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IN THE SUPREME COURT OF IOWA
NO. 24-1019

ELIZABETH BRIGHT,	)	
	)	
Appellants,	)	**JOHNSON COUNTY**
	)	
v.	)	**NO. LACV 085047**
	)	
STATE OF IOWA,	)	
	)	
Appellee.	)	
	)	

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR JOHNSON COUNTY

THE HON. KEVIN MCKEEVER, PRESIDING)

BRIEF FOR APPELLANTS, ELIZABETH BRIGHT

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STATEMENT OF THE ISSUES

I. **WHETHER Iowa Code § 714I SHOULD BE APPLIED RETROACTIVELY TO FERTILITY FRAUD CLAIMS WHICH OCCURRED BEFORE THE STATUTE WAS ENACTED**

Routing Statement

The Iowa Supreme Court should retain this case because it presents a substantial issue of first impression, viz: whether Iowa Code § 714I may be applied retroactively. Iowa R. App. P. 6.1101(2)(c). In the alternative, this case presents a fundamental and urgent issue of broad public importance requiring prompt or ultimate determination by the Supreme Court, viz.: a victim of fertility fraud's right to seek damages. Iowa R. App. P. 6.1101(2)(d).

Nature of the Case

On June 30, 2023, the State Appeal Board indicated that they received Elizabeth Bright's State Tort Claim forms. D0002, Petition ¶5 (02/08/24). The State Appeal Board denied Elizabeth's claims on October 2, 2023. Id. at ¶6. On February 8, 2024, Elizabeth filed her Petition against the State of Iowa. Elizabeth asserted her claims premised on Iowa's Fraud in Assisted Reproduction Act ("FARA") pursuant to Iowa Code § 714I. Id. at ¶7. On March 6, 2024, the Defendant, the State of Iowa filed a pre-answer Motion to Dismiss. D0007, Motion to Dismiss (03/06/24); D0006, Brief in Support of Motion to Dismiss (03/06/24).

The State asserted that Chapter 714I as it currently exists does not apply retroactively to conduct that occurred over 70 years before it was enacted and thus dismissal of Plaintiffs' Petition was appropriate. D0007, Motion to Dismiss (03/06/24). Elizabeth resisted the motion, asserting that the plain legislative intent for § 714I was for the statute to be both retrospective and prospective. D0010, Order Re: Unresisted Motion for Extension of Time to Resist Motion to Dismiss-to and including 04/01/24 (03/13/24); D0014, Resistance (04/01/24); D0015, Brief in Support of Resistance (04/01/24). The State replied on April 22, 2024. D0019, Reply in Support of Motion to Dismiss (4/22/24).

The District Court granted the State of Iowa’s Motion to Dismiss on May 30, 2024, and dismissed all of Elizabeth’s claims. D0020, Ruling (May 30, 2024).

Elizabeth timely filed her Notice of Appeal on June 19, 2024. D0021, Notice (06/19/2024).

This appellate brief is being filed concurrently with two additional companion cases that also raise the question of the retroactivity of Iowa’s FARA. Bert Miller and Nancy Duffner v. State of Iowa, No. 24-1017 (Johnson County case no. LACV 085049); Ronald Stoughton and Rebecca Myers v. State of Iowa, No. 24-1018 (Johnson County case no. LACV 085048).

Statement of Facts

In the 1950s, Iowa residents Barbara and Warren Steinkraus were having difficulty conceiving a child. D0002, Petition ¶10 (02/08/24). Consequently, Barbara Steinkraus presented to the Department of Obstetrics and Gynecology at University Hospitals State University of Iowa (now University of Iowa Hospitals & Clinics) for fertility assistance. Id. at ¶11. There she was seen by Dr. John Randall, a UIHC physician who was the head of the Department of OB-GYN from April 1952 until the time of his death on April 19, 1959. Id. at ¶12-13. Based on information and belief, confirmed through DNA testing via Ancestory.com, Dr. Randall used his own sperm when providing the treatment, resulting in Elizabeth Bright being the biological child of Dr. Randall. Id. at ¶14,16. Warren Steinkraus passed away in 1990 and Barbara died on 01/11/11. Id. at ¶15.

Argument

Preservation of Error

Elizabeth preserved error on this issue by resisting the State’s Motion to Dismiss and filing a notice of appeal within 30 days of the court’s ruling granting the State’s Motion to Dismiss. D00015, Resistance (04/01/24); D0014, Brief in Support of Resistance (04/01/2024); D0019, Ruling Granting Motion to Dismiss (05/30/24); D000020, Notice of Appeal (06/19/2024).

Standard of Review

This court reviews the District Court’s ruling on a motion to dismiss for correction of errors at law. Mueller v. Wellmark, Inc., 818 N.W.2d 244, 253 (Iowa 2012). The court views the allegations in the light most favorable to the plaintiff and will dismiss a claim only if the petition shows no right of recovery under any state of facts. Meade v. Christie, 974 N.W.2d 770, 775 (Iowa 2022). For purposes of reviewing a ruling on a motion to dismiss, this court will accept as true the petition's well-pleaded factual allegations, but not its legal conclusions. Shumate v. Drake Univ., 846 N.W.2d 503, 507 (Iowa 2014).

I. The Background Behind Iowa’s Fraud in Assisted Reproduction Act

In order to evaluate Elizabeth’s claims and arguments it is helpful to understand the background behind Iowa’s Fraud in Assisted Reproduction Act (“FARA”) found in Iowa Code 714I. Over

the past decade, the public has become increasingly aware of reports that several OB-GYNs had allegedly inseminated unsuspecting patients with their own sperm. Jody Lynee Madeira, Understanding Illicit Insemination and Fertility Fraud, from Patient Experience to Legal Reform, 39 COLUM J. GENDER & L. 110 (2019); see also OUR FATHER (Netflix 2022). Many of these instances were never discovered until many decades later when the patients' unsuspecting adult children used direct-to-consumer genetic tests, only to discover that their biological father was their mother's fertility doctor and that they had a network of half-siblings. Madeira, supra, at 110. The above-captioned case, along with its other two companion cases, are powerful examples of this stunning late in life discovery.

The discovery regarding the identity of the biological progenitor to the adult children of these patients often "wrecks personal identity and destroys familial relations." Id. at 111. It can often leave the adult children "wondering if the physician-donor passed along undesirable genetic traits." Id.

In response to these reports, many states have enacted statutes that addressed this behavior from fertility doctors. Id. at 200–03. Iowa joined in this legal movement when it passed FARA, found in Iowa Code § 714I. whose effective date was July 1, 2022. See 2022 Iowa Acts chg. 1123 § 4.

FARA prohibits certain acts and practices concerning assisted reproduction treatments and grants patients a private right of action if those prohibited acts or practices occur. Iowa Code § 714I.4. More specifically, FARA prohibits a practitioner from engaging in the following:

> [I]n a practice or act the person knows or reasonably should have known provides false information to a patient related to an assisted reproduction procedure or treatment including false information relating to…..[t]he identity of a donor of human reproductive material used or provided for assisted reproduction including but not limited to the donor’s name, birthdate or address at the time of donation.

Iowa Code § 714I.3(1)(b).

The act also prohibits health care professionals from “knowingly or intentionally” doing any of the following:

> a. Us[ing] or provid[ing] a patient with human reproductive material for assisted reproduction other than that to which the patient expressly consented to in writing.
> b. Us[ing] or provid[ing] a patient with human reproductive material for assisted reproduction that is not used or provided with the donor’s consent or in a manner or to an extent other than that to which the donor consented.

Iowa Code § 714I.3(2)(a)-(b).

Children of deceased patients who had undergone assisted reproduction and are the product of that treatment are permitted by FARA to bring a cause of action under the act. Iowa Code § 714I.4(1)(a)(1)(b).

The statute allows Plaintiffs, such as Elizabeth, to recover compensatory damages, statutory damages in the amounts of

$200,000, court costs and reasonable attorney fees. Iowa Code § 714I.4(3).

In respect to when a civil action pursuant to Iowa FARA must be brought Iowa Code § 714I.4(6) states, "An action brought pursuant to this section is not subject to a statute of limitations and may be commenced at any time."

II. Iowa's Fraud in Assisted Reproduction Act Applies Retroactively to Dr. Randall's Conduct

In granting the State's motion to dismiss, the District Court ruled that FARA could not be applied retrospectively. D0019, Rules at p. 6 (May 30, 2024). "A statute is presumed to be prospective in its operation unless expressly made retrospective." Iowa Code § 4.5. To determine whether the legislature expressly made FARA retroactive the District Court utilized a three-prong test adopted by the Iowa Supreme Court in the recent *Hedlund* decision.

The test in *Hedlund* requires the court to determine: 1.) whether the statute's application is in fact retrospective; 2.) whether the statute should be applied retrospectively; and 3.) whether a constitutional rule prohibits retrospective application of the statute. Hedlund v. State, 991 N.W.2d 752, 757 (Iowa 2023) (citing Hrbek v. State, 958 N.W.2d 779, 782 (Iowa 2021) and Nahas v. Polk Cty., 991 N.W.2d 770, 777 (Iowa 2023)). As noted by the District Court in its ruling, the parties "…agree that application of the statute to the facts in this matter would be retroactive

because it would apply new obligations to practitioners and facilities when providing fertility services and impose new consequences if those obligations were not met." D0019, Ruling at p. 4 (May 30, 2024). As such, the first prong of *Hedlund* was satisfied.

In granting the State of Iowa's Motion to Dismiss, the District Court held that the second prong of *Hedlund* was not satisfied and concluded that dismissal of the action was appropriate. Id. at p. 6. As the District Court erred in its analysis regarding the second prong of the *Hedlund* test, the District Court's ruling must be reversed and the matter remanded back to the District Court so that the parties can conduct discovery and proceed to trial.

A. FARA Should be Applied Retrospectively.

To determine whether a statute should apply retrospectively, statutory interpretation is necessary to determine if the legislature expressly made the statute retrospective. Hedlund, 991 N.W.2d at 757. When engaging in statutory construction, the goal of the court is to ascertain and give effect to legislative intent. State v. Paye, 865 N.W.2d 1, 4 (Iowa 2015). In ascertaining the intent of the legislature, courts are obliged to consider a challenged statute in its entirety. State v. Hawk, 616 N.W.2d 527, 529 (Iowa 2000). "Legislative intent is ascertained not only from

the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." State v. McCullah, 787 N.W.2d 90-95 (Iowa 2010) (citations and internal quotation marks omitted). Finally, Iowa courts strive to interpret statutes so that no part of the statute is rendered "redundant or irrelevant". State v. Gonzalez, 718 N.W.2d 304, 308 (Iowa 2006).

The District Court correctly concluded that specific words such as "retrospective" or "retroactive" do not need to be present in the statute in order to permit retroactive application. D0019, Ruling at p. 5 (May 30, 2024). The *Hedlund* Court cited two cases, *City of Waterloo v. Bainbridge* and *Iowa Comprehensive Petroleum Underground Storage Tank Fund Board v. Shell Oil Co.*, where the Iowa Supreme Court previously applied statutes retrospectively and were consistent with the revised *Hedlund* test. See generally Hedlund, 991 N.W.2d at 759-60 (citing 749 N.W.2d 245, 245-48, 251 (Iowa 2008); 606 N.W.2d 370, 375-76 (Iowa 2000)). In neither one of these cases did the Iowa Supreme Court require specific words such as "retrospective" or "retroactive."

Where the District Court erred in its analysis is its conclusion that chapter 714I does not pass the second step of the *Hedlund* test in its holding that Iowa's FARA lacks express language

indicating retrospective intent. On the contrary, Iowa's FARA, when viewed as a whole, contains express language indicating retrospective intent. This can be found in three components of the civil remedy statute found in Iowa Code § 714I.4: (1.) Iowa Code § 714I.4's lack of a Statute of Limitations; (2.) Iowa Code § 714I.4's lack of a temporal time frame in which actions may be brought under the statute; and (3.) the scope of the universe of parties that are permitted to file claims under Iowa Code § 714I.4.

As noted previously, Iowa Code § 714I.4(6) states, "[A]n action brought pursuant to this section is not subject to a statute of limitations and may be commenced at any time." Iowa courts strive to interpret statutes so that no part of the statute is "rendered redundant or irrelevant." Gonzalez, 718 N.W.2d at 308. It would be redundant to both state that the code section is not "subject to a statute of limitations" and that "an action may be commenced at any time," unless the intent of the statute was for it to be applied retroactively.

Moreover, Iowa Code § 714I.4(1)(a)(b) permits children of a parental victim of fertility fraud to bring a claim if their parent was "deceased or is otherwise unable to bring such cause of action." This evidences a clear legislative intent that these claims can be brought many years after the provision of fertility fraud services. These two sections, when read together,

demonstrate express legislative intent to permit claims to be brought forward under this statute, regardless of the timing of the original tortious act.

The express legislative intent of the three components of the statute is further magnified when analyzed along with the practice and purpose of, and the policies behind, the civil remedy portion of FARA. As stated above, when ascertaining legislative intent, the court can look beyond the language of the statute to issues such as the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, and the consequences of various interpretations. McCullah, 787 N.W.2d at 90. In the above-captioned case the purpose of the civil remedy component of FARA is to provide a method of compensating victims of fertility fraud for conduct that is often difficult to incorporate other, more traditional, civil remedies.

When many of these acts were committed they were both seemingly indetectable and yet unmistakenly a violation of a woman's body and the trust she placed in her physician. This case, and its companion cases, demonstrates that this type of tortious conduct usually comes to light through direct-to-consumer genetic testing many years (and sometimes many decades) after the acts at issue. A consequence of finding that the statute only has prospective application is that it renders it potentially

toothless for generations of victims of this type of conduct. Another consequence of finding the statute is only prospective in its application is that it also makes it unlikely that it will be prospectively used given that contemporary standards of medical practices in fertility medicine reduce the chances that physicians will engage in illicit insemination of their patients. See generally Jody Madeira et al., Against Seminal Principles; Ethics, Hubris and Lessons to Learn from Illicit Insemination, 100 FERTILITY & STERILITY 1003 (2018). It is contrary to the purpose and policies behind FARA that the legislature would have crafted a civil action that will likely not be used.

B. No Substantive Law Bars FARA's Retrospective Application

Even though the District Court ruled, at this juncture, that no substantive law prohibited retrospective application, appellants will address the issue for sake of completeness. The third step of the *Hedlund* analysis is "if the legislature expressly provides that a new law should have retrospective operation, then the court must determine whether any substantive law prohibits retrospective application of the new statute." Nahas, 991 N.W.2d at 778. Some examples of how substantive law prohibits retrospective application include additional penalties for criminal acts or depriving a Plaintiff of his or her due process rights. Id. Defendant claims that applying FARA retroactively would violate due process because all of the persons directly

involved with the fertility treatments in this case are no longer living, which could pose an evidentiary challenge. D0006, Brief in Support of Motion to Dismiss ¶9-10 (3/6/24). As the District Court noted in its ruling, Defendant "fails to provide any authority indicating that this alleged evidentiary challenge would arise to the level of violating due process." D0019, Ruling at p. 6 (May 30, 2024). Evidentiary challenges are not a consideration under the *Hedlund* test when determining if a statute should be applied retroactively. Hedlund, 991 N.W.2d at 757.

Discovery may reveal potential witnesses and other records and documents related to Dr. Randall's care may emerge. The very purpose of discovery is "to learn the facts so that the court can apply the appropriate substantive rule of law." Barks v. White, 365 N.W.2d 640, 643 (Iowa Ct. App. 1985) (citing Carter v. Jernigan, 227 N.W.2d 131, 136 (Iowa 1975)). Summary Judgment will still be available for the State after discovery has been conducted. The State of Iowa is not denied due process prior to any attempt at discovery.

CONCLUSION

For the reasons set forth, the District Court's ruling that grants the State's Motion to Dismiss should be reversed. This matter should be remanded so that parties may conduct discovery and proceed to trial.

APPELLANTS DO NOT REQUEST ORAL ARGUMENT

Elizabeth does not, pursuant to Iowa R. App. P. 6.903(2)(10) request that this matter be set for oral argument.

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CERTIFICATE OF FILING AND SERVICE

The undersigned hereby certifies that on the 15th day of August, 2024 he or a person acting on his behalf, filed the foregoing Appellants' Brief with the Iowa Supreme Court via EDMS, which will send notification of such filing to all counsel of record.

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