IN THE SUPREME COURT OF IOWA

Supreme Court No. 24–0030
Polk County Case No. LACL151685

JESSENIA BURTON, NANCY BURTON, AND TRACY BURTON,
Plaintiffs-Appellants,

vs.

WEST BEND MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT HANSON, JUDGE

BRIEF FOR APPELLANTS

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Did the district court err in ordering production of psychological test material to West Bend and its attorneys when the plain language of Iowa Code section 228.9 prohibits it?

ROUTING STATEMENT

This court should retain this case. This is an issue of first impression regarding the procedure for disclosure of psychological test material in civil litigation. Retention will allow this court to establish clear rules for litigants going forward. *See* Iowa R. App. P. 6.1101(2)(c)–(d).

STATEMENT OF THE CASE

Nature of the Case

In this interlocutory appeal, Plaintiffs seek reversal of a ruling from the district court on Defendant West Bend's motion to compel that orders the production, to West Bend and its attorneys, of psychological test materials and data that are protected from such disclosure to such individuals under Iowa law. Iowa law unambiguously states that such a disclosure may only be made to a licensed psychologist.

Plaintiff Jessenia Burton suffered permanent loss of function from the traumatic brain injury she received in a car crash. This issue arose at the close of discovery in this case. The psychological tests and data from Jessenia Burton's neuropsychological evaluation by the University of Iowa's Dr. Daniel Tranel, associate dean of the medical school and licensed neuropsychologist, can only be disclosed to another licensed psychologist under Iowa Code section 228.9 and related portions of the Iowa Administrative Code. West Bend has refused to retain a qualified psychologist to receive the data, and the district court erred in ordering Plaintiffs to produce it to West Bend and its attorneys. The court's ruling eviscerates Jessenia Burton's protections against such disclosure under the law and is contrary to the plain language of Iowa statutory and administrative law. D0056, Order (9/14/2023).

Issue Presented to the Court

This case presents an issue of first impression in Iowa: whether the plain text of Iowa Code section 228.9 protects neuropsychological test material from open discovery to attorneys and parties in civil litigation or whether the process outlined in the statute is controlling. The statute states:

> Except as otherwise provided in this section, a person in possession of psychological test material *shall not disclose the material to any other person*, including the individual who is a subject of the test. *In addition, the test material shall not be disclosed in any* administrative, *judicial*, or legislative *proceeding*. *However*, upon the request of an individual who is the subject of a test, *all records* associated with a psychological test of that individual *shall be disclosed to a psychologist licensed pursuant to chapter 154B designated by the individual*. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials.

Iowa Code § 228.9 (emphasis added).

Instead of following the unambiguous procedure outlined in Iowa Code section 228.9 and designating a qualified psychologist to receive the test materials, West Bend sought to compel production the test materials and raw test data to the insurance company and its counsel. West Bend's motion relied on the erroneous grounds that these were "material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony" pursuant to Iowa R. Civ.

P. 1.508(1)(b). Plaintiffs resisted this motion to compel on the grounds that Iowa Code section 228.9 explicitly prohibits the disclosure of psychological test material, and with it the underlying data, except by one properly licensed psychologist to another.

Because the statute is unambiguous, because the statute controls over the general discovery rule advanced by West Bend, and because the statute establishes a clear avenue for West Bend to pursue its interests, reversal is warranted. Plaintiffs ask this court to reverse and remand so discovery under section 228.9 can proceed.

Disposition of the District Court

After the district court heard arguments on West Bend's motions in September 2023, it issued an order granting West Bend's motion to compel discovery. D0056, Order (9/14/2023). While the court's ruling acknowledged the liberal nature of Iowa's discovery rules, it based its ruling on statutory interpretation of section 228.9, an analysis that was flawed from the outset.

The court outlined the correct guideposts to statutory interpretation:

> Under Iowa law regarding statutory interpretation and construction, it is presumed that the legislature, when enacting a statute, intends a) that the entire statute be effective, b) that there be a just and reasonable result, and c) that said result be feasible of execution. Iowa Code § 4.4. It is further presumed that that the legislature, in enacting a statute, included all the parts thereof for a purpose, and therefore the statute should not be read in a way that makes any portion of it redundant or irrelevant. *Rojas v. Pine Ridge Farms, L.L.C.*, 779 N.W.2d 223, 231

> (Iowa 2010). Finally, Iowa courts "avoid construing statutory provisions in a manner that will lead to absurd results." *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 770 (Iowa 2016) *(citing Iowa Ins. Inst. v. Core Grp. of Iowa Ass'n for Just.*, 867 N.W.2d 58, 75 (Iowa 2015)).

D0056 at 4–5. However, it misapplied these guideposts, leading to an erroneous result and resulting in this interlocutory appeal. As written, section 228.9 provides a rote prohibition on disclosure of psychological test materials, "except as otherwise provided in *this* section." Iowa Code § 228.9 (emphasis added). The court, *sua sponte*, instead read section 228.9 to be subject to exceptions or provisions from *other* sections of Chapter 228, specifically section 228.6(4)(a), which makes "mental health information" discoverable in a civil case. D0056 at 3. In doing so, the district court rendered section 228.9 null and void, undermining the legislature's creation of a limited discovery process for psychological test information. *See* Iowa Code § 4.4. Plaintiffs contend the broad category of "mental health information" in another section does not expand the specific statutory prohibition governing psychological test material.

Relying on the general discovery rules and on section 228.6(4)(a), the court ordered Jessenia Burton to request Dr. Tranel to deliver this protected information to West Bend, its attorneys, and their non-psychologist retained expert. D0056 at 6. West Bend's retained expert, Dr. Irving Wolfe, is a neurologist – not a licensed psychologist qualified to receive and interpret psychological test materials and data

in the process the legislature established in Iowa Code section 228.9; *see also* Iowa Admin. Code r. 645—243.4(2)–(3) (prohibiting licensed psychologists from disclosing test materials and data to anyone except a licensed psychologist). Importantly, the district court's order explicitly contemplates the insurance company and its attorneys receiving and reviewing the protected test materials and data – the very situation the clear language of section 228.9 prohibits. In sum: the district court's ruling releases highly sensitive test materials to unauthorized recipients, in direct violation of the protections against access, mandated by the Iowa legislature. *See* Iowa Code § 228.9; Iowa Admin. Code r. 645—243.4(2)–(3).

STATEMENT OF FACTS

Plaintiff Jessenia Burton was fourteen years old behind the wheel of a driver's education vehicle on April 30, 2017 when a negligent driver ran a red light and caused a serious crash, injuring Jessenia. D0001, Petition at 2 (10/13/2021). Jessenia was a student at Street Smarts, which provides underinsured motorist coverage for injured students through a policy with Defendant West Bend Mutual Insurance Company. D0001 at 1–2. Plaintiffs brought this claim against West Bend for underinsured motorist coverage and medical payments coverage because the driver who caused the crash did not have sufficient coverage to compensate Jessenia for her injuries. D0001 at 4.

The injury central to this case is the concussion Jessenia suffered as the tortfeasor's truck smashed into the driver's side of the Streets Smarts car and pushed her off the road. *See* D0049, Plaintiffs' Resist. M. Strike at 1 (8/30/2023). This concussion – by definition, a mild traumatic brain injury[1] – has caused Jessenia permanent cognitive impairment. D0001 at 3; D0039, Plaintiffs' Resist. M. Continue at 5 (7/21/2023). Jessenia's course of treatment included years of treatments and therapies for concussion, post-traumatic stress disorder, post-concussion syndrome, and headaches. Attachment to D0046, Plaintiffs' Exh. 1, Tranel Report (8/21/2023); D0049 at 1.

To better assess and explain Jessenia's injury, Plaintiffs retained Dr. Daniel Tranel as an expert neuropsychologist to perform testing of Jessenia Burton. D0023, Plaintiffs' Witness List (2/20/2023). Dr. Tranel is the Director of Neuropsychology at the Benton Neuropsychology Clinic at the University of Iowa. D0046, Plaintiffs' Resist. M. Compel at 3 (8/21/2023). The Benton Clinic is one of the leading neuropsychology clinics in the country. *Id.* Dr. Tranel is also a Professor of Neurology and an associate dean at the University of Iowa College of Medicine. Attachment to D0049, Plaintiffs' Exh. 3, Tranel C.V. (8/30/2023).

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[1] *See, e.g.*, Mayo Clinic, *Concussion*, Mayo Foundation for Medical Education and Research (Jan. 12, 2024), https://www.mayoclinic.org/diseases-conditions/concussion/symptoms-causes/syc-20355594; Cailyn M. Reilly, *Where Is Concussion Litigation Headed? The Impact of Riddell, Inc. v. Schutt Sports, Inc. on Brain Injury Law*, 20 Jeffrey S. Moorad Sports L.J. 517, 531 (2013).

Dr. Tranel examined Jessenia Burton with a battery of neuropsychological tests and prepared an expert report on her condition. *See* D0046, Exh. 1. The report included the list of the tests used in Jessenia's evaluations, Dr. Tranel's observations of Jessenia's behavior, her self-reported status, and summaries of the results of the testing broken out by category. *Id.* Dr. Tranel's report further included his opinions and conclusions as a result of the testing, in which he noted, among other results, Jessenia's "mild deficits in overall intellectual functioning and executive functioning, in the context of normal memory, speech and language, visuospatial/visuoperceptual/visuaconstructional functioning, processing speed, and attention." *Id.* at 12. All of this information was timely disclosed to West Bend on March 22, 2023 in Plaintiffs' expert disclosures. D0027, Notice of Discovery Response (3/22/2023). Following that, West Bend timely filed its own expert designations and disclosures, designating a lone medical expert: neurologist Dr. Irving Wolfe. D0030, Defendant's Expert Certifications (4/21/23); D0031, Notice of Discovery Response (5/22/23). *At no point* has West Bend designated any licensed psychologist as an expert in this case.

On July 20, 2023, the final day of discovery in this case, West Bend requested information Iowa law dictates it could not have: the psychological test materials themselves used by Dr. Tranel and the test data in the form of Jessenia Burton's responses. Attachment to D0045, Defendant's Exh. C, Plaintiffs'

Supplemental Responses to Requests for Production of Documents (8/21/2023); D0034, Notice of Discovery Request (7/20/2023). Plaintiffs timely objected to this request because Iowa Code section 228.9 plainly prohibits the disclosure of psychological test material in any judicial proceeding with one exception: disclosure from one licensed psychologist to another. D0046, Plaintiffs' Resist. Defendant M. Compel at 7 (8/21/2023). Instead of hiring a licensed psychologist to receive and interpret the neuropsychological test materials and data as required by the law, West Bend chose instead to move the court to grant it the right to this information as part of ordinary discovery. *See* D0045, Defendant's M. Compel (8/11/2023).

West Bend filed three motions[2] between its July 20, 2023 request for protected information and trial, which was slated to begin September 18, 2023. The district court heard the three West Bend motions the Monday before trial on this case: the motion to continue trial, motion to compel discovery, and motion to strike testimony of Dr. Tranel. D0056 at 1. On September 14, 2023, the district court granted West Bend's motion to continue and motion to compel. *Id.* at 7. The district court ruled that Iowa Code section 228.9, prohibiting disclosure of psychological

[2] A fourth motion, West Bend's motion for leave (D0052, Defendant's M. Leave (9/7/2023)), was rendered moot by the court's order continuing trial. D0056 at 7.

test materials, was subject to the provisions of section 228.6, which makes mental health information discoverable in a civil case. *Id.* at 3.

Following the ruling, Plaintiffs moved the court to reconsider its ruling because the plain language of section 228.9 protects psychological test material from ordinary discovery, and because attempts to amend the language of section 228.9 to make it conform to the district court's interpretation have been rejected, which supports the statute's plain meaning. D0059, Plaintiffs' M. Reconsider (9/28/2023); D0060, Plaintiffs' Brief on M. Reconsider (9/28/2023). Plaintiffs requested the court, upon reconsideration, deny West Bend's motion to compel, or alternatively amend the court's order to instead instruct the parties to comply with the letter of Iowa Code section 228.9. *Id.* The district court denied Plaintiffs' motion to reconsider. D0065, Order (12/9/2023). In compliance with the district court's ruling (D0056 at 6), Plaintiffs moved for a protective order, which West Bend resisted in part. D0066, Plaintiff's M. Protective Order (12/22/2023); D0068, Defendant's Response M. Protective Order (1/2/2024). The court issued a protective order with West Bend's preferred language, which would grant even the jury access to these protected materials, in contravention of Iowa Code section 228.9. D0069, Protective Order (1/12/2024).

The Iowa Supreme Court granted Plaintiffs' interlocutory appeal of the Order granting West Bend's motion to compel. D0070, Supreme Court Order (2/2/2024).

ARGUMENT

I. BECAUSE DISCLOSURE OF PSYCHOLOGICAL TEST MATERIAL IS PROHIBITED BY IOWA CODE SECTION 228.9 IN JUDICIAL PROCEEDINGS, IT IS NOT DISCOVERABLE IN A CIVIL CASE UNTIL WEST BEND RETAINS A LICENSED PSYCHOLOGIST TO RECEIVE IT.

Error Preservation

The district court ruled on Defendant's motions and Plaintiffs' objections. As these issues were ordinarily raised and decided upon by the district court, error is preserved. *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002).

Scope and Standard of Review

A ruling on a motion to compel discovery is reviewed for abuse of discretion. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009); *see also Detroit Edison Co. v. NLRB*, 440 U.S. 301, 316 (1979). The district court abuses its discretion when its decision is based on clearly untenable or unreasonable grounds. *Mitchell v. City of Cedar Rapids*, 926 N.W.2d 222, 227 (Iowa 2019). "A ruling based on an erroneous interpretation of a discovery rule can constitute an abuse of discretion." *Shook v. City of Davenport,* 497 N.W.2d 883, 885 (Iowa 1993) (abrogated on other grounds by *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*,

690 N.W.2d 38, 44–48 (Iowa 2004)). But where the court's ruling involves the interpretation of a statute, review is for errors at law. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009).

Introduction

Sensitive medical materials require specialized protections, particularly when those materials can become invalidated or abused if they fall into the wrong hands. The case before this court involves particularly sensitive medical materials: neuropsychological tests and the results of that testing. Neuropsychological testing is used to diagnose and treat brain injuries and is often used forensically by participants in civil litigation to determine the nature and extent of lingering cognitive issues after traumatic brain injuries. Because these tests are very sensitive in nature, the release of the tests and the resulting data are tightly controlled by Iowa law, administrative codes applying to licensed psychologists in Iowa, and by the ethical standards of the professionals who administer the testing.

Real harm will follow the wide dissemination of neuropsychological test materials and data. This is why many states, including Iowa, offer protections and prohibitions for disclosing those materials and data. In spite of those protections, the district court ignored the plain text of Iowa law regarding test materials and ordered Plaintiff Jessenia Burton to release items protected from disclosure in the normal course of discovery. This court should reverse the lower court and require

disclosure only to a licensed psychologist of Defendant West Bend's choosing, in accordance with Iowa Code section 228.9's requirements. This result conforms to the plain language of the law and serves the many different interests the law protects.

Defendant West Bend will claim the lower court's erroneous ruling instead better serves the purpose of discovery in a civil case and that West Bend's interest in cross-examining Plaintiffs' expert witness through having the materials and data in the hands of its attorneys is the more important interest. However, West Bend is already adequately protected by the provisions of section 228.9, where the legislature struck the balance between protecting the sensitive testing and data and allowing litigants to have their day in court.

Plaintiffs ask this court to reverse the lower court's order to turn over information the legislature has deemed outside of the scope of proper discovery, and instead require West Bend to follow the guidance and plain language of the law by designating a licensed psychologist to receive the requested information. Doing so is in the interest of justice and follows the legislature's balancing of all relevant interests.

A. Neuropsychological Testing is a Specialized Tool, Requiring Specialized Protections.

Neuropsychology studies the ways the nervous system relates to behavior and cognition. *Neuropsychology*, American Psychological Association,

https://www.apa.org/topics/neuropsychology (last visited July 22, 2024). More simply, it is the study of brain-behavior relationships, including the relationship between traumatic brain injuries and cognitive impairment. *Clinical Neuropsychologists: Training, Credentials and Courtroom Credibility*, 59 J. Mo. B. 184, 184 (2003). Even mild traumatic brain injuries can lead to cognitive impairment. *See* Kerry McInnes, et al., *Mild Traumatic Brain Injury (mTBI) and Chronic Cognitive Impairment: A Scoping Review*, PLOS ONE (Apr. 11, 2017) https://doi.org/10.1371/journal.pone.0174847. The Iowa legislature recognizes: "Concussions are a type of brain injury that can range from mild to severe and can disrupt the way the brain normally works." Iowa Code § 280.13C(1)(b).

For individuals like Jessenia Burton, the cognitive changes after a traumatic brain injury are very real, but can be hard to quantify. Clinical neuropsychology is able to step in and analyze the brain and its cognitive output. Nat'l Acad. of Neuropsychologists, *Definition of a Clinical Neuropsychologist*, Official Position Statement (May 5, 2001) https://www.nanonline.org/NAN/files/PAIC/PDFs/NANPositionDefNeuro.pdf. A core component of that analysis is testing. "Psychological and neuropsychological tests offer an objective means of evaluating strengths and weaknesses of performance capacities, as well as characteristics of symptom reporting." Kyle Brauer Boone, et al., *Official Position of the Am. Acad. of Clinical Neuropsychology on Test Security*, 36 The Clinical

Neuropsychologist 523, 524 (2022), https://doi.org/10.1080/13854046.2021.2022214. Neuropsychological testing of the brain often consists of a battery of different pen-and-paper tests. *See* Brauer Boone, *supra*, at 536; Kenneth R. Morel, *Test Security in Medicolegal Cases: Proposed Guidelines for Attorneys Utilizing Neuropsychology Practice*, Oxford J., 24 Archives of Clinical Neuropsychology 635, 642 (2009), https://doi.org/10.1093/arclin/acp062. "What is being evaluated is the brain's ability to perform the tasks that it is designed to do every day, which include the areas of attention; processing speed, planning and reasoning (i.e., executive functioning); language abilities; visuospatial functions; motor skills; learning; and memory." Mark Prohaska & David P. Martin, *Obtaining Neuropsychological Test Data: Why is This So Hard?*, Ala. Law., May 2007, at 216, 219.

In this case, based on Jessenia Burton's ongoing symptoms of cognitive impairment, Plaintiffs retained Dr. Daniel Tranel of the University of Iowa's Benton Neuropsychology Clinic to testify as to her neuropsychological condition. D0023 at 1. Dr. Tranel is an eminently qualified neuropsychologist, and indeed has a decorated *curriculum vitae* that indicates he is one of the top experts in his field. *See* D0049, Exh. 3. Dr. Tranel evaluated Jessenia on October 12, 2022. D0046, Exh. 1 at 3. The clinical assessment included a battery of over thirty neuropsychological tests, which were listed by name in Dr. Tranel's report. D0046

at 13. Some of these tests are self-reporting inventories; some test memory; some test pattern recognition; some test speed of connection-making; some are verbal; some are written. All of them, when used together, can help a licensed practitioner diagnose cognitive impairment.

This court has found such expertise to be valuable. *See generally Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882 (Iowa 1994). For at least thirty years, Iowa courts have allowed neuropsychologists to testify regarding brain injuries, including causation for brain injuries. In *Hutchison*, this court determined that neuropsychologists were sufficiently qualified to testify to expert causation opinions regarding brain injuries. *Id.* at 888. In specific, this court noted that neuropsychology as a medical field was beyond question in its ability to medically examine the brain, and that "ample basis existed for admission" of a neuropsychologist's testimony regarding brain trauma. *Id.*

And, in fact, a qualified neuropsychologist is the only person who can provide such evidence of impairment. Specialized training is required to properly interpret neuropsychological tests and use them to make a diagnosis. Brauer Boone, *supra*, at 535 ("accurate judgment of proper administration, scoring, and interpretation procedure requires the assistance of a retained expert"). The practice of interpreting these tests and patients' responses to them is one of the reasons clinical neuropsychology exists as a specialized practice under the broader

umbrella of psychology. *See* Nat'l Acad. Neuropsychologists, *supra*. Clinical neuropsychologists are trained and licensed as clinical psychologists but have additional specialized training, "well beyond that required to obtain a Ph.D. in clinical psychology." Prohaska, *supra*, at 218. "Without advanced specialized training, even a licensed clinical psychologist is *not qualified* to practice neuropsychology or to administer and interpret neuropsychological tests, and neither are other professionals such as psychiatrists or physicians." *Id.* at 219.

The specialized nature of clinical neuropsychology goes hand in hand with concerns in the field over the security and validity of neuropsychological testing. Considering the education required to practice clinical neuropsychology, it follows that untrained individuals may, willfully or mistakenly, misinterpret the results of testing, or use the information in a manner not supported by science or medicine.

Test security and validity are two vital considerations in this case, as in every case involving neuropsychological testing. Neuropsychologists, professional associations, Iowa's Board of Psychology, and the Iowa Legislature all emphasize the importance of keeping the specific tests used by neuropsychologists secure and out of the public purview, thus ensuring only qualified individuals obtain and utilize the test materials and data. The United States Supreme Court has likewise recognized: "Test secrecy is concededly critical to the validity of any such

program, and confidentiality of scores is undeniably important to the examinees." *Detroit Edison Co.*, 440 U.S. at 304.

A lack of security for neuropsychological testing can result in public harm and test invalidity. Prohaska, *supra*, at 221. Public harm comes in many forms, but primarily from bad actors not bound by the pertinent legal or ethical standards misusing or misrepresenting the tests or data. *Id.* The tests can also be 'gamed' by an unscrupulous individual who has access to the tests beforehand, and individuals can be coached to perform better or worse. *Id.*; Brauer Boone, *supra*, at 529. Test invalidity is the other side of that coin. One unique aspect of neuropsychological testing is that the tests themselves are based on the test takers having "no prior knowledge or exposure to the specific tests." Brauer Boone, *supra*, at 524. When the test-taker has been exposed to the tests beforehand, there is the potential for the subject of the test to "manipulat[e] results to artificially increase or decrease performance capabilities or to misrepresent symptom report." *Id.* "[I]f test items and responses are disseminated widely, the tests will become invalid and new ones will have to be developed, standardized and published. This process is both costly and time-consuming, with the process typically taking several years." Prohaska, *supra*, at 221.

It is thus important that both the tests themselves and the responses are kept secure. Individually, these items are commonly referred to as "test materials" and

"test data" within Iowa's regulatory structure for licensed psychologists. Iowa regulations for the professional licensure of psychologists define test materials as "the test questions, scoring keys, protocols, and manuals that do not include personally identifying information about the subject of the test." Iowa Admin. Code r. 645—243.1. Test data is defined as "raw and scaled scores, patient responses to test questions or stimuli, and notes and recordings concerning patient statements and behavior during an examination." *Id.* The American Psychological Association likewise defines these terms in its Ethics Code as part of its guidelines on test security. "The term *test materials* refers to manuals, instruments, protocols, and test questions or stimuli." 9.11 Maintaining Test Security, *Ethical Principles of Psychologists and Code of Conduct*, Am. Psyc. Assoc'n. (2017), https://www.apa.org/ethics/code. "The term *test data* refers to raw and scaled scores, client/patient responses to test questions or stimuli, and psychologists' notes and recordings concerning client/patient statements and behavior during an examination. Those portions of test materials that include client/patient responses are included in the definition of *test data*." 9.04 Release of Test Data, *Ethical Principles of Psychologists and Code of Conduct*, Am. Psyc. Assoc'n. (2017), https://www.apa.org/ethics/code.

While these items are defined separately, they are frequently inseparable in reality, and are generally treated the same by professionals using these tests

because they are so tightly intertwined. *See* Brauer Boone, *supra*, at 532. When discussing test security, test data should be understood to be subsumed within test materials. "The distinction between 'test materials' and 'test data' is artificial in that many patient responses are the same as the test stimuli (e.g., reproduction of line drawings, repeating of word list learning tasks, etc.)." *Id.* "If it is important to safeguard a list of words or a complex figure before it is revealed to the examinee, then it should be just as important to safeguard them after they have been repeated or reproduced by the examinee." *Id.* (quoting Shane S. Bush & Thomas A. Martin, *The Ethical and Clinical Practice of Disclosing Raw Test Data: Addressing the Ongoing Debate*, 13 Applied Neuropsychology, 115, 119 (2006)). In a sense, some of the test data is created on top of or within the test materials themselves, and thus the test data and the underlying test material cannot be meaningfully separated. *See* Brauer Boone, *supra*, at 532.

It is both the test material and test data that West Bend seeks in this case: copies of the tests used by Dr. Tranel in his evaluation of Jessenia Burton, and her answers to them. No compromise on disclosure of test data will obviate the concerns regarding test security, because the test data necessarily includes test materials. Neuropsychologist Dr. Mark Prohaska explains the practical concerns of trying to separate the two:

> Even though there is a distinction between the release of test data and test materials, it is really impractical and

> often impossible to separate the two. Imagine obtaining the raw scores to a test that consist of a number of scores ranging from one to five. Without the test items, these numbers are essentially meaningless and certainly have the potential to mislead. In many cases, tests are administered on the test forms themselves; thus, the test materials and test data are combined in a manner that does not allow the release of one without the other. And, yet, in other cases, test materials might easily be inferred from test data, and though the release of the data might not technically violate APA Ethics Code 9.11[3], it may well violate the intent of the guideline and still be in conflict with the procedures or principles articulated in 9.11.

Prohaska, *supra*, at 221.

Iowa safeguards psychological test materials and data to protect the security and validity of the tests as well as the privacy of examinees like Jessenia Burton. This is why the Iowa Board of Psychology's rules on psychological testing disclosure are so strict for its licensees:

> *Release of test data.* A licensee shall not provide test data to any person, except that upon a written request of a patient or examinee who is the subject of a test, the test data shall be disclosed to a licensed psychologist designated by the patient or examinee. A psychologist who receives test data in this manner may not further disseminate the test data.

[3] APA Ethics Code 9.11 provides, in relevant part: "Psychologists make reasonable efforts to maintain the integrity and security of test materials and other assessment techniques consistent with law and contractual obligations, and in a manner that permits adherence to this Ethics Code." 9.11 Maintaining Test Security, *Ethical Principles of Psychologists and Code of Conduct*, Am. Psyc. Assoc'n. (2017), https://www.apa.org/ethics/code.

Iowa Admin. Code r. 645—243.4(2).

> *Release of test materials.* A licensee shall not disclose test materials to any person, except for another licensed psychologist who has been designated in writing by the subject of a psychological test to receive the records associated with the psychological testing of the subject. A licensee shall not disclose test materials in any administrative, judicial, or legislative proceeding.

Iowa Admin. Code r. 645—243.4(3).

It is key to note that "state agency rules are given the force and effect of law." *City of Des Moines v. Iowa Dept. of Transp.*, 911 N.W.2d 431, 440 (Iowa 2018). This means that a psychologist who violates these regulations violates Iowa law. In this case, the district court has ordered Dr. Tranel to disclose test materials and test data to West Bend, its attorneys, its hired neurologist (who is not a licensed psychologist), and, when it comes to trial, the members of the jury. D0056 at 6; D0069, Protective Order (1/12/2024). The district court's order would thus require Dr. Tranel to violate Iowa law – a clear abuse of discretion.

The immediate harm that stems from this order is clear. Jessenia Burton's sensitive psychological testing will be necessarily misinterpreted and mischaracterized because West Bend and its attorneys are not qualified to analyze it. For Dr. Tranel, violating the regulations prohibiting nondisclosure of test materials and data makes him subject to discipline by the Board of Psychology. Iowa Admin. Code r. 645—242.2(13). But the broader risk of public harm is

present here too. The district court's order, advocated for by West Bend, would potentially invalidate the tests by making them widely available. Entities like West Bend are not bound by ethical principles or regulations to keep the test materials secure, safe from being disseminated or leveraged in future litigation.

Further, West Bend is not without recourse in this situation. In injury cases involving neuropsychological testing, attorneys routinely retain (and courts have mandated) the services of a qualified licensed psychologist to receive and review the test data and materials to ensure the other side's expert is properly representing the results of the tests in his or her expert report and opinion. *See, e.g., Whitney v. Franklin Gen. Hosp.*, No. C13–3048, 2014 WL 7339213, at *2 (N.D. Iowa December 23, 2014). This is done because the letter of the law commands it. Iowa Code § 228.9. It is also done because the nature of the testing requires specialized training to evaluate the results fairly and accurately. Brauer Boone, *supra*, at 535. West Bend's path is clear: retain a qualified expert to 'check the work' of Dr. Tranel, just as one might retain an expert doctor to dispute a diagnosis or review an x-ray.

Iowa law stands firmly on the side of protecting test security, for the sake of the practice of neuropsychology and the protection of examinees like Jessenia Burton. Iowa Code § 228.9. Without that protection, attorneys can turn this specialized field of study into anyone's game in the courtroom. "[T]he discovery

and dissemination of test materials in court turns the best available technology for evaluating mental states relevant to legal claims into junk science." Paul Kaufmann, *Protecting Raw Data and Psychological Tests from Wrongful Disclosure: A Primer on the Law and Other Persuasive Strategies*, 23 The Clinical Neuropsychologist, 1130, 1153 (2009) https://doi.org/10.1080/13854040903107809. Instead of the broad disclosure ordered by the district court, this court should rule this material "shall" be kept secure and not disclosed except by the process established by the legislature: by West Bend hiring a licensed psychologist to receive and review the test materials and data. Iowa Code § 228.9.

B. Psychological Test Material is not Discoverable Because the Plain Language of Section 228.9 Protects It.

Recognizing the importance of safeguarding patients who have undergone psychological testing and the tests themselves, the Iowa legislature balanced the competing discovery interests and created clear and unambiguous signposts to direct the disclosure – or nondisclosure – of this protected information.

1. Section 228.9 Lacks Any Ambiguity, Therefore Its Plain Meaning Controls.

Iowa law regulates the disclosure of mental health and psychological information in Iowa Code Chapter 228. In 1994, the Iowa legislature added the ninth and final section of that chapter, section 228.9, entitled "Disclosure of

psychological test material." The legislature provided new and specific discovery and disclosure rules, stating:

> Except as otherwise provided *in this section*, a person in possession of psychological test material *shall not* disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in *any* administrative, *judicial*, or legislative *proceeding*. However, upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual *shall be disclosed to a psychologist licensed pursuant to chapter 154B* designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials.

Iowa Code § 228.9 (emphasis added).

This statute prohibits the disclosure of psychological test material in any judicial proceeding. *Id.* As such, a court cannot compel the disclosure of the tests and responses from Jessenia Burton's neuropsychological evaluation, with one exception: those materials can be transferred from one licensed psychologist to another. *Id.* The remedy for litigants in a case like this is set out in the statute itself: analysis of test materials and data only by qualified individuals. In this statute, the legislature strikes a balance between the need for test and data security (and prevention of misuse of that information by malevolent actors) and the need for litigants to evaluate and try their cases.

The analysis should stop here, with all litigants herein following the plain meaning of the statute. But if statutory construction is in fact required, all interpretations of section 228.9 point to nondisclosure.

The rules of statutory construction are only applied when the terms of the statute are ambiguous. *McGill v. Fish*, 790 N.W.2d 113, 118 (Iowa 2010). Ambiguity in a statute can arise in two ways: from the meaning of particular words in the statute, or "from the general scope and meaning of a statute in its totality." *McGill*, 790 N.W.2d at 118. Ambiguity only exists if reasonable minds could differ on the meaning of the statute. *State v. Albrecht*, 657 N.W.2d 474, 479 (Iowa 2003). Section 228.9 is not ambiguous, and it has one plain meaning. But if this court does find statutory interpretation is required here, two phrases in section 228.9 are key, and both phrases are plain and definite.

The statute states: "a person in possession of psychological test material shall not disclose the material to any other person," and additionally, "the test material shall not be disclosed in any administrative, judicial, or legislative proceeding." Iowa Code § 228.9.

This court has found the term "shall" to be unambiguous as imposing a duty. Iowa Code § 4.1(30)(a); *see Sierra Club Iowa Chapter v. Iowa Dept. of Transp.*, 832 N.W.2d 636, 644–45 (Iowa 2013), *as revised on denial of reh'g* (July 15, 2013); *In re Det. of Fowler*, 784 N.W.2d 184, 187 (Iowa 2010) ("[T]he word 'shall'

generally connotes a mandatory duty."). Accordingly, a plain-language reading of the statute can only be read as imposing a duty on "a person in possession of psychological test materials" (such as the neuropsychological testing in this case) to not disclose any of that material to "any other person," or in "any . . . judicial . . . proceeding." Iowa Code § 228.9.

The district court's order passed over this definitive language to reach a different conclusion, in part based on a faulty reading of Iowa Code Chapter 228 as a whole (discussed in the next section) and in part by collapsing disparate sections of Chapter 228 into each other. However, in statutory construction, the purpose of a statute or rule is not even reached when the language – "shall" – is unambiguous. *Allen v. Tyson Fresh Meats, Inc.*, No. 17-0313, 2018 WL 1099117, at *2 (Iowa Ct. App. Feb. 21, 2018) (citing *McGill*, 790 N.W.2d at 118).

Section 228.9 aims its mandatory, prohibitive "shall not" duty to "any administrative, judicial, or legislative proceeding." And that language is unambiguous. This court has found the phrase 'any judicial proceeding' to be broad but controlling as to where procedural rules apply. *In re Girdler*, 357 N.W.2d 595, 598 (Iowa 1984). *Girdler*, a civil antitrust proceeding, dealt with compelled deposition testimony of a corporate officer , who was subject to an immunity agreement. *Id.* at 596. This court held the immunity-deal language of Iowa Rule of Criminal Procedure 2.20(3)(a) – providing that a grant of immunity is grounds to

compel a witness's testimony – applied to the civil deposition, as the plain language of the rule allowed it in "any judicial proceeding." *Id.* at 598.

Similarly, Jessenia Burton's test materials and data are prohibited from ordinary discovery in 'any judicial proceeding.' Iowa Code § 228.9. But the district court's ruling held the opposite: that the broad legislative language keeping psychological test materials from being disclosed in "any . . . judicial . . . proceeding" still allowed civil discovery. This ruling constitutes both an error at law in interpreting the statute, and an abuse of discretion in ignoring the statute's plain meaning.

2. Section 228.9 Coheres with Chapter 228 Because the Specific Language of Section 228.9 Controls over the General Language Found in Other Sections in Chapter 228.

The unambiguous language of section 228.9 paints it as an exception to the general rules of discovery found in the other sections of Chapter 228 and the Iowa Rules of Civil Procedure. The district court erred in ignoring the plain language of the section, while collapsing it into other, disparate sections within Chapter 228.

Further, Section 228.9's mandatory prohibition on disclosure of psychological test materials also provides a narrowly-defined process for escaping the duty of non-disclosure. The statute starts by stating nondisclosure applies "[e]xcept as otherwise provided in this section" – meaning within section 228.9 itself. That is, the only exceptions to the duty outlined in section 228.9 are those

listed within section 228.9 itself, by its plain language. However, the district court drew a straight line between the prohibitions of section 228.9 and the exceptions listed within a different section of that chapter, section 228.6. D0056 at 3 (quoting Iowa Code § 228.9). It appears the district court mistook the breakdown of 'sections' within a chapter of Iowa's Code for the Chapter itself.

This is a small error with tremendous consequences. By conflating a section with a chapter, the district court's ruling applies Chapter 228's general exceptions to mental health information protections to the language in section 228.9, which specifically governs psychological test information. D0056 at 3.

The Iowa Code is comprised of titles, chapters, and sections. The operative language at issue here is found in the Iowa Code under Title IV ("Human Services"), Chapter 228 ("Disclosure of Mental Health and Psychological Information"), Section 228.9 ("Disclosure of psychological test material"). The distinction between a title, a chapter, and a section of the Code is vital here. When the statute states its disclosure prohibition is controlling "[e]xcept as otherwise provided in this section," the legislature unambiguously meant that particular section, i.e., section 228.9. Here, the legislature provided a narrow exception that must not be conflated with broader language used elsewhere, such as 'except as otherwise provided, generally.' Indeed, if a broader exception was intended, the legislature could have written it that way, as it has in many other statutes. *See* Iowa

Code § 514B.32 ("Except as otherwise provided in this chapter"); Iowa Code § 481A.87 ("Except as otherwise provided"); Iowa Code § 489.14106 ("Except as otherwise provided in this section and subject to sections 489.14107 and 489.14108."). It is not for the courts to rule the legislature did not mean what it unambiguously said when it instructed, "this section." *See Lorentzen v. Deere Mfg. Co.*, 66 N.W.2d 499, 503 (Iowa 1954).

Accordingly, the only exception to be applied to the statutory prohibition on turning over psychological test materials is the single avenue, set forth in section 228.9 itself: that "upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual shall be disclosed to a psychologist licensed pursuant to chapter 154B."

In contrast, the district court's order throws the protective doors of section 228.9 open and makes psychological test materials and data discoverable because other mental health information in other cases is discoverable:

> Mental health information may be disclosed in a civil or administrative proceeding in which an individual eighteen years of age or older or an individual's legal representative or, in the case of a deceased individual, a party claiming or defending through a beneficiary of the individual, offers the individual's mental or emotional condition as an element of a claim or a defense.

Iowa Code § 228.6(4)(a).

Mental health information is defined, in pertinent part, as that which "indicates the identity of an individual receiving professional services and which relates to the diagnosis, course, or treatment of the individual's mental or emotional condition." Iowa Code § 228.1(6). This is necessarily a broad category of information, encompassing a wide swath of potential care or malady. Mental health information is, indeed, addressed by sections 228.1 through 228.8 of Chapter 228 ("Disclosure of Mental Health and Psychological Information").

The language of section 228.6 is important because provisions of related statutes can help determine the plain meaning of section 228.9. *See Matter of Est. of Franken*, 944 N.W.2d 853, 859–60 (Iowa 2020). A reading of section 228.9 in the context of the whole chapter clearly shows section 228.9 is a specific carveout to the general procedures outlined in other parts of Chapter 228. There is no doubt that mental health information is broadly discoverable under section 228.6. It is *specifically* discoverable because the statute says so – it "may be disclosed." Iowa Code § 228.6. But the discoverable mental health information of section 228.6 does not encompass psychological test materials and data, not only because they have their own specific definitions (Iowa Admin. Code r. 645—243.1) but also because the language of section 228.9 is insular, specific, and controlling over the broader rules in sections 228.2–228.8. Narrow section 228.9 is simply, and crucially, not subject to the broader language found in section 228.6.

It is a fundamental principle of statutory construction that the specific controls over the general. *See* Iowa Code § 4.7. "Where there is one statute dealing with a subject in general and comprehensive terms, and another dealing with a part of the same subject in a minute and definite way … the one dealing with the common subject matter in a minute way[] will prevail over the general statute." *Georgen v. State Tax Comm'n.*, 165 N.W.2d 782, 787 (Iowa 1969). Put another way, "where there is a conflict or ambiguity between specific and general statutes, the provision of the specific statutes control." *Id.* Here, section 228.6 deals with general mental health information, while section 228.9 deals with specific psychological test materials – 228.6 is the general statute, and 228.9 is the specific statute. Thus, 228.9 must control. *See* Iowa Code § 4.7.

If the specific (section 228.9) is correctly allowed to control over the general (sections 228.3, 228.4 and 228.6, etc.), all parts of Chapter 228 are given meaning – just in their different, applicable circumstances. The elements of Iowa Code section 228.6(4)(a) that come into effect when an individual like Jessenia Burton makes her mental condition an element of her claim apply in general, but those elements do not apply to the more specific statute governing psychological test data. *See Georgen*, 165 N.W.2d at 787.

Therefore, all parts of Chapter 228 work together. Section 228.6(4)(a) still applies, just not to psychological test materials and data, and section 228.9 is given

its narrower effect. But doing the reverse, where any time section 228.6(4)(a) is invoked then section 228.9 ceases to exist, leads to bizarre outcomes and nullifies the narrower process established specifically for psychological test materials and data by the legislature.

Compliance with section 228.9 is not absurd; it sets out a process designed by the Iowa legislature. Section 228.9 was intended to be effective in its entirety. *See* Iowa Code § 4.4(2). Its specific prohibitions are not superfluous. *See Thomas v. Gavin*, 838 N.W.2d 518, 524 (Iowa 2013). This court should read the plan language "shall not disclose" and "any . . . judicial . . . proceeding" as clear directives that drive the purpose of the section, and are mandatory ("shall"), unless the narrow process within that same section is followed by the litigants (disclosures only from psychologist to psychologist). Iowa Code § 228.9.

3. Section 228.9 Strikes a Proper Balance, Obviating Defendant's Concerns.

Defendant West Bend argues section 228.9 does not cover Jessenia Burton's neuropsychological tests and data; the rationale it provides is somewhat scattershot, but essentially West Bend appears to contend that by retaining an expert for litigation and by placing her mental health status at issue in this case, Plaintiff Jessenia Burton can no longer avail herself of the protections in Iowa Code section 228.9. D0045 at 2, 7. D0056 at 2, 5; D0072, Tr. Hearing at 8:19–21

(9/11/2023). Defendant will provide no citations to Iowa law to support this contention.

The plain language of section 228.9 does not change its protections based on how the testing happens, nor does the plain language of section 228.9 change its protections based on whether the testing is performed in the course of treatment or in the course of a forensic evaluation. As outlined in Section C below, this court will see that several attempts have been made at the legislative level to amend section 228.9 to explicitly change those protections for civil litigants, but all of these attempts have failed, and the 1994 statute controls.

The underlying policy rationale behind section 228.9 – protecting the validity of testing, preventing the coaching of test takers, and ensuring the materials are only evaluated by those who are qualified to do so and who are subject to ethical and legal penalty for misuse of those materials – not only applies in the civil context, but is likely heightened. Defendant West Bend's claims that somehow, some way, section 228.9 should not apply because Dr. Tranel is a retained expert has no support in the law itself, nor in the policy undergirding the law.

Next, West Bend will argue that it needs the materials in the hands of its attorneys to effectively cross-examine Dr. Tranel. West Bend ignores the fact it has a clear path to discover whether the materials and data support Dr. Tranel's

opinions in this case: designating its own licensed psychologist to review the data. *See* Iowa Code § 228.9. The statute itself provides this method, because the legislature struck a balance it determined to be the best regarding the vital considerations of test validity and security, and the ability of litigants to put on their best case. West Bend can simply hire an expert psychologist to verify or dispute the opinions of Dr. Tranel, as well as the conclusions drawn from the data and the items provided in accordance with Iowa law and ethical standards (including, for example, percentile scoring of various tests) comport with commonly accepted neuropsychological practices and methods. West Bend has refused this simple step to date without explanation. This is strange, because in cases involving a brain injury, it is common for one side to request such testing, and for the other side to obtain the services of a licensed psychologist to review that data, because that is what the law plainly requires. *See* Iowa Code § 228.9; *see also Whitney*, 2014 WL 7339213, at *2.

The legislature often has to comport with competing interests, finding a statutory path that serves many masters. The Iowa legislature has balanced the interests of litigants and the needs of neuropsychological testing through the plain language of section 228.9. This court should uphold and honor the legislature's balance by reversing the lower court, and allowing disclosure of protected

materials only to a qualified licensed psychologist, as specified in Iowa Code section 228.9.

C. The Legislative Resilience of Section 228.9 Reinforces Its Plain Meaning.

Iowa Code section 228.9 was introduced by the legislature in 1994 and signed into law that same year by Governor Terry Branstad. It has been the law continuously for thirty years. It has survived tectonic shifts in medicine, politics, population growth, technology, and developments in psychology. It remains a strong source of protection for psychological test materials and data. Brain injured or psychologically-harmed Iowans have long relied on its protections to keep their sensitive psychological testing only in the hands of licensed psychologists.

West Bend's contention that the clear protections of section 228.9 were written to be subject to and subsumed by the broader mental health disclosure provisions of section 228.6 and other sections is belied by recent legislative action rejecting that proposition. The essence of West Bend's argument is that section 228.6 (as well as the general rules of civil discovery) makes mental health information discoverable when a plaintiff's mental condition is in controversy in a civil case, so therefore psychological test materials and data should likewise be discoverable when a plaintiff's cognitive abilities are in controversy. The plain language shows otherwise. West Bend's reading of section 228.9 as toothless in civil litigation is undermined by recent attempted legislative action, which sought

to amend section 228.9 to conform precisely with the proposition West Bend promotes today. *See, e.g.*, House File 2386, 89th Gen. Assemb. (Iowa 2022). Those proposed amendments have all failed, indicating there is no legislative appetite to rebalance the competing interests by adopting West Bend's reading of section 228.9 or by eroding its protections in the way West Bend requests.

Rejection of a proposed amendment by the legislature shines light on the legislative intent in enacting the statute, and may indicate the legislature's satisfaction with the law as it is. *Ballard-Hassett Co. v. Miller*, 260 N.W. 65, 67 (Iowa 1935). For protection of psychological test materials, the Iowa legislature has stood by its original 1994 legislation, and the significant protections it granted to psychological test materials with the initial passing of section 228.9.

As an example, as part of the 2021–2022 legislative session, House File 2386 was proposed and brought before the Iowa House Committee on Judiciary. The bill sought to amend Iowa Code section 228.9 to add new paragraphs to the section, reproduced below (the underlined portion is the new wording sought to be included as part of the amendment). That proposed amendment would have brought section 228.9 largely in line with the reading Defendant West Bend asks this court to now adopt (and that the district court erroneously did adopt):

Section 1. Section 228.9, Code 2022, is amended to read as follows:

228.9 Disclosure of psychological test material.

1. Except as otherwise provided in this section, a person in possession of psychological test material shall not disclose the material to any other person, including the individual who is a subject of the test. In addition, the test material shall not be disclosed in any administrative, judicial, or legislative proceeding. ~~However, upon~~

2. Upon the request of an individual who is the subject of a test, all records associated with a psychological test of that individual shall be disclosed to a psychologist licensed pursuant to chapter 154B designated by the individual. An individual's request for the records shall be in writing and shall comply with the requirements of section 228.3, relating to voluntary disclosures of mental health information, except that the individual shall not have the right to inspect the test materials.

3. Unless otherwise ordered by a court, subsection 1 shall not apply in a civil action if a demand for psychological test material has been made pursuant to a discovery request or a subpoena issued in litigation and the cognitive abilities of the individual who is the subject of the test are at issue in the litigation.

4. If a court, in a civil action involving sexual abuse, receives test material from the subject of the test, the psychological test material shall be sealed by a protective order and barred from disclosure to any person not directly involved in the litigation.

H.F. 2386 at 2; *See* Attachment to D0059, Exh. 1 at 2 (9/28/2023).

Under the 'Explanation' section of the proposed bill, the proponents noted "[t]he bill allows a person in possession of psychological test material … to disclose the psychological test material of an individual if a demand … has been made pursuant to a discovery request or a subpoena issued in litigation in a civil

action." H.F. 2386 at 2–3; D0059, Exh. 1 at 2–3. The bill would make psychological test material discoverable in a civil case, as in section 228.6.

There would be no reason for House File 2386's proponents to attempt to change the law to include this specific language if the legislature intended such a result to already exist within the current language. Examination of legislative intent for amendments is clear: "in interpreting an amendatory act there is a presumption of change in legal rights." *State ex rel. Palmer v. Board of Sup'rs of Polk Cty.*, 365 N.W.2d 35, 38 (Iowa 1985). Because amendment brings the presumption of a change in legal rights, the changes offered in the 2022 proposed amendment in House File 2386 would logically represent a change in the existing legal rights conferred by Iowa Code section 228.9. In other words, if House File 2386 had passed, the new sections added to the existing section 228.9 – which would then read to state that the prohibition on disclosure of psychological test material did not apply in litigation – would represent a change in the rights of Jessenia Burton to have that material protected. *See* H.F. 2386 at 2. It also follows that rejection of the amendment by the legislature represents a repudiation of that change in legal rights – and, in effect, a repudiation of the reading of section 228.9 taken by West Bend and the district court. In short: there is no need for proponents of this bill to push for such a change if that was already the state of the law, highlighting the error in the district court's analysis.

D. The Strength of Iowa's Protections is Unique and Necessary to Safeguard Jessenia Burton's Sensitive Psychological Testing.

One likely reason the legislature has not changed section 228.9 for over thirty years in spite of attempts to amend it is because section 228.9 provides the strongest protection for vulnerable people like Jessenia Burton in the nation. The strength of that protection is a sign of legislative intent, and one this court should uphold and honor by reversing the district court.

Across the county, many states have enacted regulations urging psychologists to act in order to protect test security. *See* Ariz. Admin. Code § 4-26-106 (psychologists may decline to disclose test materials or data if disclosure "may result in misuse or misrepresentation of the information and potentially harm the client or patient"); Ark. Code Ann. § 12-12-917(d)(2)(A)(ii) (restricting disclosure of psychological tests and examiner's notes); Cal. Code Regs. tit. 16 § 1396.3 (psychologists shall limit access to test materials to professionals who will safeguard their use); Fla. Admin. Code Ann. r. 64B19-18.004(3) (test materials and data may not be released except when required by law); Minn. Stat. Ann. § 148.965 (providers shall not be required to disclose test materials "if the provider reasonably determines that access would compromise the objectivity, fairness, or integrity of the testing process for the individual or others."); Mo. Code Regs. tit. 4, § 2235-5.030(12)(E) (psychologists shall not publicly reproduce test materials); 172 Neb. Admin. Code, ch. 156, § 010(04) (psychologists shall reasonably

safeguard test materials); N.M. Admin. Code tit. 16, § 16.22.2.16(B) (psychologists shall safeguard test materials and data from disclosure to unqualified persons.); Ohio Admin. Code 4732-17-01(E)(2) (requiring psychologists to "make reasonable efforts to maintain the integrity and security of test materials"); 22 Tex. Admin. Code § 465.22(c)(4) (test materials may not be distributed unless otherwise permitted or required by law); Wash. Admin. Code § 246-930-310(7)(a) (regulating who may perform and interpret psychological testing to protect the validity of psychological test findings).

Some jurisdictions have adopted the American Psychological Association's Ethics Code, which strongly disfavors disclosure of psychological test materials and data in the interest of test security. *See* Ga. Comp. R. & Regs. r. 510-4-.02; Or. Admin. R. 858-010-0075; S.C. Code Reg. 100-4(A)(1); *see also Ethical Principles of Psychologists and Code of Conduct*, Am. Psyc. Assoc'n. (2017), https://www.apa.org/ethics/code.

A few states offer more robust protections. In Illinois, psychological test material may not be disclosed in any judicial proceeding if such disclosure "would compromise the objectivity or fairness of the testing process." 740 Ill. Comp. Stat. 110/3(c). Similar to Iowa, in Maryland, psychological test data is only discoverable in a civil action if the party seeking the data has a qualified expert witness to receive and interpret it. Md. Code Ann., Health-Gen. I § 4-307(e)(1)–(3).

Iowa's protections are the strongest: test materials shall not be disclosed in any judicial proceeding, unless the party seeking them has a qualified licensed psychologist to receive and interpret them. Iowa Code § 228.9. Iowa makes psychologists subject to professional discipline if they disclose test materials or data to anyone else. Iowa Admin. Code r. 645—242.2(13). And the legislature rejected an amendment to make such protected information discoverable. *See* H.F. 2386.

Iowa law stands in sharp contrast to the weaker regulations found in Missouri, for example. *See* Mo. Code Regs. tit. 4, § 2235-5.030(12)(E). Missouri promotes an interest in test security by prohibiting its psychologists from putting neuropsychological tests in popular publications or public presentation. *Id.* That is a fundamentally different and weaker standard than that adopted in Iowa Code section 228.9 and the associated Iowa administrative code sections. Iowa Admin. Code r. 645—243.4(2)–(3). Importantly, the district court relied on a Missouri court's weak protections for psychological test materials to hold that general discovery rules must trump a psychologist's professional ethics and must trump the clear language of section 228.9. D0056 at 5 (citing *State ex rel. Svejda v. Roldan*, 88 S.W.3d 531, 533 (Mo. Ct. App. 2002)). Missouri does not have statutory protection for psychological test material. Iowa does. The lower court's use of a

Missouri case as persuasive on this issue, in spite of the difference in degree of protections afforded by Iowa and Missouri, constitutes an abuse of discretion.

This court's ruling will help the lower courts as they wade through issues related to neuropsychological testing. Iowa's district courts have at times struggled with this issue in the absence of specific appellate guidance on application of section 228.9 and the administrative law for psychologists. The Iowa District Court for Polk County itself has ruled both ways on the topic of test materials. *See Foote v. Hoskins*, No. CL 101751, 2008 WL 5971932 (Iowa Dist. Ct. Jan. 18, 2008) (Trial Order) (protecting test materials from discovery); *Ham v. IMT Ins. Co.*, No. LACV110763, 2003 WL 25648067 (Iowa Dist. Ct. Oct. 16, 2003) (Trial Order) (denying motion to compel test materials); *contra Campbell v. Mashek*, No. 65070 at 1–2 (Iowa Dist. Ct. Oct. 24, 1995) (discussed in *Douglas v. Parkview Adventist Medical Center*, No. CV-12-098, 2017 WL 3011516, at *4 (Me. Super. Ct. May 17, 2017) (Trial Order)).

This court's ruling should guide the lower courts to enforce the protections provided by the legislature in section 228.9. Those protections are not just for the psychologists' tests, though. Iowa seeks to protect the subject of the test too.

Jessenia Burton was a fourteen-year-old girl when she was hit by a truck. This would be a harrowing experience for anyone. For Jessenia, it has changed the trajectory of her life in ways she never would have anticipated when she signed up

for driver's education. Today, seven years after the crash, Jessenia is a young mother navigating new trials and challenges – but with the burden of an old injury still clinging to her. Jessenia does not want to be hurt. She wants to heal and be whole again, though the science says her impairments, while mild, are likely to be lifelong. Jessenia deserves dignity in her psychological health. She may have put her condition in controversy, but she did not waive the rights granted by the legislature in section 228.9. She did not ask to be hurt like this. And while her claims for damages deserve scrutiny and must be proven, the Iowa legislature prohibited disclosure of her sensitive psychological testing except to a licensed psychologist. The legislature's narrow exception does not grant access to her attorneys, West Bend's attorneys, West Bend's unqualified neurologist, West Bend itself, or the jury. *See* Iowa Code § 228.9.

CONCLUSION

In conclusion, the district court plainly erred in its interpretation of Iowa Code section 228.9 by making psychological test materials and raw data subject to ordinary discovery. This court should reverse and remand.

REQUEST FOR ORAL SUBMISSION

Plaintiffs-Appellants request this matter be set for oral arguments.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(g) and 6.903(1)(i) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font and contains 9,950 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

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CERTIFICATE OF COSTS

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

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CERTIFICATE OF FILING AND SERVICE

I certify that on July 22, 2024, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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