IN THE SUPREME COURT OF IOWA

Supreme Court No. 18-2183
Monroe County No. LALA003789

LEMARTEC ENGINEERING & CONSTRUCTION CORPORATION n/k/a LEMARTEC CORPORATION

Third-Party Plaintiff-Appellant,

vs.

ADVANCE CONVEYING TECHNOLOGIES, LLC

Third-Party Defendant-Appellee,

APPEAL FROM THE IOWA DISTRICT COURT FOR
MONROE COUNTY
THE HONORABLE JOHN TELLEEN

THIRD-PARTY PLAINTIFF-APPELLANT'S REPLY BRIEF

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Case Law **Page(s)**

Statutes and Rules

Other Authorities

STATEMENT OF ISSUES

I. THIS CASE IS VERY DIFFERENT FROM THE FEDERAL SUIT

Case Law

Elsberry v. Wailes, 695 N.W.2d 503 (Iowa Ct. App. 2005) (unpublished), 2005 WL 67580
Kester v. Bruns, 326 N.W.2d 279 (Iowa 1982)
Leuchtenmacher v. Farm Bureau Mutual Insurance Co., 460 N.W.2d 858 (Iowa 1990)
Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011)
Rieff v. Evans, 630 N.W.2d 278 (Iowa 2011)
Villarreal v. United Fire & Casualty Co., 873 N.W.2d 714 (Iowa 2016)
Walls v. Jacob North Printing Co., 618 N.W.2d 282 (Iowa 2000)

Other Authorities

Iowa R. Civ. P. 1.402(2)(a)

II. CLAIM PRECLUSION IS WAIVED AND INAPPROPRIATE

A. The *Noel* Waiver Rule Applies, and ACT's Proposed Exception for "Identical" Claims is Unprecedented and Unworkable

Case Law

Arnevik v. Univ. of Minn., 642 N.W.2d 315 (Iowa 2002)
Buck Creek Coal v. Sexton, 706 F.3d 756 (6th Cir. 2013)
Elsberry v. Wailes, 695 N.W.2d 503 (Iowa Ct. App. 2005) (unpublished), 2005 WL 67580
Lehman Brothers, 593 B.R. 166 (Bankr. S.D.N.Y. 2018)
Lovilla Coal Co. v. Harvey, 109 F.3d 445 (8th Cir. 1997)
Pavone v. Kirke, 807 N.W.2d 828 (Iowa 2011)
Pontiere v. Dinert, 426 Pa. Super 576 (Pa. Ct. App. 1993)
Noel v. Noel, 334 N.W.2d 146 (Iowa 1983)
Pagel v. Notbohm, 186 N.W.2d 638 (Iowa 1971)
Storey v. Hanks, 224 P.2d 468 (Idaho 2009)
Villarreal v. United Fire & Casualty Co., 873 N.W.2d 714 (Iowa 2016)

Other Authorities

Restatement (Second) Judgments §26
Restatement (Second) Judgments §24

III. ACT IS NOT ENTITLED TO ISSUE PRECLUSION

Case Law

Hunter v. City of Des Moines, 300 N.W.2d 121 (Iowa 1981)
Iowa S. Ct. Bd. Prof. Ethics v. D.J.I., 545 N.W.2d 866 (Iowa 1996)
Soults Farms, Inc. v. Schafer, 797 N.W.2d 92 (Iowa 2011)

Other Authorities

Restatement (Second) of Judgments §27

IV. LEMARTEC DID NOT WAIVE ANY CLAIMS

INTRODUCTION AND SUMMARY OF ARGUMENT

These facts test the limits of Iowa *res judicata*. This Court confronts a situation where two different parties – the installation subcontractor and the end-user – have different complaints about ACT's performance arising at different times. SPG, the installer, sought cost overruns in the Federal Suit for field remediation prior to turnover of the conveyor by Conve, the general contractor, to HFCA, the end user. HFCA sought damages because, as it used the conveyor, latent problems such as corrosion allegedly manifested. Lemartec simply sought indemnity from ACT for both. Because the first-party plaintiffs sued in different forums, with SPG's Federal Suit being filed thirteen months earlier, Lemartec asserted the SPG indemnity in the Federal Suit while asserting the HFCA indemnity in this case. ACT acquiesced in the two simultaneous suits, asserting that both cases had to be pursued in the same action only after it won in the Federal Suit.

Now, ACT seeks to minimize these extraordinary circumstances by focusing on the pleadings and *Villarreal*'s transactional test. Essentially, ACT seeks an approach that would bar two suits where the pleadings involve one contract, even if the need for indemnity arose at different times for different reasons. But these issues – and in particular latency – can be disregarded only by leaving Iowa law sharply at odds with itself and other jurisdictions.

Part I refutes ACT's factual premise – that the Federal and State Suits are "identical" because they were pled similarly. This one conceit permeates each of ACT's arguments with the constant refrain that there were similar pleadings filed near in time. And ACT is right; the pleadings are similar. But ACT is wrong to urge this Court to ascribe legal significance to this fact because Iowa is a notice pleading state, and there are only so many ways to give notice that one seeks indemnity. Iowa's *res judicata* law has never countenanced such a focus on mere pleadings. Moreover, the actual, as-litigated facts in the Federal Suit focused solely on indemnity limited to SPG's pre-completion cost overruns and ***not*** HFCA's post-completion defect claims. Part I chronicles the post-trial submissions showing that, in every count, Lemartec sought the same damages for overruns it paid SPG. The Federal Judgment agrees, limiting itself to the issue of indemnity for SPG's overruns.

By contrast, despite parallel pleadings, Lemartec now seeks indemnity from ACT ***only to the extent*** that HFCA is able to prove the latent, post-completion defects identified in its interrogatory responses. These are, factually, two distinct indemnity claims, despite similar notice pleadings. Each time ACT seeks to decry "identical" or "duplicative" suits, it is incorrectly leveraging notice pleadings and ignoring the actual, developed facts. This violates summary judgment standards.

Part II exposes particular flaws with claim preclusion: (a) waiver and (b) substantive, elemental failings. Waiver is the application of a Restatement section adopted by two Iowa Supreme Court decisions (*Noel* and *Pagel*). Where two suits are simultaneously pending, a defendant must contemporaneously object and seek a remedy or waive claim preclusion. Although ACT does not dispute (i) the rule, (ii) the existence of simultaneous suits, or (iii) its failure to object, it asserts an exception where the two suits are "identical." Part I disproves the factual premise; the suits are not "identical." Regardless, departing from the Restatement, *Noel*, and *Pagel* would leave this Court with a new, unprecedented, and unworkable exception.

If claim preclusion were not waived, the second half of Part II exposes fatal, elemental failings. *Villarreal* endorses several practical concerns for precluding claims as "the same." ACT incorrectly urges notice pleadings to dictate "sameness" when the underlying facts belie it. Furthermore, ACT does not grapple effectively with latency. Iowa law (and all U.S. jurisdictions) unequivocally recognizes recovery for latent defects. A prior Iowa appellate decision (*Ellsberry*) rejects dismissal where a family first sued for a defective floor and then later sued for more extensive, latent defects. For ACT to prevail, it needs this Court to endorse a one-contract-one-suit approach. But that has never been Iowa law, and it contradicts *Villarreal*'s pragmatic approach.

Part III focuses on issue preclusion, but ACT again tries incorrectly to leverage the similar, notice pleadings. ACT argues such a broad and unprecedented view of issue preclusion that it would equate issue and claim preclusion. This again tramples on latency doctrine and amounts to an unprecedented expansion of issue preclusion.

ARGUMENT

I. THIS CASE IS VERY DIFFERENT FROM THE FEDERAL SUIT

ACT's defense involves one theme, the similarity of the pleadings: "Lemartec's nearly identical state-court and federal-court pleadings, filed a day apart, establish the identity of the issues." ACT Br. 55. *See also, e.g.*, *id*. at 1; *id*. at 14 n.2; *id*. at 21-22; *id*. at 28 & n.3; *id*. at 29; *id*. at 37-38 & n.4; *id*. at 43; *id*. at 48; *id*. at 48-49; *id*. at 54-55; *id*. at 62; *id*. at 63-64; *id*. at 72. ACT hopes, through this simplistic pleading comparison, to distract from factual divergence.

The most salient deficiency with ACT's approach is that pleadings are not intended as specific roadmaps to claims. Iowa is a notice pleading state. *Rieff v. Evans*, 630 N.W.2d 278, 292 (Iowa 2011); Iowa R. Civ. P. 1.402(2)(a). While notice pleading does not dispense with specificity, "[i]t enables a party to postpone the necessity of specificity from the pleading to the pretrial stage." *Kester v. Bruns*, 326 N.W.2d 279, 284 (Iowa 1982). That is why, once a case has been litigated, one must look to later stages to understand the claims.

The later stages of the Federal Suit clarified Lemartec's claims. Thus, Lemartec's Proposed Ruling made clear that Lemartec sought indemnification damages of $162,978.38 "for ACT's responsibility in causing the damages that SPG claimed in this lawsuit." App. 651. Under its contract claim, Lemartec sought damages of $162,978.38 because ACT "caused significant delays and necessitated significant corrective work that caused Lemartec to have to pay SPG sums over and above the amount stated in the SPG Subcontract." App. 646. On its breach of implied warranty of fitness for a particular purpose claim, Lemartec sought damages of $162,978.38 because ACT's breach "caused Lemartec to have to pay SPG sums over and above the amount stated in the SPG Subcontract." App. 648. On its breach of express warranty claim, Lemartec sought damages of $162,978.38 because ACT's breach "caused Lemartec to have to pay SPG sums over and above the amount stated in the SPG Subcontract." App. 649. By trial, then, it was clear that ***all*** of Lemartec's claims sought reimbursement/indemnity for the identical cost-overrun sums Lemartec had paid SPG.

The Federal Judgment clarifies that "the remaining issues for trial were whether either of the two remaining parties owes money to the other for money earned, but unpaid; project delays; and ***for additional work that was required to make the conveyor system functional***." App. 684 (emphasis added); App. 686–87. Despite the breadth of the pleadings (alleging the elements in broad-brush terms),

the Federal Suit actually decided a discrete set of issues concerning whether ACT had breached its contract causing SPG's expenses.

By contrast, this case began when HFCA sued Conve and others alleging problems with the completed plant, including the conveyor. Lemartec cross-claimed against ACT because HFCA's claims amounted to allegations that ACT's work manifested latent defects. Because Lemartec sought indemnity damages under multiple theories, it properly alleged their elements, in broad-brush form, similarly to its federal pleadings. But this similarity means merely that indemnification was sought in each case. Substantial differences remain including, but not limited to:

- The Federal Suit evaluated defects discovered and resolved pre-completion. Indeed, the Federal Judgment (App. 684) accepted that "[t]he conveyor system was fully operational by June of 2015." The present case, conversely, concerns alleged ***latent*** defects that HFCA discovered post-completion.
- Because of different alleged defects, the evidence here will differ markedly from the Federal Suit, overlapping only as to undisputed facts such as the formation and content of the Purchase Order.
- There were distinct first-party plaintiffs. The first-party plaintiff here (HFCA) could not join in the Federal Suit without destroying diversity.

ACT depends on inferring the content of Lemartec's case from the pleadings, contrary to Iowa law. In *Leuchtenmacher v. Farm Bureau Mut. Ins. Co.*, 460 N.W.2d 858 (Iowa 1990), the defendant moved to dismiss a bad-faith claim after the plaintiff recovered under an insurance policy. The action was dismissed, but the Supreme Court reversed. Noting the procedural posture and inferences afforded plaintiffs, the Court observed that "whether the estate's 'bad-faith' case was precluded by the prior suit depends on whether the cases arose out of the same set of facts." *Id*. at 861. The Court refused to decide that from the pleadings because "a bad-faith claim might well be based on events subsequent to the filing of the suit on a policy and therefore could not be based on the 'same' facts." *Id*. Later, in *Villarreal v. United Fire & Cas. Co.*, 873 N.W.2d 714 (Iowa 2016), when the Court held that bad-faith claims must typically be filed with the underlying policy suit, it re-affirmed *Leuchtenmacher*, because it "indicate[s] that a bad-faith claim based on events subsequent to the filing of a breach of contract claim would not be precluded by a judgment in the breach-of-contract case." *Id*. at 721-22. *Villareal* and *Leuchtenmacher* thus cannot be reconciled with ACT's focus on pleadings.

This case is remarkably similar to another case cautioning against basing *res judicata* on pleadings, *Elsberry v. Wailes*, 695 N.W.2d 503 (Iowa Ct. App. 2005) (unpublished), 2005 WL 67580. There, the Elsberrys hired the defendant for

renovations, completed in October 2000. By February 2001, they detected defects in the new floors. They sued, securing $2,892.34. Later, in August 2003, they again sued the contractor, alleging that he breached the contract and an implied warranty because of other defects, unknown to them earlier. The district court dismissed for claim preclusion. *Id*. at *1.

The Court of Appeals reversed. Examining the second case, the court observed that, "[b]ecause Iowa requires only notice pleading, a petition need . . . only allege enough facts as to give the defendant 'fair notice' of the incident giving rise to the claim and the claim's general nature." *Id*. at *2. The court noted that one could not reach a fact-based conclusion from the skeletal nature of Iowa notice pleadings: "Here, while it is entirely possible the breach alleged in the second action has or should have been fully and fairly litigated in the first action, that conclusion is not inevitable. We cannot know, at this early stage of the proceeding, whether the recovery demanded in the two proceedings are the same, or whether the same evidence supports both actions." *Id*. at *2.

The defendant insisted that an inquiry into the facts was unnecessary, claiming – just as ACT does here – that there can be only one "transaction" under one construction contract. The Court disagreed: "determining whether the claims arise from the same transaction or common nucleus of operative facts is necessarily a fact-laden inquiry." *Id*. at *3. "We cannot conclude, as a matter of

law, that the claims at issue here arose out of the same transaction merely because they arose under one contract." *Id*.

The present case comes on a motion for summary judgment, but the analysis is identical. ACT acknowledges the inchoate factual posture because "[a]lthough this State Court case has been pending for some time, . . . it is still in the initial discovery phases." ACT Resp. 51. Lemartec stressed that it was entitled to the benefit of every factual dispute and inference (*see* Lemartec Initial Br. 44 (citing *Walls v. Jacob North Printing Co.*, 618 N.W.2d 282, 284 (Iowa 2000))), and ACT does not disagree. Thus, at this early stage, this Court must accept as true that this case concerns alleged latent, post-completion defects for which indemnity could not be sought at the time the Federal Suit was filed and would consist of evidence almost completely unrelated to that litigated federally.

It is settled law that a party cannot be precluded from litigating claims that it could not have raised in the first proceeding. *See, e.g.*, *Pavone v. Kirke*, 807 N.W.2d 828, 835 (Iowa 2011). If, as the Court must accept at this stage, Lemartec could not possibly have known at the time the Federal Suit was filed what latent defect claims would be brought by HFCA a year later, then Lemartec could not have raised those claims in the Federal Suit, and neither claim nor issue preclusion applies. ACT's argument here is tantamount to the proposition that a plaintiff may bring suit related to a single contract only once, barring all subsequent suits. This is

flatly inconsistent with *Leuchtenmacher* and *Elsberry*, and it would be unworkable policy. If suits addressing a patent defect thereafter afford the defendant immunity for any unknown latent defects, that rule would bar meritorious and non-duplicative suits.

If HFCA's allegations of breach (and therefore Lemartec's claims for indemnity) turn out to involve deficiencies in ACT's work that were the subject of the Federal Suit, Lemartec does not dispute that they could have been addressed federally and would therefore be subject to claim preclusion by motion brought at an appropriate time. In the meantime, however, Lemartec must be provided the opportunity to demonstrate that this case is very different from the Federal Suit.

II. CLAIM PRECLUSION IS WAIVED AND INAPPROPRIATE

A. The *Noel* Waiver Rule Applies, and ACT's Proposed Exception for "Identical" Claims is Unprecedented and Unworkable

Lemartec recounted Section 26 of the Restatement and two Iowa Supreme Court cases – *Noel* and *Pagel* – adopting a special rule for simultaneous suits. Lemartec Initial Br. 26-34. That rule deems claim preclusion waived when "in neither action does the defendant make the objection that another [suit] is pending ***based on the same claim***." Restatement (Second) Judgments §26, cmt. a (emphasis added). It is undisputed that this case and the Federal Suit were pending simultaneously and that ACT made no objection, much less sought a remedy. Now, ACT urges an exception that excuses the failure to object because "there was no

'splitting of [Lemartec's] claim'….to which ACT needed to object." ACT Resp. 49. ACT reasons that Lemartec "brought all parts of the same claims in both cases, seeking the same full relief in both." ACT Resp. 48.

Preliminarily, this factual premise is false. Most prominently, the relief Lemartec seeks here (indemnification for HFCA's alleged latent, post-completion defects) is different from the relief it sought in the Federal Suit (indemnification for SPG's pre-completion defects). ACT's claim to the contrary is merely an unsupported assertion in conflict with summary judgment standards.

But, even evaluated on its own terms legally, the argument fails. ACT acknowledges a requirement to object to simultaneous suits or waive claim preclusion, but nonetheless claims it is inapplicable if the suits are somehow deemed identical. This is contrary to the Restatement, *Noel* and *Pagel*, and the multi-state cases Lemartec cited initially. It is an unprecedented and unworkable request for appellate rule making.

ACT was unable to cite a single case excusing failure to object to simultaneous suits. ACT's inability to do so would leave this Court as the first, nationwide, to adopt such a rule. The Restatement catalogues numerous cases finding waiver; none mention ACT's proposed exception. And the Restatement synthesizes the nationwide rule as waiver where "in neither action does the defendant make the objection that another [suit] is pending ***based on the same***

claim." *Id*. ACT's attempt to distinguish between cases that are "the same" and those that are "identical" is thus unprecedented and directly contrary to both the basic rule and the well-accepted definitions of those two terms. It is also unworkable.

Such a rule would swallow the exception and require untenable judgment calls. Lemartec's Initial Brief pointed out (at 33-34) that claim preclusion already requires "sameness" as an element. ACT's proposed exception would thus negate the waiver doctrine only where claim preclusion would otherwise be effective – making waiver redundant of claim preclusion's very elements. ACT's Response ignores this, effectively conceding the doctrinal futility of an exception that would swallow the base rule. Such a rule would require an unprecedented and untenable distinction among simultaneous suits that are: (i) different suits (where no claim preclusion would lie anyway), (ii) the "same" suits (subject to waiver), and (iii) "identical" suits (where defendants could invoke claim preclusion without prior objection).

B. Claim Preclusion Fails Substantively

Even without waiver, there are multiple, independent reasons why summary judgment on claim preclusion fails. ACT touts *Villarreal* as adopting a broad, transactional approach mandating claim preclusion. There, this Court required insurance claims and related bad-faith claims to be brought simultaneously in

bifurcated trials. The Court indeed invoked the "transactional" approach of Restatement Section 24. But that approach is not remotely consistent with ACT's position, in which any given contract can be breached only once. Instead, *Villarreal* recognized:

> (2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

873 N.W.2d at 720 (quoting Restatement Section 24). ACT wants two facts – the same underlying contract and similar pleadings – to smother the rest of *Villarreal*'s instruction. Any one of these "pragmatic" considerations suffices to defeat summary judgment, and ACT's Response is long on invoking the contract and pleadings, and short on rebutting *Villareal's* "pragmatic" issues.

1. The similarity of evidence, not pleadings, governs claim preclusion, and the evidence in the two cases is radically different.

Urging the "transactional" test, ACT's primary argument, once again, is the similar pleadings: "Based on Lemartec's own pleadings, Lemartec's allegations against ACT are nearly identical in both cases." ACT Resp. 28. Lemartec already established that Iowa rejects reliance on pleadings. What Iowa courts ***do*** focus on is the evidence, called the "same evidence" test. *Villarreal* explained that "[s]ince we began citing the Restatement (Second) of Judgments, we have also continued to

discuss and apply the older 'same-evidence' test in tandem with the more recent transactional approach." 873 N.W.2d at 719 n.3. There is no hostility between the two, as the Restatement itself (in Section 24, cmt. b at 198-99, cited in *Villarreal*, 873 N.W.2d at 720) provides that "[t]hough no single factor is determinative, the relevance of trial convenience makes it appropriate to ask how far the witnesses or proofs in the second action would tend to overlap the witnesses or proofs relevant to the first." Indeed, the degree of overlap of evidence is a primary consideration for what constitutes "a convenient trial unit" under Section 24.

Lemartec proved above (at 9–15) that the evidence here concerns alleged defects that are unrelated to SPG's alleged defects. Because this case is so early in discovery, the most salient factual basis for the claims are HFCA's June, 2018 discovery responses. They clarify that the defects differ from those in the Federal Suit. ACT has no response, instead choosing to consider the responses exclusively in the context of the bright-line timing rule (*see infra* at 21–23) rather than the same-evidence test to which they are directed. ACT's conclusory assertion (Resp. 41) that "[t]he June 2018 HFCA discovery responses are simply irrelevant to the Court's analysis of claim preclusion" is in conflict with both *Villareal*'s same-evidence test and core summary judgment standards.

Equally unavailing is ACT's assertion that "[i]t is not possible for Lemartec to prevail against ACT on its indemnity claim against ACT in the State Court case

without obtaining a judgment that is fundamentally inconsistent with the [federal] judgment." ACT Resp. 32–33. If SPG's alleged pre-completion defects were overstated or not ACT's fault, whereas HFCA's unrelated alleged post-completion defects turn out to be significant and ACT's fault, both of those conclusions could form fully consistent judgments.

2. The bright-line timing rule independently bars claim preclusion.

ACT tries (ACT Resp. 31-37) to undercut one of Lemartec's independent reasons that claim preclusion could not lie – HFCA's complaint in this case was filed a year after ***after*** the Federal Suit was filed. Lemartec cited copious authority for a bright-line rule: claims arising after filing of the first complaint are never claim-precluded. It is termed a "bright-line" rule because it permits no messy inquiry into whether amendments might have integrated the two cases. *See* Lemartec Initial Br. 34-46. Although unclear, ACT's argument appears to rely on the theme that the State and Federal Suits are the same and that nothing new happened after the Federal Suit was brought.

First, ACT's position recycles its "identical claims" theory. ACT reasons that there was nothing "new" to address here because "[a]s a legal matter, the claimed differences are immaterial, where they rely on the same transaction, i.e. ACT's performance of the Purchase Order." ACT Resp. 35.

ACT also incorrectly relies on *Pavone v. Kirk*, 807 N.W.2d 828 (Iowa 2011), to claim that each contract gets one suit. That was true in *Pavone* only because that was a "total breach" case; "there is no genuine issue of fact concerning total repudiation of the October agreement," meaning that the Court "must determine if the repudiation required SMG to bring a single claim for damages." *Id*. at 835. *Pavone* involved correspondence stating that a management agreement was "terminated," and the counterparty suing for damages for a lost casino contract. *Id*. at 830-31. Later, it became clear that the termination cost the plaintiff yet another casino deal. *Id*. at 831-32. The plaintiff maintained a first suit seeking damages for casino one, secured a $10 million judgment, then brought a second suit for casino two. This Court affirmed claim preclusion, citing Restatement (Second) of Contracts that "a claim for damages ***for total breach*** is one for damages based on all of the injured party's remaining rights to performance." *Id*. at 837. (emphasis added).

Pavone thus applies settled contract/judgment law barring a party seeking more damages in a second suit based on a repudiated contract. There is no claim that the parties' contract here was repudiated, and Lemartec explained the applicable "partial breach" doctrine in its initial brief (at 54-55). Repudiated contracts get a single suit for all damages past, present and prospective, but this is not a repudiation case.

ACT tries (ACT Resp. 38) to focus on events after the filing of the Federal Suit (particularly Lemartec's amendment of its Third-Party Petition) to start a new clock under the bright-line rule. But by conducting an examination of how the Federal Suit was actually litigated and speculating as to what might have happened, ACT is engaging in precisely the kind of post-complaint analysis that the bright-line rule precludes. *See* Lemartec Initial Br. 42-43 & n.10 (citing authority).

ACT is also wrong that there was nothing "new" after completion and that "Lemartec has identified no 'subsequent acts' of ACT." ACT Resp. 36. The conceit is that, once ACT turned over the conveyor, it could not have engaged in any further breaches. This ignores Lemartec's whole point that HFCA allegedly identified latent post-completion defects. Iowa plainly recognizes latency, which does not require new contractual performance, and in which contractual issues can manifest long after performance. *See, e.g., infra* at 23–25. If ACT's approach – subsequent suits are legitimate only in the face of new defendant conduct – were accepted, it would be tantamount to dispensing with latency.

3. ACT has no answer to the latency issue.

ACT, SPG, and Lemartec believed that the conveyor was fully operational when handed over to Conve for subsequent turnover to HFCA. That assumption (which was not actually litigated, but rather assumed) was reflected in the Federal

Judgment. *See* App. 684 ("[t]he conveyor system was fully operational by June of 2015"). After the conveyor had been operating, HFCA disagreed and alleged classic latent defects such as corrosion and premature decay. *See* App. 935–37. Lemartec now seeks indemnity for these latent defects, yet ACT posits an approach to claim preclusion that would foreclose latent claims whenever there was an initial suit for patent claims. ACT's approach cannot be reconciled with Iowa (or multi-state/federal) recognition of latency.

Elsberry v. Wailes is directly on point, as it involves construction defects that manifested themselves only after the Elsberrys had lived with the additions and had already recovered for an obvious defect. The denial of claim preclusion there follows a larger body of law permitting second claims based on latent issues.

In *Storey v. Hanks*, 224 P.2d 468 (Idaho 2009), the actor sued a contractor upon completion of a home in 2001 yet lost at arbitration. *Id*. at 471. Then, in 2006, he "experienced water intruding into the house and other problems" and "allegedly discovered additional construction defects that were previously unknown." *Id*. A lower court "held that where the Trustee had asserted a breach of contract claim for construction defects in the prior arbitration, all future claims for construction defects under the same contract were barred by res judicata, even if the future claims had not been asserted in the prior arbitration, were unknown at that time, and could not reasonably have been known." *Id*. En route to reversing

and ordering arbitration, the *Hanks* court noted that "[t]here can be more than one construction defect in a construction project. Under the parties' contract, there can also be more than one claim 'arising out of or related to' the parties' construction contract." *Id*. at 475. *See also Pontiere v. Dinert*, 426 Pa. Super 576 (Pa. Ct. App. 1993) (rejecting *res judicata* because "[i]n this suit, [plaintiffs] seek damages incurred in repairing a latent defect in their furnace that was discovered in 1991, four years after the prior action.").

These examples comport with a broader approach to latency, recognizing it as one of the "pragmatic" concerns militating against claim preclusion. *See, e.g.*, *Lovilla Coal Co. v. Harvey*, 109 F.3d 445, 450 (8th Cir. 1997) (affirming denial of *res judicata* in miner's second suit for black lung benefits because "[r]es judicata is not implicated when a miner brings a duplicate claim so long as the claimant demonstrates that his or her physical condition…has changed") (citing multiple conforming cases and noting the latent nature of black lung); *Creek Coal v. Sexton*, 706 F.3d 756, 759 (6th Cir. 2013) (rejecting *res judicata* because "pneumoconiosis is a latent and progressive disease").

4. ACT implies that Lemartec could have brought both claims in one action but ignores the diversity jurisdiction problem.

As noted above, the transactional approach examines what constitutes a "convenient trial unit." 873 N.W.2d at 720. *Villarreal*, for example, dealt with back-to-back suits in state court for breach of an insurance contract followed by

bad faith. The Court reviewed the procedures for (bifurcated) treatment (*id*. at 727-28), as well as other jurisdictions that, pragmatically, used bifurcation. *Id*. at 722-25. The Court concluded that "during the pre-trial stages of a first-party case like this one, we see no difficulty in combining the breach-of-contract and bad-faith claims." *Id*. at 728.

ACT ignores this language and Lemartec's analysis demonstrating that, in stark contrast to *Villarreal*, Lemartec's indemnity claims involving SPG were subject to diversity jurisdiction, whereas those involving HFCA were not. Thus, not only was there "difficulty in combining" the suits, *id.*, it was jurisdictionally precluded. The district court knew that "Lemartec was jurisdictionally barred from joining HFCA and Conve to the action as non-diverse parties" (Order at 19 n.9) but opined that Lemartec could have moved to dismiss the Federal Suit so the claims could be tried here. *See id*. But it was SPG, and not Lemartec, who initiated the Federal Suit. There is no reason for a federal court to deny a plaintiff its chosen forum, particularly where ACT was pressing counterclaims against Lemartec. Moreover, it is settled under *Noel* that it is the party invoking *res judicata* (ACT) that must object and seek a remedy. *See supra* at 16–18. Combining HFCA's claims with SPG's therefore cannot constitute a "convenient trial unit" under *Villareal*'s transactional test.

5. The unique nature of indemnity claims demonstrates that the suits are unrelated and that claim preclusion cannot apply.

Another pragmatic concern here is the unique nature of indemnity, which caused this case to accrue substantially later than the Federal Suit. Indemnity is not so much a cause of action as a way of shifting liability for other causes of action. As such, those seeking indemnity have to react to the primary liability claim, and the indemnity claim accrues only when liability is fixed and the indemnitor refuses to indemnify.

Lemartec cited *In re Lehman Brothers.*, 593 B.R. 166, 180-82 (Bankr. S.D.N.Y. 2018), for the proposition that "LBHI's contractual indemnity claims did not accrue until LBHI's liability was fixed upon the approval of a prior 2014 settlement." Lemartec Initial Br. 41. ACT first asserts that "*LBHI* addressed issue preclusion, not claim preclusion." ACT Resp. 45. But *LBHI* addressed both claim ***and*** issue preclusion. *See, e.g.*, *LBHI*, 593 B.R. at 178 ("Motion to dismiss the Complaints on the basis of ***claim preclusion*** is denied.") (emphasis added). Second, ACT claims that *LBHI* "merely" addressed the statute of limitations and "[t]he issue was not . . . the same" as Lemartec's accrual issue. ACT Resp. 45. That is also wrong; the case turned on accrual of indemnity, which is when limitations began to run: "LBHI's claim for indemnification under section 711 of the Seller's Guide ***did not accrue*** until the date of the Fannie Mae Settlement,

when its liability to a third party was fixed or payment was made." *LBHI*, 593 B.R. at 181 (emphasis added).

Citing *Arnevik v. Univ. of Minn*., 642 N.W.2d 315 (Iowa 2002), ACT asserts that indemnity is irrelevant. Arnevik "sued her employer for indemnification based on the principle of respondeat superior." *Id*. at 317. Suffering dismissal, Arnevik tried to "pursue[] an alternate theory of indemnification based on contract." *Id*. But *Arnevik* says nothing about seeking the same indemnification for two different sets of problems. Instead, it is the prototypical plaintiff losing on one legal theory and trying again on another. *Id*. at 319.

III. ACT IS NOT ENTITLED TO ISSUE PRECLUSION

ACT admits (ACT Resp. 54) that, in order to prevail on issue preclusion, it needed to prove that the issue involved here is identical to an issue actually resolved earlier. ACT returns to its "identical pleadings" argument: "Lemartec's nearly identical state-court and federal-court amended pleadings, filed a day apart, establish the identity of the issues." ACT Resp. 55. Lemartec disproved this above (at 9–14). ACT's related arguments also fail.

A. ACT first claims (ACT Resp. 55-59) that defining the issue for preclusion "depend[s] on the elements of the litigated claims." This just relabels ACT's pleading argument, since pleadings typically recite the elements without factual detail. As previously demonstrated (at 18–22), considering only the elements of

contract-based claims is equivalent to arguing that one alleged breach of a contract, no matter how minor, immunizes the defendant from any subsequent suit for breach, because the elements are the same.

ACT has no authority on point. ACT dwells on *Soults Farms, Inc. v. Schafer*, 797 N.W.2d 92 (Iowa 2011), but does not argue that it supports the approach of looking to the elements to define the issue. In *Soults*, the Court found that the issue of an individual's authority to bind a company was presented in two cases involving different documents. Although the documents were slightly different, the issue of corporate authority was identical; the party merely tried to raise additional arguments on the identical issue in the second suit, which the Court prevented. *See id*. at 105. It was critical that the party had every opportunity to raise the new argument in the first case. *See id*. at 106. The case therefore dictates the opposite result in cases like this one, where Lemartec could not have raised the latent defects HFCA pled when the Federal Suit was filed, and where joining HFCA would have destroyed diversity.

Similarly unavailing is ACT's citation (ACT Resp. 55) of *Hunter v. City of Des Moines*, 300 N.W.2d 121 (Iowa 1981), for the proposition that similar pleadings can establish identity of the issues. *Hunter*, focusing on offensive issue preclusion, treated identity only in passing. *Id*. at 125. The court did not describe how detailed the allegations of negligence were, but it is clear from context that the

central allegation (negligently leaving a pile of snow near an automobile accident, *see id*. at 122) would be identical between the two suits. *Hunter* cannot control here, where the alleged breaches center on distinct issues asserted far apart in time.

The one case ACT cites in which a court does actually consider elements of claims is *Iowa S. Ct. Bd. Prof. Ethics v. D.J.I.*, 545 N.W.2d 866 (Iowa 1996). There, the client successfully sued its lawyer for fraud. *Id*. at 869. The question arose whether the prior action definitively determined a breach of professional duty in disciplinary proceedings pursuant to Supreme Court Rule 118.7. Because the Rule required the burden of proof in the prior proceeding to be greater than a mere preponderance of the evidence (*see id*. at 871), the Court had to parse the elements of fraud, which had an elevated burden of proof. *See id*. at 875. The fraud against the clients was precisely the conduct meriting discipline, so the Court permitted offensive issue preclusion. *See id*. Nothing in the case remotely suggests that the failure to prove breach of contract for one set of defects precludes future inquiry into a separate set of alleged defects.

B. ACT next argues (ACT Resp. 59–60) that it is entitled to issue preclusion because it prevailed on its claim for nonpayment. That too misses the point. The parties did not dispute that ACT had performed the broad outlines of its contract by designing and fabricating the conveyor; the question was whether SPG's additional installation burden resulted from ACT's deficient performance. ACT is correct the

federal court ruled that it did not breach the contract as it pertained to that. But, again, the federal court itself defined the "issue" involved in that case as responsibility ***for Lemartec's payment to SPG***. *See* App. 686–87. There is no support in the record for ACT's present claim that the issue involved in the Federal Suit was whether ACT's performance was faultless, precluding future recovery for latent defects. It recycles ACT's incorrect one-contract-one-suit argument.

C. ACT recycles that argument again (ACT Resp. 60–62) by arguing that the indemnity claim "involves the same issue of whether ACT violated any terms of the Purchase Order or any express or implied warranties arising from it." *Id*. at 60. Certain of ACT's premises are correct. It is true that Lemartec must "establish the basis for ACT's indemnity obligation to Lemartec," "that the Purchase Order contains no express indemnity provision," and that indemnity depends on Lemartec proving ACT breached a duty. *See id*. at 60-62. It is also true that ACT's duties to indemnify Lemartec derive ultimately from the Purchase Order. *See id*.

The insurmountable problem is the conclusion that ACT demands from those premises. Again, the federal court decided ***only*** ACT's contractual responsibility "for what Lemartec paid to SPG, the original plaintiff in this case." App. 686–87. ACT dismisses this as "a red herring" (ACT Resp. 60), but in fact it is ACT's analysis that presents a whole different kettle of fish from anything considered in the Federal Suit. ACT wants this Court to reason that, because the

federal court did not find a breach of ACT's duty compelling indemnification ***specifically with respect to the pre-completion issues involved in the extra payments to SPG***, that there can be no breach of ACT's duty compelling indemnification for ***HFCA's post-completion allegations***. The federal court did not find that indemnification was categorically unavailable under the Purchase Order; it merely found that ACT had not breached the contract regarding SPG's pre-completion issues. Thus, ACT's argument amounts to yet another assertion that a defendant's victory in one suit under a contract confers blanket immunity for any subsequent suits, even suits for unknown latent defects. That is still incorrect.

D. ACT's recycling of this argument a fourth time also fails. ACT's assertion that "the Federal Court found ACT satisfied each of the obligations Lemartec relies on in the State Case as the basis for ACT's common law indemnity obligation" (ACT Resp. 63–66) is more of the same. Now, ACT focuses on the individual contract provisions, the breach of which Lemartec identified as justifying indemnity. *See id*. at 63. Thus, ACT reasons, because "the Federal Court expressly found in ACT's favor on each claim" (*id*. at 64), it must necessarily follow that "Lemartec is unable to identify a source of either implied contractual indemnity or equitable indemnity." *Id*. at 65.

The problem is the same. When considering whether ACT breached the enumerated contract provisions, the federal court did so specifically in the context

of determining ACT's contractual responsibility "for what Lemartec paid to SPG, the original plaintiff in this case." App. 686–87. That finding expressed no opinion as to whether those same provisions might be breached by latent defects not before the court. The "issue" of whether SPG's alleged pre-completion defects violated the Purchase Order can hardly be considered "identical" to the issue of whether HFCA's alleged latent, post-completion defects violated the Purchase Order. ACT does not even articulate an argument as to how that could be the case, except for its constant premise that a contract can be breached only once.

E. ACT unpersuasively quarrels with the distinction between pre-completion versus post-completion defects (ACT Resp. 66-71). First, ACT misconstrues what "post-construction defects" means. It does not mean that ACT worked and introduced new defects after the conveyor turnover. Rather, it means that this case solely concerns alleged latent defects ***that manifested themselves*** after HFCA received the conveyor. Viewed with that understanding, there is nothing in Lemartec's pleading "directly refut[ing]" (ACT Resp. 67) the pre-/post-completion distinction.

ACT invokes Illustration 2 from Restatement (Second) of Judgments §27. There, a defendant claims fraud in the inducement as a contract defense, loses, and is precluded from raising the identical defense in a subsequent suit. Of course, the defense of fraud is binary; any given contract either was or was not procured by

fraud. That is not analogous to losing a suit for breach of contract, which does not foreclose the possibility of later proving a latency breach on different facts. This is the same one-contract-one-suit error.

F. Finally, ACT briefly (ACT Resp. 71-72) addresses the fact that Lemartec's claims seek ***indemnity*** damages. Specifically, ACT claims "[t]hat different first-party plaintiffs may be involved in the two cases does not change the fact that the indemnitee must identify a basis for its claim against the indemnitor." *Id*. at 72. First, while it is true that different first-party plaintiffs do not change the elements of indemnity claims, it is equally true that different first-party plaintiffs involve essential differences, such as accrual and whether necessary parties could have been added. *See supra* at 25–28. ACT has no response to these differences, rendering the issues here far from "identical." Second, the identical elements of indemnity do not affect issue preclusion unless the failure to obtain indemnification for certain defects necessarily precludes all indemnification for subsequently discovered latent defects, which it does not.

IV. LEMARTEC DID NOT WAIVE ANY CLAIMS

ACT argues that Lemartec waived the dismissal of Counts III-VI because "Lemartec argues only that its indemnity claims in the two actions involve different issues." Resp. 72. ACT's argument is misplaced.

Lemartec previously explained (*see supra* at 10–16) that each of its different substantive counts in the Federal Suit sought identical damages – overage paid to SPG for installation. As ACT is eager to point out, Lemartec's pleadings here track the federal pleadings; under various theories, they each seek indemnity from ACT. Although there are six different counts (only two of which expressly reference indemnification), they each seek as damages only what Lemartec may have to pay others. Each of the counts are properly treated as an indemnification theory.

ACT incorrectly implies that the district court conducted a separate *res judicata* analysis of each count necessitating separately captioned appellate arguments. The court consistently referred to ***all of Lemartec's claims*** as "indemnity," regardless of the exact legal theory. In the conclusion of its claim preclusion analysis, the court lumped all the counts together, concluding "Lemartec's third-party ***petition for indemnity*** from ACT stems from the same written agreement underlying transaction as that litigated and adjudicated in federal court." App. 349 (emphasis added). *See also, e.g.*, App. 331–32, 332 n.3, 342 ("Lemartec's claims for indemnification from ACT in both cases are premised on the contractual relationship between Lemartec and ACT under the Purchase Order for the design and fabrication of a salt conveyor."), 347, 350 (describing issue as "whether ACT's performance entitled Lemartec to indemnity under theories of breach of contract and implied or equitable remedies"), 351, 353

(noting that the federal court "could have found ACT liable to indemnify Lemartec for those damages resulting as an outgrowth of its deficient performance" and string-citing the statutory basis for each count), 354, and 355 ("*res judicata* bars Lemartec from pursuing further litigation against ACT for indemnity on the basis that ACT's performance under the Purchase Order violated express, implied, or contractual warranties.").

The district court properly denominated each of Lemartec's counts as "indemnity counts" based on the damages sought. The Order consistently used the shorthand of "indemnity" for all counts, without a separate count-by-count analysis. Lemartec adopted the same convention in its appellate briefs. There is no waiver in following this convention.

CONCLUSION

The summary judgment should be reversed and the case remanded.

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The undersigned certifies a copy of Defendant-Appellee's Proof Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 24th day of June, 2019:

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