

**STATE AND DISTRICT JUDICIAL NOMINATION COMMISSION
AND OFFICE OF THE GOVERNOR
JOINT JUDICIAL APPLICATION**

Please complete this application by placing your responses in normal type, immediately beneath each request for information. Requested documents should be attached at the end of the application or in separate PDF files, clearly identifying the numbered request to which each document is responsive. Completed applications are public records. If you cannot fully respond to a question without disclosing information that is confidential under state or federal law, please submit that portion of your answer separately, along with your legal basis for considering the information confidential. Do not submit opinions or other writing samples containing confidential information unless you are able to appropriately redact the document to avoid disclosing the identity of the parties or other confidential information.

PERSONAL INFORMATION

- 1. State your full name.**

Dustin Dean Hite

- 2. State your current occupation or title. (Lawyers: identify name of firm, organization, or government agency; judicial officers: identify title and judicial election district.)**

Attorney with Heslinga, Dixon & Hite

- 3. State your date of birth (to determine statutory eligibility).**

November 14, 1983

- 4. State your current city and county of residence.**

New Sharon, Mahaska County, Iowa

PROFESSIONAL AND EDUCATIONAL HISTORY

- 5. List in reverse chronological order each college and law school you attended including the dates of attendance, the degree awarded, and your reason for leaving each school if no degree from that institution was awarded.**

University of Iowa, College of Law-Iowa City, Iowa August 2006-May 2009
J.D., with Distinction

Central College-Pella, Iowa August 2002-May 2006
B.A., Summa Cum Laude
Majors: History, Economics, and Social Sciences

Indian Hills Community College-Ottumwa, Iowa August 2001-December 2001
I took one psychology course offered for college credit during my senior year in high school.

- 6. Describe in reverse chronological order all of your work experience since graduating from college, including:**
- a. Your position, dates (beginning and end) of your employment, addresses of law firms or offices, companies, or governmental agencies with which you have been connected, and the name of your supervisor or a knowledgeable colleague if possible.**
 - b. Your periods of military service, if any, including active duty, reserves or other status. Give the date, branch of service, your rank or rating, and present status or discharge status.**

Heslinga, Dixon & Hite September 2009-Present
Formerly Heslinga, Heslinga, Dixon & Moore and Heslinga, Dixon, Moore & Hite
118 North Market Street, Oskaloosa, Iowa 52577
Attorney
David D. Dixon-Partner, (641) 673-9481

City of Oskaloosa-City Band May 2016-Present (Summers)
220 South Market Street, Oskaloosa, Iowa 52577
City Band Member-Trombone
Bruce Peiffer-Director, (641) 660-7853

Iowa House of Representatives January 2019-December 2022
1007 East Grand Avenue, Des Moines, Iowa 50319
State Representative
Pat Grassley-Speaker of the Iowa House, (319) 231-8763

City of New Sharon, Iowa January 2012-December 2018
101 South Main Street, P.O. Box 507, New Sharon, Iowa 50207
Mayor
Lisa Munn-City Clerk, (641) 637-4124

Mahaska County-County Attorney's Office May 2008-August 2008
106 South First Street, Oskaloosa, Iowa 52577
Prosecuting Intern
Hon. Rose Anne Mefford-former County Attorney, (641) 673-7786

Vermeer Manufacturing
1210 East Vermeer Road, Pella, Iowa 50219
Student Worker-Construction
Kelly Gordon-Supervisor, Contact Information Unknown

May 2006-August 2006

7. **List the dates you were admitted to the bar of any state and any lapses or terminations of membership. Please explain the reason for any lapse or termination of membership.**

State of Iowa

September 25, 2009

8. **Describe the general character of your legal experience, dividing it into periods with dates if its character has changed over the years, including:**
- a. **A description of your typical clients and the areas of the law in which you have focused, including the approximate percentage of time spent in each area of practice.**
 - b. **The approximate percentage of your practice that has been in areas other than appearance before courts or other tribunals and a description of the nature of that practice.**
 - c. **The approximate percentage of your practice that involved litigation in court or other tribunals.**
 - d. **The approximate percentage of your litigation that was: Administrative, Civil, and Criminal.**
 - e. **The approximate number of cases or contested matters you tried (rather than settled) in the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel, and whether the matter was tried to a jury or directly to the court or other tribunal. If desired, you may also provide separate data for experience beyond the last 10 years.**
 - f. **The approximate number of appeals in which you participated within the last 10 years, indicating whether you were sole counsel, chief counsel, or associate counsel. If desired, you may also provide separate data for experience beyond the last 10 years.**

I have a general practice, including but not limited to family law, probate and estate planning, litigation, real estate, and taxes. In addition, I am the city attorney for approximately 10 small towns in Jasper, Poweshiek, Mahaska, and Keokuk Counties. My practice has morphed over the years, as many small-town lawyers' practices do. When I first started practice, approximately 80 percent of my work was made up of court appointed cases, including juvenile, criminal, and mental health and substance abuse commitments. As time moved on, my non-court appointed business grew, so I slowly shrank my court appointed work until I completely withdrew prior to going into the Legislature in 2019. Currently, I estimate that 25 percent of my practice is family law, 25 percent of my practice is probate and estate planning, 25 percent of my practice is real estate, 10 percent of my practice involves my city clients, 10 percent of my practice involves taxes, and 5 percent of my practice involves the remaining areas such as business law, litigation, small claims, and criminal matters.

Trying to describe a typical client of mine is an impossibility. I represent clients who are very wealthy and clients who live in poverty. I represent businesses and cities. I represent farmers, teachers, factory workers, executives and hospitality workers. I represent clients who have never set foot in a court room before and clients who are almost more familiar with the court system than I am. I represent clients who have been to prison and clients who have never had a speeding ticket. I represent clients who are the fifth or sixth generation to live on the same farm and clients who recently immigrated to the United States. I have clients whose families have been clients of my firm for four generations and clients who have never had a lawyer. One of the benefits of having a general small-town practice is that I have clients from all walks of life and with a wide variety of experiences.

Currently, I estimate that approximately 50 percent of my work includes matters not involving litigation or court appearances. My practice outside of litigation and court appearances consists mostly of real estate transactions, estate planning, and taxes. I also prepare and review contracts and advise clients on general business matters. I would estimate that approximately 50 percent of the work that I do for cities involves non-litigation matters, such as attending council meetings, drafting ordinances, preparing and reviewing contracts, and generally advising my clients.

I estimate that approximately 50 percent of my practice involves litigation and court or administrative appearances. Of these matters, almost all of them are civil cases, including small claims, family law, probate, general litigation, and prosecuting civil infractions and criminal cases on behalf of my city clients. In addition, I handle approximately one or two criminal cases a year and approximately one or two administrative cases a year. When I first started practicing, my litigation and court experience was approximately 50 percent civil matters and 50 percent criminal matters. This makeup slowly shifted over time, and I began to take on more civil cases and fewer criminal cases.

At the beginning of the last 10 years of my practice, having contested hearings and bringing things to trial happened quite frequently, especially in juvenile court and magistrate court. However, since I gave up my contract with State Public Defender's Office and stopped accepting court appointed work, the number of cases I have that actually ended up in trial has decreased substantially. Therefore, it is extremely difficult to approximate how many cases I tried in the last 10 years, especially if I include small claims, municipal infractions, and simple misdemeanors. I would estimate that I have tried between 75 and 100 cases in the last 10 years. All of these have been in state court, and approximately 75% are in magistrate or juvenile court, with the remaining cases being tried in district court. Currently, I average two to three trials per year in district court, and six to ten trials in magistrate court. Most of my litigation in district court involves family law cases, but also includes general litigation. I am the sole attorney in most all of the cases I litigate. I have been involved in three jury trials during my practice and the remaining trials have been decided by a judge.

I handle the appeals for all my cases that are appealed. I have been listed as an attorney in 11 appellate cases in the last 10 years. Of the cases in the last 10 years, I have been the sole counsel in 4 cases, lead counsel in 4 cases, and was guardian ad litem in 3 cases. I have been involved with 22 appellate cases during my entire career. Of these cases, I have been sole counsel in 5 cases, lead counsel in 4 cases, associate counsel in 4 cases, guardian ad litem in 8 cases, and I represented a father who did not participate in an appeal in 1 case.

9. Describe your pro bono work over at least the past 10 years, including:

- a. Approximate number of pro bono cases you've handled.**
- b. Average number of hours of pro bono service per year.**
- c. Types of pro bono cases.**

I have been involved with the Iowa Legal Aid Volunteer Lawyers Project (VLP) since almost the beginning of my career. I usually accept one to two cases a year, although many of them do not end up in litigation. The VLP cases I have been involved with are typically family law cases, although they have included guardianships, real estate, and estates as well. In addition to working with the VLP, I help several local non-profit organizations. My work with the non-profit organizations includes preparing organizational documents, including obtaining non-profit status from the Internal Revenue Service, filing necessary reports with the Iowa Secretary of State, and providing general legal advice. For the last three years, I have volunteered my legal services through Mahaska Connect, which is a one-day, one-stop location for low-income residents to obtain necessary services from haircuts and SNAP benefits applications, to legal services. This past year, we teamed up with Iowa Legal Aid and ran an expungement clinic during the Mahaska Connect event. I average between 5 and 10 hours of pro bono service a year, with some years being higher and some years being lower.

10. If you have ever held judicial office or served in a quasi-judicial position:

- a. Describe the details, including the title of the position, the courts or other tribunals involved, the method of selection, the periods of service, and a description of the jurisdiction of each of court or tribunal.**

Not Applicable.

- b. List any cases in which your decision was reversed by a court or other reviewing entity. For each case, include a citation for your reversed opinion and the reviewing entity's or court's opinion and attach a copy of each opinion.**

Not Applicable.

- c. **List any case in which you wrote a significant opinion on federal or state constitutional issues. For each case, include a citation for your opinion and any reviewing entity's or court's opinion and attach a copy of each opinion.**

Not Applicable.

11. If you have been subject to the reporting requirements of Court Rule 22.10:

- a. **State the number of times you have failed to file timely rule 22.10 reports.**

Not Applicable.

- b. **State the number of matters, along with an explanation of the delay, that you have taken under advisement for longer than:**

- i. **120 days.**

Not Applicable.

- ii. **180 days.**

Not Applicable.

- iii. **240 days.**

Not Applicable.

- iv. **One year.**

Not Applicable.

12. Describe at least three of the most significant legal matters in which you have participated as an attorney or presided over as a judge or other impartial decision maker. If they were litigated matters, give the citation if available. For each matter please state the following:

- a. **Title of the case and venue,**
- b. **A brief summary of the substance of each matter,**
- c. **A succinct statement of what you believe to be the significance of it,**
- d. **The name of the party you represented, if applicable,**
- e. **The nature of your participation in the case,**
- f. **Dates of your involvement,**
- g. **The outcome of the case,**
- h. **Name(s) and address(es) [city, state] of co-counsel (if any),**
- i. **Name(s) of counsel for opposing parties in the case, and**
- j. **Name of the judge before whom you tried the case, if applicable.**

This is a difficult question to answer. As an attorney in a small town, county seat practice, I take the cases and clients who walk in my door, and I do not have the luxury of seeking out the most legally significant cases. Much of what I do, while routine to me, is significant to my clients. Whether it is family law case where I was able to get my client the custody arrangement they desired, an estate where I helped a family navigate the probate process at the same time they are grieving the loss of their loved one, or the farm sale which ensured that the family farm stays in the family, all of what I do is important to my clients. The three cases below are the three legal matters, that as I look back, still stand out to me as important matters in my legal career:

1.
 - a. *In re: C.H. and T.H.*; Poweshiek County Case Nos. JVJV001538-001539
 - b. These cases involved two young siblings and were Child in Need of Assistance (CINA) cases instigated by the Department of Human Services after the children were found wandering down the street without any parents around. The children were originally removed from the parents and placed in foster care but were eventually returned to the custody of the mother and the case was closed.
 - c. This case is significant because it involved what I believed was a wrong decision by DHS which I did not believe was in the best interest of the children. I was able to help steer the case back to where I think it should have been. I was guardian ad litem for the children, and DHS had made the decision early on that the parents were not capable of having their children returned and were moving to terminate the parents' rights and to have the children be adopted. The Department went so far as to move the children from one foster home to another in which the foster parents were seeking to adopt the children. The Department even recommended termination of parental rights to the court. Both parents had mental limitations, and the father also had some physical limitations, but in my opinion, they were able to adequately care for their children, they just needed some help and guidance. I did not believe that termination was in these children's best interests and fought and argued with the Department and its social workers to move the case and their efforts towards reunification instead of termination. I believe this was a case where the Department made certain assumptions, and as guardian ad litem, it was clear to me that I was expected to just agree. This case was early on in my career, and as a young attorney, it is not always the easiest path to disagree. The children were returned, and the case was eventually successfully closed. The mother of the children still calls me every couple of years and updates me on how the family is doing, and to the best of my knowledge, the family has had no more interactions with DHS. This case solidified for me the importance of every role in a case. There is no question in my mind that this case came to the correct outcome, in part, due to my actions.
 - d. All names in juvenile cases are confidential, but I was the children's guardian ad litem.
 - e. I was guardian ad litem for the children.

- f. August 10, 2010-December 1, 2012.
 - g. The children in this matter were returned to the parents, and the case was successfully closed.
 - h. None.
 - i. Rebecca L. Petig-Assistant Poweshiek County Attorney, Grinnell
Fred Stiefel-Mother's Attorney, Victor
Denise Gonyea-Father's Attorney, Grinnell
 - j. Hon. Randy S. DeGeest
- 2.
- a. *In re: the Guardianship of A.G.G.; Wapello County Case No. GCPR007092*
 - b. In this case, the grandmother of a child was attempting to get guardianship over her granddaughter. The granddaughter lived with the grandmother for most of her life as both parents had been in and out of the child's life for various lengths of time, and each parent struggled with mental health and drug use.
 - c. This case is significant because I was able to obtain my client guardianship over her granddaughter, which has allowed the child to have the stability in her life that she deserves. There is a strong preference in Iowa law for parents, and this case was far from a sure thing. This case involved a substantial amount of time, but for my client, this was probably the most important thing she had ever undertaken. My client has ended up being a long-term client so I have been able to observe and see how this one case has had a significant and positive impact on the life of my client and her granddaughter. This case is an example of a case that is routine for me as an attorney, but the most important thing in my client's life.
 - d. Juvenile guardianships are now confidential. My client's initials are J.H.
 - e. I represented the petitioner and proposed guardian.
 - f. March 8, 2016-December 8, 2020.
 - g. My client was granted guardianship, although the guardianship was eventually closed because my client adopted her granddaughter.
 - h. Heather Simplot, Ottumwa
Represented my client until I took over the case in March 2016.
 - i. Michael O. Carpenter-Mother's Attorney, Ottumwa
Sarah Wenke-Guardian ad Litem, Ottumwa
Sam Erhardt-Guardian ad Litem (until withdrawal), Ottumwa
Jeff Logan-Attorney for Father, Deceased
 - j. Various judges entered orders during the pendency of this Guardianship, but the Hon. Dan Wilson served as the judge at the trial on the Petition for Guardianship.
- 3.
- a. *Drost v. Mahaska County Board of Review; Mahaska County Case No. CVEQ086908; 2013 Iowa App. LEXIS 1069 (Iowa Ct. App. 2013).*
 - b. This case involved a dispute about the assessed valuation of agricultural real estate. I represented landowners who had sold a Wetlands Easement to the United States which prevented any agricultural or other use of the

property, except that it allowed the land to be used for hunting and recreation. Iowa law requires that agricultural real estate is to be assessed for tax purposes, based upon the ground's productivity. Iowa Administrative Rules further provided a formula to calculate a parcel of agricultural land's assessed value using the Corn Suitability Rating. My clients challenged the assessed value of their land because the land was no longer able to be productive for agricultural use, and therefore, the assessed valuation based solely on the formula using CSR was not an accurate gauge of the land's productivity.

- c. This case is significant because even though my clients were unsuccessful in this matter, I believe that it brought about a change in the law. During the pendency of the appeal of this matter, after both parties submitted their briefs but prior to oral arguments and the ruling in this case, the Iowa Department of Revenue adopted Iowa Admin. Code r. 701-71.3(1)(b)-(d), which now provided, beginning with the 2014 assessment, that the assessor could consider "non-cropland" and decrease the assessed valuation to account for the nonproductivity of the "non-cropland." I had received a call from an attorney for the Iowa Property Assessment Appeal Board (PAAB) while the case was on appeal, and so I knew the PAAB, and likely the Department of Revenue, was watching this appeal. This case showed me the importance of taking on those issues that may be difficult because even if the outcome is not what you wanted, it may still have a larger impact. Ultimately, I believe that this case brought about a change in the law which was beneficial to not only my clients, but other landowners across Iowa.
- d. Thomas Drost and Cynthia Drost.
- e. I was the attorney for the plaintiffs and landowners. While my former partner, Garold F. Heslinga, served as co-counsel, I handled all the legal work, including drafting all pleadings and briefs, representing my clients at trial, and arguing the case before the Iowa Court of Appeals.
- f. June 9, 2011-December 23, 2013.
- g. The district court denied my clients' challenge to their property assessment, which was affirmed on appeal.
- h. Garold F. Heslinga, deceased.
- i. Brett M. Ryan, Council Bluffs
- j. Hon. Dan Wilson

13. Describe how your non-litigation legal experience, if any, would enhance your ability to serve as a judge.

In addition to litigation, I handle such matters as estate planning, real estate transactions, business formation and operation, probate, and serve as the city attorney for multiple small towns. All of these experiences have better prepared me to be a district court judge. A district court judge can easily handle a dozen different types of cases on a court service day, just before lunch, which highlights the need to have a broad range of knowledge to effectively and efficiently do his or her job.

For example, family law cases, and dissolution of marriage cases often involve several different tax issues, some of which may be very complicated and sometimes not obvious. The difference in tax treatment of a traditional IRA versus a Roth IRA can be significant; the wages shown on a W2 do not always reflect the gross income of a party for the purposes of calculating child support; and the difference between the cost basis on a farmer's depreciate schedule and the actual value of a piece of machinery can often be substantial. I have substantial tax practice and prepare well over 100 tax returns a year. This allows me to know these differences and to understand the arguments of the parties better, which in turn, will lead to a more just and correct decision.

Another example involves probate and estates. District court judges often enter orders in several estates each court service day. Often, estates do not have an "opposing party;" therefore, the judge must rely upon their knowledge coupled with the representations of the attorney handling the estate. I have probated dozens and dozens of estates so I understand how the process works. Because of this experience, I know that if there is an estate where a niece is a beneficiary, there will likely need to be an Inheritance Tax Clearance on file before the estate can be closed. I also know what to look for in a properly executed will when deciding whether to enter an order for it to be admitted to probate. I can start from day one as a district court judge dealing with estate and other probate files, knowing I have a solid background and experience in probate.

As city attorney, I am also often asked to attend city council meetings when a particularly contentious issue has arisen. Sometimes it is because the city has sent out dozens of notices requesting residents to clean up their properties, or the city is looking at tightening the building regulations in town. I am asked to attend these meetings to provide legal advice to the council and mayor, but often, I am also asked to attend the meetings to keep the peace. I take the opportunity to explain the law, the city's options, the reason why the council should or should not make a decision, both to the city council and all the residents who may be in attendance. I must explain why I think the city should do something in a way that is understandable by both the people who are happy with the proposed action and those who are opposed with the goal to keep the peace. This is exactly what a district court judge does every day. A judge is required to keep order and decorum in the court room, and he or she must explain their decision in a way that is understandable and legally sound.

These are just a few examples of how my broad range of experience will benefit me as a judge. If selected, I will bring this experience with me to the bench and use it to do the job effectively and efficiently.

- 14. If you have ever held public office or have you ever been a candidate for public office, describe the public office held or sought, the location of the public office, and the dates of service.**

Mayor-City of New Sharon, Iowa

In office: January 2012-December 2018
Elections: November 2011 and November 2015

I served as mayor of a small town with approximately 1,300 residents. The city had four full-time employees, and operated its own fire department, water and sewer utilities, street department, library, and police department. As mayor, it was my job to chair city council meetings, but also operate as the day-to-day leader of the city. I dealt with a variety of issues from employment issues to disaster response to public relations. During my time as mayor, the city took over the library from a local nonprofit, franchised our water utility to the local rural water association, expanded our fire and police departments, and made various public works improvements.

State Representative, Iowa House of Representatives, Des Moines, Iowa

In office: January 2019-December 2022
Elections: June and November 2018, June and November 2020, June 2022

As a state representative, I served on various committees and subcommittees, both during and outside of session. I served as vice chair of the Judiciary Committee in 2019 and 2020, and served as chair of the Education Committee in 2021 and 2022. I presided over committee meetings, subcommittee meetings, and even the entire House of Representatives during debate when the Speaker was not available. As a state representative, I worked on various laws, from the beginning and drafting the bills, all the way to amending and changing them during the process, to voting for them. In addition, I worked with constituents to solve issues they may be dealing with. I kept my constituents informed of what was happening through newsletters and public forums, and attended various public events, such as being the guest speaker at an Eagle Scout ceremony.

Trustee-Mahaska Health Partnership (Mahaska County Hospital), Oskaloosa, Iowa

In office: April 2023-Present
Elections: This office is an elected position, but I was recently appointed to fill a vacancy, and therefore, have not participated in any election for this office. As a trustee, I am part of the board that oversees the hospital, sets the budget, and otherwise is responsible for the direction of the hospital.

15. If you are currently an officer, director, partner, sole proprietor, or otherwise engaged in the management of any business enterprise or nonprofit organization other than a law practice, provide the following information about your position(s) and title(s):

- a. Name of business / organization.**
- b. Your title.**
- c. Your duties.**
- d. Dates of involvement.**

- a. Indian Hills Community College Foundation

- b. Board of Directors Member
- c. I am part of the Board of Directors which oversees the Foundation and provides overall governance and direction for the Foundation.
- d. October 2022-Present

16. List all bar associations and legal- or judicial-related committees or groups of which you are or have been a member and give the titles and dates of any offices that you held in those groups.

Iowa State Bar Association-Member	2009-Present
Mahaska County Bar Association-Member	2009-Present
President	2011-2016
Secretary/Treasurer	2010-2011
Iowa Board of Law Examiners-Bar Exam Grader	2014-2017
Judicial District 8A Nominating Commission-Member	2016-2018
Mahaska County Magistrate Appointing Commission-Member	2015-2018

17. List all other professional, business, fraternal, scholarly, civic, charitable, or other organizations, other than those listed above, to which you have participated, since graduation from law school. Provide dates of membership or participation and indicate any office you held. “Participation” means consistent or repeated involvement in a given organization, membership, or regular attendance at events or meetings.

Mahaska County United Way-Board of Directors Member	2012-2017
President	2014
Vice President	2013
Past President	2015
Treasurer	2017
New Sharon Little League-Coach	2016-2019, 2023
Mahaska County Historical Society-Member	2018-Present
Pella Historical Society-Member	2020-Present
Sons of the American Legion-Member	2018-Present
Knights of Columbus-Member	2015-Present

North Mahaska Mock Trial-Coach

2012-2017

North Mahaska School Improvement Advisory Committee 2016-2017

-Member

- 18. If you have held judicial office, list at least three opinions that best reflect your approach to writing and deciding cases. For each case, include a brief explanation as to why you selected the opinion and a citation for your opinion and any reviewing entity's or court's opinion. If either opinion is not publicly available (i.e., available on Westlaw or a public website other than the court's electronic filing system), please attach a copy of the opinion.**

Not Applicable.

- 19. If you have not held judicial office or served in a quasi-judicial position, provide at least three writing samples (brief, article, book, etc.) that reflect your work.**

Writing Sample 1-*Curry v. Lewis*; Mahaska County Case Nos. LALA075371 & SCSC033720-Proposed Ruling

Writing Sample 2-*In re: the Guardianship of A.G.G.*; Wapello County Case No. GCPR007092-Petitioner's Brief

Writing Sample 3-*In re: J.C.*; Iowa Supreme Court Case No. 17-1283-Appellants Final Brief

OTHER INFORMATION

- 20. If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) is your spouse, son, daughter, brother, sister, uncle, aunt, first cousin, nephew, niece, father-in-law, mother-in-law, son-in-law, daughter-in-law, brother-in-law, sister-in-law, father, mother, stepfather, stepmother, stepson, stepdaughter, stepbrother, stepsister, half brother, or half sister, state the Commissioner's name and his or her familial relationship with you.**

None.

- 21. If any member of the State Judicial Nominating Commission (for Court of Appeals and Supreme Court applicants) or District Judicial Nominating Commission (for District Judge and District Associate Judge Applicants) is a current law partner or business partner, state the Commissioner's name and describe his or her professional relationship with you.**

None.

While not a direct answer to the question asked, I currently represent commission member Diane Crookham-Johnson in her role as executor of her mother's estate.

22. List the titles, publishers, and dates of books, articles, blog posts, letters to the editor, editorial pieces, or other published material you have written or edited.

“Contrary to perception, conservative values are compatible with tackling race issues in Iowa.” Guest Essay. *Des Moines Register*, June 9, 2020.

“New law brings transparency to property taxes.” Guest Column. *Des Moines Register*, May 28, 2019.

In addition, when I was a State Representative, I composed and published weekly newsletters during the legislative session. These newsletters were often written by my clerks, using articles created by caucus staff. Most of these newsletters were published in the local newspapers in the district I represented.

23. List all speeches, talks, or other public presentations that you have delivered for at least the last ten years, including the title of the presentation or a brief summary of the subject matter of the presentation, the group to whom the presentation was delivered, and the date of the presentation.

Iowa 8th Judicial District Bench/Bar Conference, October 29, 2021
Panelist discussing recent changes in laws regarding firearms.

Iowa 8th Judicial District Bench/Bar Conference, November 22, 2019
Panelist discussing recent changes in laws regarding guardianships and conservatorships.

Drake University-Continuing Legal Education Seminar, October 11, 2019
Panelist discussing recent changes in laws regarding guardianships and conservatorships.

University of Iowa-Continuing Legal Education Seminar, November 15, 2019
Panelist discussing recent changes in laws regarding guardianships and conservatorships.

Iowa Press, Iowa PBS, originally aired February 12, 2021
A question-and-answer news show focused on Iowa politics where I appeared, along with the Ranking Member of the Iowa House Education Committee, Representative Ras Smith, where we answered questions and had discussions about education policy and laws in the State of Iowa.

North Mahaska High School Graduation, Guest Speaker, May 15, 2022
Motivational speech entitled “Everything I need to know, I learned in kindergarten.”

American Legion Memorial Day Ceremony-Pella, Iowa, May 30, 2021
Speech honoring the soldiers and sailors who gave their lives in service to their country.

Memorial Day Ceremony-New Sharon, Iowa, May 28, 2018
Speech honoring the soldiers and sailors who gave their lives in service to their country.

In addition to the foregoing, as a politician, I have spoken at many different public events and have given many radio and television interviews. I have spoken to groups, including the Iowa Farm Bureau, the Iowa Association of School Boards, the Iowa Association of Business and Industry, the Iowa State Education Association, groups of local school board members and superintendents, and the Oskaloosa Optimist Club. I have participated in various candidate debates, legislative forums, and given political speeches at fundraisers and other political events. I have also made many speeches and debate comments during committee and subcommittee meetings as well as during debate in the Iowa House.

- 24. List all the social media applications (e.g., Facebook, Twitter, Snapchat, Instagram, LinkedIn) that you have used in the past five years and your account name or other identifying information (excluding passwords) for each account.**

Facebook:

Personal Account: <https://www.facebook.com/dustin.hite.969>

Political Account: <https://www.facebook.com/HiteforIowa>

State Representative Account: <https://www.facebook.com/RepDustinHite>

Snapchat

Username: dus10height

- 25. List any honors, prizes, awards or other forms of recognition which you have received (including any indication of academic distinction in college or law school) other than those mentioned in answers to the foregoing questions.**

The Economics Award, Central College, May 2006.

- 26. Provide the names and telephone numbers of at least five people who would be able to comment on your qualifications to serve in judicial office. Briefly state the nature of your relationship with each person.**

Judge Lucy Gamon, (641) 683-0055

I have appeared in front of Judge Gamon on numerous occasions, and she would have knowledge of my qualifications to be a judge.

Judge Shawn Showers, (319) 653-7741

I have appeared in front of Judge Showers on numerous occasions, and he would have knowledge of my qualifications to be a judge.

Judge Greg Milani, (641) 777-5096

I have appeared in front of Judge Milani on numerous occasions, and he would have knowledge of my qualifications to be a judge.

Wesley A. Chaplin, (641) 628-2383

Wes is a fellow attorney with whom I have had many cases. Typically, Wes and I are on opposite sides of a family law case, and he would have knowledge of my preparation, diligence, and temperament.

Michael W. Mahaffey, (641) 623-5425

Mike is a fellow attorney with whom I have had many cases. Many times, Mike and I are on opposite sides of various legal issues and cases, although we have also represented parties in the same case with the same goals. Mike would have knowledge of my demeanor, preparation, attention to detail, and knowledge of the law.

Kari Diggins, (641) 660-2136

Kari is a court reporter in District 8A and has been a reporter for many cases and contested hearings. She would have knowledge of my preparation for a hearing or trial, my knowledge of the law, my demeanor, and my interactions with court staff and the clerk's office.

27. Explain why you are seeking this judicial position.

I have always enjoyed public service, and I have actively sought out roles in public service since I have been in practice. I enjoy public service because it gives me an opportunity to be part of the process and work towards the goal of bettering my community. A district court judge is a public servant who works towards providing justice to the citizens of the district. While the methods may be different than an elected official, the goal is the same--working within the system to best serve the community. That is what I enjoy about public service so being a district court judge would allow me to continue that public service.

I also want to be part of the team which shapes how the judiciary looks over the next several decades. In my time as a lawyer, I have seen many changes take place, from the implementation of mandatory mediation in family law cases to electronic court files with EDMS to virtual court hearings. It is impossible to tell what the future holds for the court system, but it will be necessary to have judges who are willing to adapt, try new things, and utilize technology to increase the efficiency of the courts. As a partner in a small firm, I have actively worked to bring positive changes to our practice. Whether it's seeking the best software for tax preparation, or changing from paper files to electronic files, I have enjoyed the challenge of changing with the times. As a district court judge, I

want to work within the judicial system to address the changing needs of the judiciary. This includes not only embracing technology to be the most efficient possible, but also finding solutions to issues facing the courts such as the increase in pro se litigants. I believe that I am the right person who can help our court system change with the times to better serve the people of Iowa because that is exactly what I have done, both in my own practice and as an elected official.

Finally, being on the bench as a judge has been a goal of mine since I started practice. I believe that I will enjoy the job. I like interacting with people, resolving issues, and doing research and writing. I have always admired the work that our judges do not only in the courtroom, but also from an administrative aspect. I want to be a part of that team, and I believe that this is a good time in my life to apply. I have substantial experience in a variety of legal fields, and I also have experience outside of the law as an elected official and member of various community boards. I will bring that experience with me, which will help me be a fair, effective, and efficient judge.

28. Explain how your appointment would enhance the court.

I believe my background and experience uniquely qualifies me to be a district court judge. Since my practice has included various fields, including criminal law, family law, juvenile law, business law, probate and estate planning, litigation, municipal law, taxes, and real estate, I have a broad range of knowledge across many different subjects. Several times these areas overlap, and to effectively make a decision as a judge, a person must understand that overlap and the interactions between various subjects. For example, while a case may appear to be a dispute about real estate, it could very easily also include aspects of probate if the real estate was inherited. A district court judge could see several different types of matters in a single day, which is exactly what happens in my practice.

In addition my experience in the aforementioned subject areas, my history as a public servant and elected official also provide a great foundation for being a district court judge. As a public servant, I have interacted with thousands of people, all with different viewpoints and issues to be solved. I have presided over meetings where passions on both sides of the issues were strong. I have worked with various stakeholder groups to come together and find solutions to an issue. All of these are skills that suit a district court judge. Often time passions run high in a courtroom, and the judge must keep everything under control, while still ensuring a fair process. A judge must keep his or her calm, even when a litigant or attorney is trying their patience. And ultimately, a judge is tasked with resolving an issue. These are all things that I have dealt with on a routine basis as a public official.

We often hear about the term judicial temperament. A judge must have the right judicial temperament. He or she must be fair, firm, decisive, but also must show compassion and empathy. For most litigants and parties, the case in front of the court is the most important thing in their life at the time. As an attorney in private practice, I believe that I have shown that I have the right temperament. I treat everyone with respect, whether it is my own client, or the attorney or party on the other side. I have spent the past thirteen

years building relationships with my clients, fellow attorneys and their staff, judges, court staff, and members of my community because I believe it is important. I have kept my calm even when perhaps my client has not. I have shown that I have the temperament to do the job.

A district court judge's job is not only varied, but it can be very busy and hectic at times. I will bring a work ethic that helps to manage the busy times. As an attorney in private practice, I am used to something not being a 9-5 job. There are times, especially during tax season where late nights, early mornings, and weekends are required to complete the job. In a small-town practice, I know there is no one there to pick up the slack if I do not do my job. Litigants in a case deserve a prompt and clear decision, and my history shows that I have the work ethic necessary to handle the workload of a district court judge.

As a partner in a small firm, I also have the experience of handling the administrative responsibilities of a judge. I have experience managing employees, juggling technology upgrades with getting work done, and managing the workload. My office currently has two support staff to assist three full-time and one half-time attorneys. I know how to work with staff efficiently, while also understanding the work they must do for other attorneys. This is an important aspect of being an effective judge who must work well with the other judges, court administration, court reporters, and clerks' offices. I must also do this every day in my own practice, and I will draw upon on those skills I have developed to be an effective judge.

A judge must be able to control the courtroom, even when tempers run hot. I have demonstrated this throughout my career, both as a lawyer and as a public official. As an attorney, I often deal with heated situations. I have clients that are upset at what is happening. It is my job as their attorney to help focus them on what we can change and where I can help them. As an elected official, I have presided over countless meetings, many of which are not very amicable. As mayor, I presided over city council meetings where citizens came to criticize the work we were doing. As a state representative and chair of one of the largest standing committees in the Iowa House, I presided over both committee and subcommittee meetings, and even debates on the House floor, where both sides of the aisle were passionate about their position. In all these situations, it was my job to ensure that decorum was kept, the rules were followed, and everyone was able to give their input. As a district court judge, I would implement the exact same approach each and every time I was in the courtroom or making a decision.

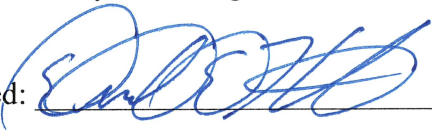
Being a district court judge could be described as a Jack of all trades, and a master of all. The variety of work and issues that a judge must handle are as varied as the parties in the cases. I have experience in many different areas of the law and have served in many different roles beyond that of just a lawyer. I would bring all this experience with me to the bench, to best serve the public.

29. Provide any additional information that you believe the Commission or the Governor should know in considering your application.

If I am fortunate to be chosen as the next district court judge in District 8A, you will not regret that decision. I will bring the same level of dedication, hard work, and fairness that I have applied in every aspect of my life. I approach everything I do with 100% of my efforts, and this will be no different. I look forward to the challenge and the new experiences that this may bring.

I also simply want to thank you for your time and consideration of my application. The decision you must make involves much time and preparation, and I appreciate your dedication.

I hereby certify all the information in this joint judicial application is true and correct to the best of my knowledge.

Signed:  _____

Date: May 9, 2023

Printed name: Dustin D. Hite

IN THE IOWA DISTRICT COURT IN AND FOR MAHASKA COUNTY

JARED CURRY, d/b/a)
CURRY CONSTRUCTION,) Case No. LALA075371
Plaintiff,) SCSC033720
)
vs.)
)
LARRY LEWIS,)
Defendant.)

LARRY LEWIS,)
Third-party Plaintiff,)
)
vs.) SUBMISSION OF PLAINTIFF'S
) PROPOSED RULING
)
LEWIS REPAIR & MANUFACTURING,)
INC.,)
Third-party Defendant.)

LEWIS REPAIR & MANUFACTURING,)
INC.,)
Counterclaimant,)
)
vs.)
)
JARED CURRY, d/b/a)
CURRY CONSTRUCTION,)
Counterclaim Defendant.)

COMES NOW, the plaintiff and hereby submits the attached Proposed Ruling.

Respectfully submitted this 3rd day of January, 2022.



Dustin D. Hite AT0010176
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ATTORNEYS FOR PLAINTIFF

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S.P. DeVolder-Attorney for Defendant/Counterclaimant

IN THE IOWA DISTRICT COURT IN AND FOR MAHASKA COUNTY

JARED CURRY, d/b/a)
CURRY CONSTRUCTION,) Case No. LALA075371
Plaintiff,) SCSC033720
)
vs.)
)
LARRY LEWIS,)
Defendant.)
)
)
)

LARRY LEWIS,)
Third-party Plaintiff,)
) RULING ON PLAINTIFF'S
vs.) PETITION, DEFENDANT'S
) THIRD PARTY CLAIM, THIRD-
LEWIS REPAIR & MANUFACTURING,) PARTY DEFENDANT'S
INC.,) COUNTERCLAIM, AND
Third-party Defendant.) PLAINTIFF'S THIRD-PARTY PETITION
)
)

LEWIS REPAIR & MANUFACTURING,)
INC.,)
Counterclaimant,)
)
vs.)
)
JARED CURRY, d/b/a)
CURRY CONSTRUCTION,)
Counterclaim Defendant.)

BE IT REMEMBERED this matter came before the court for trial on Plaintiff's Small Claims Petition filed on March 6, 2020, Defendant's Third-Party Claim filed on September 28, 2020, Third-Party Defendant's Counterclaim filed on September 28, 2020, and Plaintiff's Third-Party Petition filed on October 16, 2020. The plaintiff, Jared Curry, personally appeared and was represented by his attorney Dustin D. Hite. The defendant, Larry Lewis, personally appeared and

appeared on behalf of the third-party defendant, Lewis Repair & Manufacturing, Inc., and was represented by his/its attorney, Steven P. DeVolder.

The court heard the testimony of Jared Curry, Larry Lewis and Howard Gordon, and received documents into evidence. After reviewing the file, the testimony of witnesses, the documents entered into evidence and the applicable law, the court enters the following ruling.

FINDINGS OF FACT

Sometime in September or October of 2019, Larry Lewis (“Lewis”) and Jared Curry, d/b/a Curry Construction (“Curry”) entered into an oral contract for the construction of a pole barn, also called a post frame building (the “building”).¹ Curry was to construct a 48 feet by 88 feet by 14 feet tall post frame building on Lewis’s property located in Cedar, Iowa. The building included one overhead door and one walk through door. Lewis was to pay for the materials directly to the supplier, A&W Metal, LLC (“A&W”). The cost of the materials was \$24,514.15. Lewis was to pay Curry \$18,000.00 for erecting the building. At or around the time of the agreement, Curry provided an estimate to Lewis, which was substantially similar to Plaintiff’s Exhibit 2.

On November 14, 2019, Lewis tendered a check in the full amount of \$24,514.15 to A&W, and gave the check to Curry for delivery to A&W. The check was written from the checking account of Lewis Repair & Manufacturing, Inc. (“Lewis Repair”). Lewis is the sole shareholder and officer of Lewis Repair.

Curry delivered the check to A&W shortly after receiving it. Curry began construction sometime in December 2019. Curry and his crew of one worked on the building for approximately three days. Curry had installed the poles, mud boards and girts on three sides of the building, leaving the remaining end open to allow him to set trusses. The mud boards are pressure treated

¹ The court notes that as is often the case with unwritten contracts, much of the disagreement in this matter likely would not have happened if the parties had a written contract setting forth the details of their agreement.

boards around the bottom of the building and the girts are boards around the sides of the buildings. The building as it sat after Curry's approximately 3 days of work is shown in Plaintiff's Exhibit 1.

It was at this time that Lewis became suspicious of the amount he paid for materials. He personally went to A&W to obtain a materials list for the building. For some reason not explained to the court, employees at A&W refused to provide Lewis with a copy of the materials list. Lewis attempted to call Curry and Curry did not answer. A&W then called Curry and he authorized A&W to provide the list to Lewis.

Curry then called Lewis to discuss whatever issues Lewis may have with the building. According to Lewis's testimony, he was upset that the materials list did not include an electric garage door opener and that the building was taking longer to build than Lewis had anticipated. The parties differed in their testimony on the substance of the conversation. The credible version is that the conversation between Lewis and Curry became heated. Lewis told Curry that he was going to file suit against Curry and that all further communication should be made through his attorney; and Curry told Lewis to build the building himself.

After the telephone conversation ended, Curry considered himself fired from the job by Lewis. Curry then removed his equipment from the jobsite. Curry also took the pictures admitted as Plaintiff's Exhibit 1.

Lewis, for his part, also took steps after the telephone conversation ended. According to Lewis's own testimony, immediately after leaving A&W, he went to a local tire shop and asked Mike Shelton for a recommendation of a contractor who could finish constructing the building. Mr. Shelton recommended John Wagler ("Wagler"). Sometime around the end of December 2019, or early January 2020, Lewis hired Wagler to complete the building.

Wagler completed the building sometime toward the end of January or early February of 2020. Wagler's work included installing the trusses or rafters, installing the siding and roofing, and completely constructing the end wall, which is the wall on which all the doors are located. Sometime after Curry's and Lewis's original agreement, Lewis changed his mind and added a second overhead door. Wagler completed his work in approximately three to three and one-half days. For his work, Lewis paid Wagler \$12,200.00.

Lewis later hired Terry Grace of the The Door Shop to install the overhead doors. Lewis paid \$500.00 for the installation of the doors. At the same time, Lewis purchased an electric garage door opener and remote from The Door Shop for \$1,000.00.

After the construction of the building, Lewis had several truckloads of rock installed inside and outside of the building. Lewis claims that this rock was necessary to solve a water issue in the building. Lewis claims that the amount of rock installed inside of the building was 289.44 tons of rock, which cost a total of \$6,272.88. Lewis provided receipts from Witt Auto Salvage & Trucking, which were admitted as Defendant's Exhibits G-1, G-2, and G-4. The receipt admitted as Exhibit G-1 included a handwritten notation added by Lewis of "FARM."

Lewis later installed a French drain around the building at the recommendation of Craig Hol, supposedly to address a water problem with the building. Notably, Lewis and Lewis Repair did not call Mr. Hol as a witness despite previously designating Mr. Hol as an expert in their combined Designation of Expert Witnesses filed on July 16, 2021.

Lewis further presented the testimony of Howard Gordon ("Gordon"). Gordon is the owner of his own concrete business, and he has worked in the concrete and construction industries for more than 30 years. Gordon was retained by Lewis to provide an estimate for pouring a new concrete floor in the building. Notably, Gordon testified that in his 30 years of experience in the

concrete industry, he never installed a concrete floor to alleviate water issues. In addition, Gordon testified that there are various opinions among builders on where to set the floor height on a building, and that the floor height is dictated by where the bottom of the overhead door is set. Finally, Gordon confirmed Curry's testimony that the grading for pole buildings can be completed after the building is built.

Neither Lewis nor Lewis Repair have made any payments to Curry. This action followed.

CONCLUSION OF LAW

A. Curry v. Lewis

Curry originally filed this action as a small claims action seeking \$6,000.00 for "labor on the construction of a post frame building *and* breach of contract." (Emphasis added.) The hearing on small claims "...shall be to the court, shall be simple and informal, and shall be conducted by the court itself, without regard to technicalities of procedure." Iowa Code Section 631.11(1). Curry's small claims petition contains two counts. One for the labor for the construction of the pole building, which is a claim for unjust enrichment, and one for breach of contract.

1. Breach of Contract

The parties entered into an oral agreement whereby Curry would construct a pole building and Lewis would pay Curry for his labor in constructing the pole building. To prove the existence of an oral contract, the proponent must show the terms are "sufficiently definite for a court to determine with certainty the duties of each party, the conditions relative to performance, and a reasonably certain basis for a remedy." *Gallagher, Langlas & Gallagher v. Burco*, 587 N.W.2d 615, 617 (Iowa Ct. App. 1998). "For an oral contract to be found and enforceable, the terms must be so definitively fixed so that nothing remained except to reduce the terms to writing." *Western*

Reserve Life Assur. Co. of Ohio v. Bratton, 2007 U.S. Dist. LEXIS 26531, *69 (N.D. Iowa 2007) (quoting *In re Price*, 571 N.W.2d 214, 216 (Iowa App. 1998)).

The elements to prove a breach of an oral contract are 1) the existence of a contract, 2) the terms and conditions of the contract, 3) that plaintiff performed all the terms and conditions under the contract, 4) that the defendant breached the contract in some particular way, and 5) that the plaintiff suffered some damages as a result of the breach. *Molo Oil Co. v. River City Ford Truck Sales, Inc.*, 578 N.W.2d 222, 224 (Iowa App. 1998).

a. Existence of a contract

Here, there is no dispute as to the existence of an oral contract for the construction of a pole building. “As a matter of agency law, a corporate officer is not ordinarily liable for damages for a breach of contract by the corporation. An agent can be held liable for breach of contract if the principal is not disclosed.” *Tannahill v. Aunspach*, 538 N.W.2d 871, 873 (Iowa Ct. App. 1995). The evidence at trial showed that the contract was made between Curry and Lewis. The building was to be constructed on land owned by Lewis. Curry credibly testified that Lewis never indicated that it was Lewis Repair that was making the agreement. In fact, Lewis’s own exhibits offered at trial showed that various businesses issued invoices in Lewis’s name and not Lewis Repair’s name, bolstering Curry’s testimony that no mention was made of Lewis Repair.

b. Terms and conditions

The terms of the contract were simple. Lewis was to pay the material supplier directly, Curry was supposed to erect the pole building on Lewis’s land, and Lewis would pay Curry the sum of \$18,000.00 for his services. Lewis’s claims that there was a deadline contained in the contract or that Curry agreed to provide any grading services is not supported by the evidence. Lewis claimed that the building was to be completed by December 1, 2019. However, he testified

that upon the payment for materials, which he made on November 14, it would be approximately 10 days to 2 weeks before the materials would be ready. This put the earliest that construction could begin at the beginning of December. Curry credibly testified that that the timeline for construction of a pole barn depended largely on the weather, but that it would take one to two weeks to complete the building once it was started. Taken together, Lewis's claimed deadline would be impossible to meet, and therefore, Lewis's testimony in this regard was unbelievable. Notably, Lewis's own third-party claim against Curry states that the building was to be completed by November 30, 2019, a date based upon Lewis's own testimony that was wholly unattainable.

It is also not credible that the agreement included Curry grading the property. Lewis claimed that he would be responsible for rock, but that Curry would provide all the remaining grading. However, the record does not contain any other evidence to support this allegation. Curry credibly testified that he does not do grading, except for some cursory grading to "knock down the high spots". His business is building buildings. Lewis testified that he believed all grading must be completed prior to the construction of the building, but he never expressed concern to Curry during the construction that no grading had been performed.

c. Plaintiff's performance

Curry performed under the contract up until Lewis fired him. Curry installed the poles and girts, or boards on the side, leaving one end open to install the trusses. Curry was on track to complete the building until the phone call with Lewis.

d. Defendant's breach

Lewis breached the contract during the phone call dubbed the "A & W call" at trial, when he told Curry that he was suing him and that all further communication needed to be through his lawyer. Curry clearly took this threat and direction as an indication that he was being fired from

the job. In addition, Lewis's actions after the call show that he also believed that he fired Curry. Immediately after the call and on the way home from Bloomfield, Lewis stopped by the tire shop to get a recommendation for a replacement contractor. Lewis also testified that he first became aware that Curry would not be finishing the construction when he arrived home and saw Curry had moved his equipment to the neighbor's property. The court finds Lewis's contradictory testimony incredible. Further, Lewis's refusal to pay Curry for the services performed was also a breach of contract.

e. Plaintiff's damages

Curry suffered damage as a result of Lewis's breach. Curry testified that the work he was allowed to complete was approximately one-third of the entire amount of labor to be performed, and requested damages in the amount of \$6,000.00, or one-third of the agreed upon amount for labor. Lewis disputes that Curry's work was worth \$6,000.00, based upon the amount of time Curry spent on the project. Curry spent approximately three days working on the building. After hiring Wagler, Wagler spent an additional three to three and one-half days completing the building. Lewis paid Wagler \$12,200.00 for his work. Given that Wagler spent only slightly more time on the building than Curry, and that if Curry's request and Wagler's payment are combined, for a total of \$18,200.00, only \$200.00 more than the agreed upon amount, Curry's request for \$6,000.00 as damages is credible.

2. Unjust enrichment

Curry's petition seeking \$6,000.00 for "labor on construction on a pole building" is a claim for unjust enrichment. Since the court has determined that Curry is entitled to relief under his breach of contract theory, the court need not reach the unjust enrichment claim. However, Curry would prevail on this claim as well. "Unjust enrichment is a doctrine of restitution. It requires a

plaintiff to prove the defendant received a benefit at the expense of the plaintiff under circumstances make it unjust for the defendant to retain the benefit.” *Rilea v. State*, 959 N.W.2d 392, 393-394 (Iowa 2021). “Unjust enrichment exists when (1) one party is enriched (2) at the expense of the other, and (3) it would be unjust under the circumstances for the enriched party to retain the benefit.” *MidWestOne Bank v. Heartland Co-op*, 941 N.W.2d 876, 886 (Iowa 2020).

There is no dispute that Curry performed services and erected poles and girts which were later used to construct a completed pole barn by Wagler. Evidence showed that Wagler simply completed the building as started by Curry, using all the same poles and girts as installed. Lewis originally agreed to \$18,000.00 for the construction of the pole building. He paid Wagler \$12,200.00. If Curry is not compensated for his labor, Lewis would receive a \$6,000.00 windfall because he only paid \$12,200.00 for something he had previously agreed to pay \$18,000.00. Curry prevails on his claim for unjust enrichment.

B. Lewis v. Lewis Repair

Lewis also made a claim for indemnification against Lewis Repair. As provided above, the court believes that the agreement with Curry was made by Lewis and not on behalf of Lewis Repair. However, Lewis Repair admitted all the allegations in Lewis’s third-party petition, and therefore, Lewis’s claim for indemnification by Lewis Repair should be granted.

C. Lewis Repair v. Curry

Lewis Repair made claims against Curry for breach of contract and negligence.

1. Breach of Contract

Lewis Repair claims that Curry breached the contract by a) failing to complete the building by the November 30th deadline and b) by failing to grade the site. Lewis Repair bears the burden of proof to show that these two terms were part of the original agreement.

a. Existence of a contract

For the reasons stated above, Lewis Repair has failed to prove that there was an agreement between Curry and Lewis Repair. The evidence showed that the agreement was between Curry and Lewis, and not Lewis Repair and Curry.

b. Terms and conditions

Lewis Repair failed to prove that the deadline and grading was part of the contract. Lewis's own testimony shows that the alleged deadline would be impossible to obtain given the timeline of Lewis Repair's payment for supplies. In addition, no evidence was offered, except for Lewis's self-serving testimony that the court finds unbelievable, that the agreement included any grading of the building site. Lewis Repair's own petition stated that Curry "...was to supply the labor crew to construct the structure." At trial, Lewis Repair attempted to expand this term. Lewis Repair's attorney attempted to imply that the "labor" component in Curry's estimate and bill meant the building was ready to be used and included grading. The court notes in Exhibit L20 and L21, there appears to be electrical boxes and wiring in the building, but no claim was made by Lewis Repair that the "labor" component also included electrical work.

c. Lewis Repair's performance

Lewis Repair had one duty under the agreement with Curry, to pay Curry for erecting the building. There is no dispute that either Lewis Repair or Lewis has ever paid Curry for any of his work on the building.

d. Curry's breach

Lewis Repair asserts that Curry breached the contract by failing a) meet the deadline, b) grade the property and c) negligently constructing the building. Since the court concludes that neither the deadline nor the grading were part of the agreement, Curry could not have breached

these terms. Lewis Repair also failed to prove that Curry negligently constructed the building. This claim is essentially the same claim as the negligence claim and will be addressed below.

f. Damages

Lewis Repair failed to prove any damage caused by an alleged breach by Curry. The only additional expenses Lewis Repair claims are a) additional rock needed, b) French drain installation, c) concrete floor, d) door installation, and e) additional supplies and labor.

Lewis Repair's main claim is that because Curry set the building too low, it gathered water. Lewis Repair then asserts that this caused it to incur expenses for rock, a French drain, and the addition of a concrete floor to address water problems. Curry originally constructed the building so that the finish floor would be at the top of the mud board, a level which would be higher than surrounding ground, thus eliminating any water issue. However, Curry was unable to install the section of the wall that included the overhead doors before Lewis fired him. Lewis's own expert, Howard Gordon, confirmed that the height of the finished floor is set by the height of the bottom of the doors, and the control of the door height was exclusively with Wagler. Any issue with the height of the floor was a result of others, and not Curry.

The court also doubts Lewis Repair's claim of water problems. Lewis failed to call any expert regarding the water issue and whether or not it was caused by Curry's construction. Lewis designated parties who appear to be able to provide that testimony, but for reasons known only by Lewis and Lewis Repair, these people were not called as witnesses. The only expert witness called by Lewis Repair, Gordon, testified that he did not see any issues with water problems. He further testified that in his experience, he has never installed a concrete floor to solve a water issue.

Finally, Lewis Repair claims additional expenses for door installation, a garage door opener, and additional lumber. As stated, Lewis added an overhead door after the agreement was

made with Curry. Any additional expenses of a door were the exclusive result of Lewis's change of mind. The court also finds that the original agreement did not include a garage door opener. Lewis agreed to pay A & W directly for the supplies. Lewis's payment to A & W was the exact amount quoted by Curry and did not include a garage door opener. Finally, any additional lumber required was a result of the change in contractor and not anything caused by Curry.

Of note, and more to the credibility of Lewis, Lewis Repair's petition against Curry stated that Curry's breach cause Lewis Repair to incur expenses for "...additional materials—such as rock, door and other items..." The original agreement with Curry was for the construction of a building with one overhead door. All parties agreed on that fact. Lewis testified that he later decided to add a second door, and that such addition had nothing to do with Curry, Lewis just changed his mind. This major discrepancy between Lewis Repair's third-party petition and Lewis's testimony show to the court that Lewis and/or Lewis Repair were trying to inflate damages and changed their strategy later when it appeared that this would not work.

2. Negligence

Lewis Repair claims Curry was negligent in constructing the portions of the building that he constructed. "To be an actionable, a claim of negligence must satisfy four elements: (1) existence of a duty, (2) failure to conform to that duty, (3) causation, and (4) damages." *Intlekofer v. Reitberry Rental Prop., LLC*, 2019 Iowa App. LEXIS 786, *5-6 (Iowa Ct. App. 2019).

a. Duty

Without deciding the issue, the court will assume that Curry had a duty to construct the pole building in a workman like manner.

b. Failure to conform to that duty

Lewis Repair failed to show that Curry failed to conform to the duty to construct the building in a workman like manner. Curry began construction by setting the poles and attaching the girts. As shown by Plaintiff's Exhibit 1, all the poles and girts appear to be straight and true. This is all that Curry was allowed to do before he was fired by Lewis. As laid out above, any issues with the height of the floor or water issues occurred after Curry was off the job, necessarily excluding him from breaching any duty regarding this.

c. Causation

Causation requires that the harm be within the scope of liability and that the risk be foreseeable. *Thompson v. Kaczinski*, 774 N.W.2d 829 (Iowa 2009). Since there was no breach of duty, Lewis Repair has failed to prove any causation. Curry constructed an adequate structure. None of the defects claimed by Lewis Repair were the result of Curry's actions or inaction.

d. Damages

For the reasons set forth above, Lewis Repair has failed to prove any damage. Any water issues were the result of the actions of others, not Curry. While Lewis Repair also complained about Curry's workmanship regarding the straightness of poles, Lewis Repair failed to provide any evidence of damages. In fact, when questioned about the issue, Lewis could not answer whether or not the out-of-level pole had actually increased any construction cost.

D. Curry v. Repair

Curry also makes a claim, in the alternative, against Lewis Repair for breach of contract and unjust enrichment. Lewis Repair admits that any agreement with Curry was made on behalf of Lewis Repair, and therefore, any duty owed to Curry was owed by Lewis Repair. Because of Lewis Repair's admission, and for the reasons stated above, the court finds in favor of Curry on its claim of breach of contract and unjust enrichment against Lewis Repair.

RULING

For all the above reasons, the court determines that Curry's petition against Lewis should be granted, Lewis's claim against Lewis Repair should be granted, Lewis Repair's claim against Curry should be denied, and Curry's claim against Lewis Repair should be granted.

ORDERS

IT IS THEREFORE ORDERED that:

1. Judgment is hereby entered against Larry Lewis and Lewis Repair & Manufacturing, Inc., jointly and severally, in favor of Jared Curry in the amount of \$6,000.00, with the clerk to assess the statutory interest rate from the date of this ruling.
2. Judgment is hereby entered against Lewis Repair & Manufacturing, Inc., in favor of Larry Lewis in the amount of \$6,000.00.
3. Lewis Repair & Manufacturing, Inc.'s claim against Jared Curry is hereby dismissed.
4. Costs are taxed to Larry Lewis and Lewis Repair & Manufacturing, Inc.

IN THE IOWA DISTRICT COURT IN AND FOR WAPELLO COUNTY
(Probate Division)

IN THE MATTER OF)	Probate No. GCPR007092
)	
THE GUARDIANSHIP OF)	
)	PETITIONER'S BRIEF
A.G.G.,)	IN SUPPORT OF PETITION
Proposed Ward.)	

The Court should grant J.H.'s Petition for Appointment of Guardian, and appoint her as guardian of A.G.G., her granddaughter.

Facts

A.G.G. is five years old, having been born in 2011. Her parents are C.B. and W.G. By all accounts, A.G.G. lived with C.B. for the first week to month of her life. Thereafter, she went to live with W.G., and his mother, J.H., the Petitioner herein. Sometime after this move, W.G. was kick out of the house by J.H. due to his behaviors and choices, and J.H. continued to care for A.G.G. up through, and continuing after trial. W.G. was granted primary custody of A.G.G., by agreement of the parties in Wapello County Case No. DREQ107949, on June 29, 2011. Thereafter, C.B. sought to modify the custodial arrangement, but was unsuccessful.

C.B. admitted that while W.G. had custody of A.G.G., it was, in reality, J.H. who had raised and taken care of her almost her entire life. J.H. continued to provide C.B. with every other weekend visits as originally provided in the Decree between W.G. and C.B. C.B. did not always exercise these visits, and in fact missed the visit the weekend before trial and missed the visit on the weekend of August 12 after trial. C.B. also admitted that for almost an entire year, she failed to have contact with A.G.G. or J.H., blaming the lack of contact on her inability to obtain transportation. C.B. testified at trial that her missed visits were for lack of transportation and J.H.'s obstructionist attitude. However, her testimony was belied by her very own responses to

interrogatories where she admitted that all missed visits were attributed to her lack of transportation.

During A.G.G.'s young life, she has only known one, stable home—that of J.H. All parties admit that J.H. has done an excellent job of raising A.G.G. to be a creative and smart little girl. It was J.H. who registered A.G.G. for preschool and kindergarten. It is J.H. who works with A.G.G. on schoolwork, and constantly keeps up with the goings on at school. C.B. admitted that she had no contact with either the preschool or kindergarten and could not even name A.G.G.'s preschool teacher.

In addition to A.G.G.'s education, J.H. has been the guardian of her health as well. C.B. admitted that she had never been to a doctor's appointment. Essentially, J.H. has been the only person responsible for A.G.G.'s care from when she was only a week old. J.H.'s neighbor, a daycare provider herself, testified that J.H. provides excellent care to A.G.G., and that perhaps her only flaw is that she worries too much and is a little overprotective.

Despite C.B.'s insistence that J.H. has been obstructing her ability to be a parent to A.G.G., the facts simply show otherwise. J.H. has had A.G.G. in her care by agreement of the parties. J.H. had a temporary guardianship that was dissolved in short order, but for the two years this case has been pending, and the three years of A.G.G.'s life before that, C.B. has never asked that J.H. return A.G.G. to her care. C.B. claimed that she was naïve and did not know her rights, but she has had learned and experienced counsel since the beginning of this matter who has undoubtedly advised her of those rights. Despite all this, neither W.G. nor C.B. has ever requested A.G.G. be returned to their care. It is only after J.H. filed the Petition to be appointed as guardian for her granddaughter, the child she has cared for her entire life, that C.B., and W.G. initially, have ever expressed an objection to J.H.'s care.

I. Need for Guardianship

J.H. has carried her burden to show that a guardianship is needed, and that she is the one who should be appointed as guardian for A.G.G. Iowa Code Section 633.551(1) provides that the Petitioner must prove the need for the guardianship by clear and convincing evidence. Iowa Code Section 633.559 provides a presumption of for parents of children. This presumption is, however, rebuttable. Colquhoun v. Swab, 797 N.W.2d 121, 127 (Iowa Ct. App. 2011). The non-parent bears the burden of proving that the natural parent is not a qualified and suitable caregiver. Id. However, the best interests of the child are paramount when considering a guardianship. In re the Guardianship of D.A.B.P., 2012 Iowa App. LEXIS 833, *11 (Iowa Ct. App. 2012) (citing G.G., 799 N.W.2d, 549, 551 (Iowa Ct. App. 2011)). In determining the best child's best interest, the Court looks to the parent's past performance as indicative of the type of future care the parent is able to provide. Id. The Court must consider both the immediate and long-range interests of the child. Id. at *10. The Iowa Supreme Court has previously held that "a parent who has taken 'an extended holiday from the responsibilities of parenthood' may not take advantage of the parental preference for custody." In re Guardianship of Stewart, 396 N.W.2d 820, 823 (Iowa 1985).

In this case, the evidence showed that neither parent has taken an active role in parenting. All parties agree that J.H. has cared for A.G.G. for almost her entire life. W.G. has had no contact since January of 2016, and prior to that, only every other weekend visits. C.B. remained out of A.G.G.'s life for an entire year, twenty percent (20%) of her entire life. It is only recently that C.B. has begun to exercise her every other weekend visits. Even C.B. admits that those visits are not regular, missing them because of her lack of transportation. C.B. even missed the visit directly before trial and directly after trial. If C.B. cannot be counted on to have visits with A.G.G. for just four days during the month, how can she be expected to parent her full-time?

The Court of Appeals granted a guardianship where the mother "... has not taken action to affirmatively assume the role of parent after nine years, instead limiting her role in parenting the children to exercising weekend visitation." S.E. v. T.E., 2006 Iowa App. Lexis 788, *7 (Iowa Ct. App. 2006). Here, the facts are very similar. C.B.'s only involvement with A.G.G. is her every other weekend visits. C.B. has not been involved with A.G.G.'s education, health care, and has not provided any financial assistance. C.B.'s assertion that J.H. refused to provide the information about doctor's visits and school is simply not credible. This case has been going on for 2 years, and during that time, C.B. has never requested, either informally or through formal discovery, any information regarding the day-to-day needs and care of A.G.G. J.H. has shown, by clear and convincing evidence, that neither parent is capable of taking care of A.G.G.'s needs. The parental presumption does not apply here because both parents have "taken a vacation" from the responsibilities of parenthood. Despite that, J.H. has shown by clear and convincing evidence that the presumption has been overcome because the past history of the parents has shown they have not ever been a parent to this child beyond four days a month, despite having five years to do so.

C.B.'s request to be appointed guardian of A.G.G. shows the flaws in her argument. C.B. admits that a guardianship is necessary because W.G. has primary physical care of A.G.G. and he is not fit to care for her. However, C.B. has not taken the steps to change that and is instead relying on the guardianship as a way to circumvent the modification process. C.B.'s inaction in this sphere shows that a guardianship is necessary, and that C.B. is not the person who will take the actions necessary to protect A.G.G. from W.G. In fact, the undersigned has been unable to find a case where a biological parent has been appointed as guardian for a child, because if the biological parent is capable, then a guardianship is not necessary. The case cited to the Court by C.B. as an example, shows quite the opposite. In Knell v. Schriever, 537 N.W.2d 778 (Iowa 1995), the Court

granted the stepfather's request to be appointed guardian over the father's objection because the father had very limited contact with the child for six years. Instead of supporting C.B.'s position, the Court held it must be guided by the principle that "if the person having lawful care of a child has properly provided for a child's social, moral and educational needs for a substantial period of time and the child has become attached to that environment and those responsible for his [or her] welfare and happiness, a court is not justified in transferring that custody to another except for the most cogent reasons." Id. at 782. C.B. acknowledged that a change in custody would be detrimental to A.G.G.'s mental and emotional health. In addition, C.B. never requested that she be appointed guardian until after the evidence had been submitted at trial.

Conclusion

The Court should grant the Petition and appoint J.H. as guardian of A.G.G. J.H. has carried her burden and shown by clear and convincing evidence that neither parent is able to assume the proper role of full-time parent. Neither parent has been involved in the important decisions of A.G.G.'s life. Neither parent has taken care of A.G.G. for more than a weekend at a time. Both parents have, at times, been absent from A.G.G.'s life for extended periods of time.

In contrast, J.H. (and D.H.) have been the one constant in A.G.G.'s life. J.H.'s home has been the only home that A.G.G. has known. J.H. has been the one who ensures A.G.G.'s needs are met. J.H. arranges daycare; J.H. attends and schedules all the doctor's appointments; J.H. registers A.G.G. for school and provides the supplies. A.G.G.'s best interest requires that J.H. be appointed as her guardian.

WHEREFORE, the Petitioner respectfully requests the Court grant the Petition, appoint her as guardian for A.G.G., and for any other relief the Court deems just and equitable under the circumstances.

Respectfully submitted this 18th day of August, 2016.



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No copy given to W.G.-no known address.

IN THE SUPREME COURT OF IOWA

Iowa Supreme Court No. 17-1283
(Mahaska County No. MHMH005126)

IN THE MATTER OF

J.C.

ALLEGED TO BE SERIOUSLY
MENTALLY IMPAIRED,

Respondent-Appellant.

APPEAL FROM THE IOWA DISTRICT COURT,
IN AND FOR MAHASKA COUNTY
THE HONORABLE ROSE ANNE MEFFORD, JUDGE

APPELLANT'S FINAL BRIEF AND
REQUEST FOR ORAL ARGUMENT

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In re Oseing, 296 N.W.2d 797 (Iowa 1980)

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ROUTING STATEMENT

The Supreme Court should transfer this case to the Court of Appeals because this case presents the application of existing legal principles. See Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

I. Nature of the Case

This case involves an appeal from an order finding that J.C. is seriously mentally impaired and ordering her to inpatient care and treatment at Genesis Medical Center pursuant to Iowa Code Section 229.14(1)(b).

II. Relevant Events of Prior Proceedings

On August 1, 2017, Marcy Dewitt, the coordinator of emergency and intake at Behavioral Health Services, Mahaska Health Partnership, filed an Application for Order of Involuntary Hospitalization. Appendix pages 4-6. Attached to the Application was an Affidavit in Support of Application Alleging Serious Mental Impairment, completed by Dr. Ronald R. Berges, a psychiatrist. Appendix pages 7-8. On August 1, 2017, J.C. was ordered to be detained at Mahaska Health Partnership pursuant to Iowa Code Section 229.11(2). Appendix page 9. Thereafter, on August 2, 2017, J.C. was transferred to Genesis Medical Center pursuant to an order of the court. Appendix pages 10-11.

On August 7, 2017, a hearing was held before the Honorable Judge Rose Ann Mefford to determine whether J.C. was seriously mentally impaired. Appendix page 14. The court admitted the Physician's Report of

Examination completed by Dr. Jeffrey Weyeneth over the objection of J.C. Appendix page 36, Line 4, and Appendix page 21, Line 20-page 22, Line 1.

III. Disposition of the Case

The Court found that J.C. was seriously mentally impaired and that she was likely to physically injure herself or others. Appendix page 37, Line 21-page 38, Line 10. The court entered an Order for Hospitalization on August 7, 2017, ordering J.C. into the care and custody of Genesis Medical Center. Appendix pages 14-16. On August 14, 2017, J.C. timely filed a Notice of Appeal, and this appeal follows. Appendix page 17-18.

STATEMENT OF FACTS

On August 1, 2017, an application for involuntary hospitalization of J.C. pursuant to Iowa Code Section 229.6 was filed by Marcy Dewitt, a licensed independent social worker at Mahaska Health Partnership. Appendix page 4. In support thereof, Ms. Dewitt stated that J.C. had “[d]elusions of grandeur, flight of ideas and loosened associations present during interview. Agitated and threatening legal action for imagined issues.” Appendix pages 4-6. Dr. Ronald Berges, J.C.’s psychiatrist, provided a supporting statement/affidavit wherein he stated as follows:

While [J.C.] has enjoyed reasonable mental health for a number of years, over the past few months she has had a dramatic change in her mood. She has become increasingly paranoid, grandiose, delusional & unstable, all consistent with a manic state. She has been very unnatural demanding, making multiple calls to Mahaska Hospital staff & administration threatening malpractice lawsuits & other legal type complaints without valid basis.

Appendix pages 7-8.

The court ordered the respondent to be detained at Mahaska Health Partnership by order dated August 1, 2017. Appendix page 9. The court later directed the respondent to be detained at Genesis Medical Center. Appendix pages 10-11.

Dr. Jeffrey G. Weyeneth examined J.C. on the 3rd, 4th, 5th and 7th of August, 2017. Appendix page 23, Line 22-page 24, Line 12. A physician’s

report of examination completed by Dr. Weyeneth pursuant to Iowa Code 229.10 on August 7, 2017. Appendix pages 12-13. The report failed to note the date and time of the examination. Appendix page 12. Dr. Weyeneth opined in his report that J.C. was mentally ill, suffering from “Bipolar Disorder-manic.” Appendix page 12. He further stated that he believed that J.C. was incapable of making responsible decisions with respect to her hospitalization and treatment because she had: “poor insight, poor judgment, not compliant with treatment. Refusing medication on several occasions while in the hospital.” Appendix page 12. He opined that if allowed to remain at liberty without treatment, J.C. was likely to injure herself or others because she was “very grandiose, disorganized at times, threatening others with lawsuits, intrusive to others.” Appendix page 13.

Finally, Dr. Weyeneth stated that in his judgment, J.C. was not likely to inflict serious emotional injury on family members or those who lack reasonable opportunity to avoid contact with her if she were allowed to remain at liberty, and that J.C. was not incapable of satisfying her needs for nourishment, clothing, essential medical care and shelter. Appendix page 13.

On August 7, 2017, pursuant to a previous court order, a hearing was held on the application. Appendix page 14. The court admitted and considered the physician’s report over the objection of J.C. that the report was

not completed in accordance with Iowa Code Section 229.10. Appendix page 21, line 11-page 22, line 1, and page 36, line 4.

Dr. Weyeneth testified that he conducted the examination "...the day after she [J.C.] was admitted..." Appendix page 23, lines 18-24. Dr. Weyeneth saw J.C. for the first time on August 3, 2017, and then the following two days and the day of the hearing. Appendix page 23, line 22-page 24, line 12. There was no testimony as to what time the examination actually took place. See generally Appendix pages 19-40.

Dr. Weyeneth testified that J.C. suffered from a history of bipolar disorder and was, at the time of the hearing, manic with grandiosity. Appendix page 24, lines 18-19. He based his opinion on reports that J.C. was "...causing some disruption..." in the community, and threatening to sue the local hospital. Appendix page 24, lines 19-22. In addition, while at the Genesis Medical Center, J.C. was "...being very loud and intrusive..." Appendix page 25, lines 9-12. He also testified that he believed J.C. was likely to injure herself or others because she was irritable and threatened to sue Genesis Medical Center and the people at the hospital. Appendix page 27, lines 12-22.

Despite the concern of threatened lawsuits, Dr. Weyeneth testified that J.C. was not physically aggressive while at Genesis Medical Center.

Appendix page 28, lines 4-8. He also testified that J.C. had not made any physical threats of violence towards any person while at Genesis Medical center. Appendix page 31, line 23-page 32, line 2. He testified that his opinion of J.C.'s dangerousness was based upon his previous experience with other bipolar patients in a manic state. Appendix page 28, line 23-page 29, line 6, and page 33, lines 6-17.

Based solely upon Dr. Weyeneth's testimony and the physician's report of examination, the court concluded that J.C. was a person who was seriously mentally impaired and ordered her to be hospitalized at Genesis Medical Center. Appendix page 37, Line 21-page 38, Line 10. See also Appendix pages 14-16. This appeal follows.

ARGUMENT

I. WHETHER THE DISTRICT COURT ERRED BY ADMITTING THE PHYSICIAN’S REPORT OF EXAMINATION WHEN NO SHOWING WAS MADE THAT IT WAS COMPLETED WITHIN 24 HOURS OF THE RESPONDENT BEING DETAINED AS REQUIRED BY IOWA CODE SECTION 229.10(1)(a) (2017).

A. PRESERVATION OF ERROR

J.C. preserved error by objecting to the court’s consideration of the physician’s report of examination at trial and timely filing a notice of appeal. Appendix page 21, Line 20-page 22, Line 1; and pages 17-18.

B. STANDARD OF REVIEW

Courts generally review evidentiary rulings for an abuse of discretion. *State v. Rodriguez*, 636 N.W.2d 234, 239 (Iowa 2001). “An abuse of discretion occurs when the trial court exercises its discretion ‘on grounds or for reasons clearly untenable or to an extent clearly unreasonable.’” *Id.* (citing *State v. Maghee*, 573 N.W.2d 1, 5 (Iowa 1997)). “A ground or reason is untenable when it is not supported by substantial evidence or when it is based on an erroneous application of the law.” *Id.* (citing *Graber v. City of Ankeny*, 616 N.W.2d 633, 638 (Iowa 2000)).

C. ANALYSIS

Iowa Code requires that a physician complete an examination within a reasonable time. Iowa Code Section 229.10 (2017). When the respondent is

in custody pursuant to Iowa Code Section 229.11(1)(b), the examination shall be conducted within 24 hours. *Id.* The physician's report must be on the form designated by the Iowa Supreme Court. Iowa Ct. R. 12.13. The form provided by the Supreme Court requires that the date and time of examination be included in the report. See Iowa Ct. R. 12.36-Form 8.

The district court erred by admitting the physician's report as filed into evidence and considering the same when determining whether J.C. was a person who was seriously mentally impaired. The physician's report failed to include the date and time of the examination. Appendix page 12. No evidence was presented by the applicant, represented by the assistant county attorney, as to when J.C. arrived at Genesis Medical Center or when the physician's examination of J.C. was completed. See generally Appendix pages 19-40. At best, the applicant proved that J.C. arrived on August 2, 2017, and that Dr. Weyeneth saw J.C. on the next day. Appendix page 23, Lines 18-24. This first meeting between Dr. Weyeneth could have been more or less than 24 hours after J.C. arrived at the hospital. In addition, the applicant did not prove that the examination actually took place on the day following J.C.'s arrival, but it was implicit in the testimony of Dr. Weyeneth that his "examination" was continuing and ongoing. Appendix page 23, Line 18-page 24, Line 12 (Dr. Weyeneth saw J.C. on August 3, 4, 5 and 7).

The court should have excluded the physician's report as it did not comply with strict timeframes implemented by Iowa Code Section 229.10(1)(a). This is not the case where the State argued that good cause existed for the delay of the examination. See *In re T.C.F.*, 400 N.W.2d 544, 547 (Iowa 1987) (holding that good cause for delay of an examination may excuse an untimely examination). Instead, the court incorrectly relied upon a report which was not completed in compliance with Iowa Code Section 229.10 (2017). The decision to admit the physician's report should be reversed and this case dismissed for failing to comply with the strict time frame imposed by Iowa Code Chapter 229.

II. WHETHER THE DISTRICT COURT ERRED BY CONCLUDING THAT THE APPLICANT PROVED THAT J.C. WAS SERIOUSLY MENTALLY IMPAIRED PURSUANT TO IOWA CODE SECTION 229.1(20) BY CLEAR AND CONVINCING EVIDENCE.

A. PRESERVATION OF ERROR

J.C. preserved error by resisting the Application at trial, arguing that the applicant failed to meet its burden of proof, and timely filing a notice of appeal. Appendix page 36, Line 22-page 37, Line 20; and pages 17-18.

B. STANDARD OF REVIEW

Challenges to the sufficiency of the evidence in involuntary commitment proceedings are reviewed for correct errors of law. *In re B.B.*,

826 N.W.2d 425, 428 (Iowa 2013). “The allegations made in an application for involuntary commitment must be proven by clear and convincing evidence.” *Id.* “Clear and convincing evidence is less burdensome than evidence establishing proof beyond a reasonable doubt, but more burdensome than a preponderance of the evidence.” *Id.* “It means that there must be no serious or substantial doubt about the correctness of a particular conclusion drawn from the evidence.” *Id.* (citing *In re J.P.*, 574 N.W.2d 340, 342 (Iowa 1998)).

C. ANALYSIS

The district court erred when it concluded that J.C. was seriously mentally impaired pursuant to Iowa Code Section 229.1(20) and committed her to Genesis Medical Center as this finding was not supported by substantial evidence. Iowa Code Section 229.1 defines “seriously mentally impaired as follows:

20. “*Seriously mentally impaired*” or “*serious mental impairment*” describes the condition of a person with mental illness and because of that illness lacks sufficient judgment to make responsible decisions with respect to the person’s hospitalization or treatment, and who because of that illness meets any of the following criteria:

a. Is likely to physically injure the person’s self or others if allowed to remain at liberty without treatment.

b. Is likely to inflict serious emotional injury on members of the person’s family or others who lack reasonable opportunity to avoid contact with the person with mental illness if the person with mental illness is allowed to remain at liberty without treatment.

c. Is unable to satisfy the person's needs for nourishment, clothing, essential medical care, or shelter so that it is likely that the person will suffer physical injury, physical debilitation, or death.

Iowa Code Section 229.1(20) (2017). "Likely" means "probable or reasonably expected." *In re Oseing*, 296 N.W.2d 797, 801 (Iowa 1980). "[T]he endanger element requires a predictive judgment, based on prior manifestations but nevertheless ultimately grounded on future rather than past danger." *In re Mohr*, 383 N.W.2d 539, 542 (Iowa 1986) (citing *In re Oseing*, 296 N.W.2d at 801)). The danger element requires a showing of "a recent overt act, attempt or threat." *Id.* "In the context of civil commitment, ... an 'overt act' connotes past aggressive behavior or threats by the respondent manifesting the probable commission of a dangerous act upon himself or others that is likely to result in physical injury." *In re Foster*, 426 N.W.2d 374, 378 (Iowa 1988).

"Dangerousness is embodied in the third element of the definition of serious mental impairment as constitutionally necessary...to provide a justification for depriving individual liberty under the state's police power." *In re Foster*, 426 N.W.2d at 377. "Stringent proof under the dangerousness standard is necessary because predicting dangerousness is difficult and, at best, speculative." *Id.* "There shall be a presumption in favor of the respondent, and the burden of evidence in support of the contentions made in

the application shall be upon the applicant.” Iowa Code Section 229.12(3)(a) (2017). The evidence in support of the application shall be presented by the county attorney. Iowa Code 229.12(1) (2017).

Even conceding that J.C. suffered from a mental illness and was unable to make responsible decisions regarding her hospitalization and treatment, the applicant failed to meet her burden of proof that J.C. satisfies one of the three alternative conditions to be seriously mentally impaired. Dr. Weyeneth opined in his report that J.C. is not likely to inflict serious emotional injury on those who cannot avoid contact with her and that she is not incapable of satisfying her needs for nourishment, clothing, essential medical care, or shelter. Appendix page 13. Therefore, the applicant must show by clear and convincing evidence that J.C. was likely to injure herself or others. See Iowa Code Section 229.1(20) (2017).

From the commencement of this case, it appeared that medical providers were more concerned about lawsuits than J.C.’s actual dangerousness. The applicant’s application indicated that J.C. was “[a]gitated and threatening legal action for imagined issues.” Appendix page 5. The supporting statement completed by Dr. Ronald Berges further backed this up by stating that J.C. “...has been very [illegible] demanding, making multiple calls to Mahaska Hospital staff & administration threatening malpractice

lawsuits & other legal type complaints without valid basis.” Appendix page 7. Further, Dr. Weyeneth’s written report indicates that he believed J.C. to be a danger to herself or others due to her being “very grandiose, disorganized at times. Threatening others with lawsuits. Intrusive to others.” Appendix page 13. Finally, Dr. Weyeneth backed up his written opinion when he testified that “she [J.C.] was calling the hospital multiple times a day and calling and threatening to sue the CEO or the president of the hospital there.” Appendix page 32, Lines 12-19.

J.C. appears to constitute more of a nuisance to those around her than any threat. Dr. Weyeneth testified that J.C. was “...causing some disruption in the community there, calling the hospital and harassing people about wanting to sue the hospital.” Appendix page 24, Lines 19-22. He further testified that J.C. was “...just being very loud and intrusive or opening their doors or making noise outside in the hallways and keeping people up at night. I think some of that was happening where she was living, too, that she was disturbing the peace, I guess, for lack of a better term, that she was bothering people and being very loud and being disruptive in the community, also.” Appendix page 25, Line 9-15. J.C. never made any physical threats while at Genesis, but instead was more of a disturbance. Appendix page 31, Line 23-

page 32, Line 25. There was further no proof that J.C. actually harmed anyone. Appendix page 33, Lines 1-12.

The only potential proof of harm by J.C. was Dr. Weyeneth's experience with other patients diagnosed with bipolar disorder. Appendix page 28, Line 23-page 29, Line 8. The Iowa Code requires that the respondent actually commit an act of violence or make a threat of violence. *In re Foster*, 426 N.W.2d at 378-379 (rejecting the argument that an overt act need not necessarily involve a threat or an act of unprovoked physical aggression). In *Foster*, the court cites with approval a North Carolina case rejecting the argument that a respondent's persistence in trying to preach on the streets constituted an overt act which shows that the respondent is likely to physically injure herself or others. *Id.* at 379 (citing *In re Hogan*, 232 S.E.2d 492, 493, 495 (North Carolina 1977)). There was simply no proof that J.C. was likely to physically injure herself or others, and she does not meet the definition of seriously mentally impaired.

The district court erred when it found that J.C. was seriously mentally impaired as there was no indication that she was likely to cause injury to herself or other, likely to inflict serious emotional injury, or incapable of satisfying her own needs. The court should reverse the decision of the district court finding that J.C. is seriously mentally impaired and directing her to the

care and custody of Genesis Medical Center and dismiss this case. The applicant failed to meet her burden of proof that J.C. was likely to physically injure herself or others, and the court should dismiss this case.

CONCLUSION

J.C. is not a person who is seriously mentally impaired pursuant to Iowa Code Section 229.1. The district court incorrectly admitted the physician's report of examination as it did not comply with the strict requirements of Iowa Code Section 229.10. Further, the applicant, through the county attorney, failed to prove by clear and convincing evidence that J.C. performed any overt act or made any threat of physical violence which may indicate the future likelihood of her seriously injuring herself or others. Because the applicant failed to meet her burden, the Order for Hospitalization entered by the district court should be reversed and this case dismissed, and the proceedings terminated.

Respectfully submitted,



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REQUEST FOR ORAL ARGUMENT

The Respondent/Appellant hereby requests to be heard in oral argument on this appeal.

Respectfully submitted,



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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on this 11th day of October, 2017, I served this document by EDMS to the Appellee's attorney as show below:

Gretchen W. Kraemer
ASSITANT IOWA ATTORNEY GENERAL

I further certify that on this 11th day October, 2017, I will file Appellant's Final Brief.

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ATTORNEY'S COST CERTIFICATE

The Appellant hereby certifies that the cost of the above and foregoing Appellant's Final Brief and Request for Oral Argument was \$0.00.

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

I. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 3,314 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

II. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in Times New Roman size 14 point font.

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