) (*accord* 15A C.J.S. Compromise & Settlement § 61). Thus, because White withheld the consideration required by the contract, the breach was sufficiently material to warrant rescission.

ii. The Breach Was Material Because There Was Not Even Partial or Substantial Performance.

The Decision errantly asserts that White's intentional refusal to pay the amount required by the contract until Arch knowingly signed a document containing a materially false statement does not rise to the level of a

"material" breach. Decision, p. 8. That begs the question: *What more would White have had to do to trip the materiality requirement?* As discussed above, White's refusal to provide the required consideration constitutes a breach so great in scope that it alone justifies rescission. *Id.* Yet the Carrier aggravated the material breach by demanding that Arch *intentionally* misrepresent a material fact in connection with an insurance claim. In other words, the breach not only meets the materiality requirement, but *exceeds* that threshold.

Perhaps the Decision's greatest flaw is that it did not identify any way in which White even partially performed his contract obligations. It is axiomatic that if a contract was not fully performed, there was either a material breach or substantial performance. "Substantial performance is performance without a material breach, and a material breach results in performance that is not substantial." II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.16, at 518 (3d ed. 2004) (quoted with approval in *Flynn Builders, L.C. v. Lande*, 814 N.W.2d 542, 546 (Iowa 2012). Thus, because White breached the contract, he must have *substantially* performed to avoid being in material breach. Moreover, the burden is on White to show he substantially performed. *Sheer Const., Inc. v. W. Hodgman and Sons, Inc.*, 326 N.W.2d 328, 332 (Iowa 1982) (citing *C. Wisconsin Supply Co. v.*

Johnston Bros. Clay Works, 190 N.W. 961, 963 (Iowa 1922)). However, he presented no evidence to indicate any performance.

Indeed, White cannot show substantial performance—or even partial performance—because he did not tender *any* payment, which was his only contractual duty. In other words, he did *absolutely nothing* toward fulfilling his contractual duty. Accordingly, by definition, he did not even *partially* perform; therefore, it is impossible for him to have *substantially* performed. Thus, by simple deduction, White *materially* breached the contract and it was error to hold otherwise.

iii. An Intentional Breach Is, by Definition, Material and Not Substantial.

White's willfulness[1] establishes that the breach was material. A finding that a breach was only substantial requires that any failure to perform be "inadvertent or unintentional." *Stratmeyer v. Hoyt*, 174 N.W. 243, 245 (Iowa 1919); *see also Littell v. Webster Cnty*, 131 N.W. 691, 694 (Iowa 1911), *opinion supplemented on denial of reh'g*, 132 N.W. 426 (Iowa 1911). However, because White's actions were intentional, it was error to hold that his breach was anything but material.

[1] *See* Section A.

iv. The Materiality of the Breach Is Demonstrated by How It Completely Deprived Arch of the Settlement Benefits.

The most significant factor in determining whether a breach is material "is the extent to which the breach will deprive the injured party of the benefit that it justifiably expected." *Van Oort Constr. Co., Inc. v. Nuckoll's Concrete Serv., Inc.*, 599 N.W.2d 684, 692 (Iowa 1999) (quoting II E. Allan Farnsworth, *Farnsworth on Contracts* § 8.16, at 496–97 (2d ed. 1998)). "A breach of a contract is a 'material breach' when it involves an essential and inducing feature of the contract . . ." 17A Am. Jur. 2d Contracts § 670 (citations omitted). Obviously, to Arch, the *only* "essential and inducing feature of the contract" was cash. Thus, White's refusal to make any payment was material.

Moreover, the deprivation was complete. Arch's only contract benefit was the settlement check. Thus, the monetary payment was *the* "essential and inducing feature" to Arch because it was his only benefit and only inducement to give up his right to litigate the matter.

v. The Materiality of the Breach Is Also Revealed in How It Would Have Stripped Arch of Almost All of His Civil Remedies.

The scope of the materiality of the breach is revealed in the dramatically altered landscape that would have resulted had Arch succumbed to lying at the Carrier's insistence. If, for whatever reason, the

check never arrived, Arch would have been at a distinct disadvantage in recovering his money because he already signed a statement acknowledging that he had it. A party trying to reform a written agreement due to mistake must do so by clear and convincing evidence. *See, e.g., Akkerman v. Gersema*, 149 N.W.2d 856, 859 (Iowa 1967).

Further, Arch would have had to show that the act giving rise to the claim was "an unintentional act or omission arising from ignorance, surprise, or misplaced confidence." 17A C.J.S. Contracts § 181. Since Arch had, appropriately, recognized the release's misstatement, he could not argue that signing it was "unintentional" nor could he credibly claim it was born of "ignorance" or "surprise." As this Court has stated, "a court of equity has the power to relieve a party from the consequences of a mistake. However, what happened here is not the result of a mistake." *SDG Macerich Prop., L.P. v. Stanek Inc.*, 648 N.W.2d 581, 587 (Iowa 2002) (citation omitted). Accordingly, once the Carrier had the signed receipt for a payment never made, it would have been in a position to exploit its superior legal position.

vi. The Depth of the Breach Is Made Clear by the Criminal Consequences That Could Have Ensued If the Demanded Additional Term Was Acquiesced To.

Another way to analyze the materiality of the breach is to consider the consequences of the Carrier's actions if Arch submitted to its demand for

him to lie in conjunction with an insurance claim. This would set up Arch to be prosecuted for insurance fraud, a felony. *See* Iowa Code § 507E.3(2). Insurance fraud is committed when a person intentionally

> [p]resents or causes to be presented to an insurer, any written document . . . as part of, or in support of, a claim for payment or other benefit pursuant to an insurance policy, knowing that such document or statement contains any false information concerning a material fact.

Iowa Code § 507E.3(2)(a). While it is possible that, if Arch were prosecuted, he could have successfully argued that he did not intend to defraud the Carrier, intentionally submitting to the Carrier's demand would have put him dangerously close to the commission of a felony. Moreover, using mail, email, or fax to transmit the release—containing a statement that Arch knew was false—could have put him in jeopardy of committing mail or wire fraud. *See* 18 U.S.C § 1341 *et seq.*; 18 U.S.C. § 1343 *et seq.* Thus, the Decision puts Iowans like Arch in a no-win situation of choosing between being at risk of criminal prosecution and not receiving bargained-for settlement funds. Similarly, the attorneys that represent them would be forced to either block the settlement or face criminal liability.[2] What is particularly disturbing about the Decision is that it only briefly acknowledges the potentially grave criminal consequences of succumbing to

[2] *See also* Iowa R. Prof'l Conduct 32:4.1(a) ("In the course of representing a client, a lawyer shall not knowingly . . . make a false statement of material fact or law to a third person . . .").

the Carrier's demands in a footnote, but does not analyze them or consider their contribution to the materiality of the breach. *See* Decision, p. 7.

vii. The Breach's Cumulative Effect, If Sanctioned, Is So Dramatic That It Would Undermine the Court's Preference for Settlements.

Passively sanctioning the Carrier's conduct would allow tort defendants and their insurers to condition a payment on a signed receipt and then not provide the payment. Leveraging the written acknowledgements by refusing to pay until claimants mustered clear and convincing evidence to the contrary would completely remake the tort resolution system. In summary, it would become a license to pay only those willing to litigate breached agreements and pay the related costs. Once this practice became known, claimants would become appropriately leery of settlement negotiations and more likely to resort to litigation. Thus, the Decision's stated goal—to encourage settlements—is actually undermined by its holding. *See* Decision, p. 6.

C. BECAUSE ARCH DEMONSTRATED THAT THE BREACH WAS MATERIAL, HE HAS A RIGHT TO RESCIND.

Because White materially breached the settlement contract, Arch is entitled to proceed to trial. *Alward*, 112 N.W.2d at 660 (*accord* 15B Am. Jur.2d Compromise and Settlement § 40 ("A party's material breach or failure to fulfill a substantial condition of a settlement agreement excuses the

other party's obligation to perform its end of the bargain." (citations omitted))). Thus, the Decision impermissibly denied Arch's right to a trial by jury.

CONCLUSION

The courts below erred in ruling that White's knowing and material breach was legally inconsequential. This Court should grant this Application and then remand the case for trial.

Respectfully submitted on March 11, 2019.

/s/ L. Craig Nierman
L. Craig Nierman AT0005754
Phelan, Tucker, Mullen, Walker, Tucker & Gelman, L.L.P.
321 E Market Street, Suite 200
PO Box 2150
Iowa City, IA 52244-2150
T: 319-354-1104
F: 319-354-6962
nierman@ptmlaw.com
ATTORNEY FOR PLAINTIFF-APPELLANT

CERTIFICATE OF COMPLIANCE WITH TYPEFACE TYPE-VOLUME LIMITATION

This Application complies with the typeface and type-volume requirements of Iowa R. App. P. 6.1103(4) because this Application has been prepared in a proportionally spaced typeface using Times New Roman in 14-point, and contains 3,129 words, excluding the parts of the Application exempted by Iowa R. App. P. 6.1103(4)(a).

/s/ L. Craig Nierman	March 11, 2019
Signature	Date

CERTIFICATE OF FILING AND SERVICE

I certify the preceding Application for Further Review was filed with the Supreme Court of Iowa by electronically filing the same with the Iowa Supreme Court Clerk on March 11, 2019.

I further certify I served the preceding Plaintiff-Appellant's Final Brief on attorneys of record for all other parties by electronically filing this document in accordance with the Chapter 16 Rules on March 11, 2019.

/s/ L. Craig Nierman	March 11, 2019
Signature	Date