

IN THE IOWA SUPREME COURT

NO. 18-1051

Polk County No. CVCV055213

ANITA GUMM

Appellant,

vs.

**EASTER SEAL SOCIETY OF IOWA, INC., AMERICAN
COMPENSATION INS. CO., AND SFM INSURANCE COMPANY**

Appellees.

**APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
THE HON. PAUL SCOTT, JUDGE**

**APPELLEE'S APPLICATION FOR FURTHER REVIEW AND
BRIEF IN SUPPORT OF APPLICATION**

**LEE P. HOOK
TYLER S. SMITH
PEDDICORD WHARTON, LLP
6800 Lake Drive, Suite 125
West Des Moines, Iowa 50266**

lee@peddicord.law

tyler@peddicord.law

**Telephone: (515) 243-2100; Facsimile: (515) 243-2132
ATTORNEYS FOR APPELLEE EASTER SEAL SOCIETY OF
IOWA, INC., AND SFM INSURANCE COMPANY**

QUESTIONS PRESENTED FOR REVIEW

- I. **WHETHER THE COURT OF APPEALS DECIDED THE CASE UNDER THE APPROPRIATE STANDARD OF REVIEW, WHICH PROVIDES FOR DEFERENCE TO THE IOWA WORKERS' COMPENSATION COMMISSIONER?**

- II. **WHETHER THE COURT OF APPEALS OF IOWA CORRECTLY INTERPRETED SUPREME COURT OF IOWA CASELAW AS IT RELATES TO WORKERS' COMPENSATION CUMULATIVE-INJURY LAW, SPECIFICALLY IN ITS INTERPRETATION AND APPLICATION OF *ELLINGSON V. FLEETGUARD* AND *FLOYD V. QUAKER OATS*?**

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STATEMENT IN SUPPORT OF APPLICATION FOR FURTHER REVIEW

Pursuant to Iowa R. App. P. 61103, Appellee, Easter Seal Society of Iowa Inc., and SFM Insurance Company (hereinafter “SFM”), hereby applies to the Supreme Court of Iowa for further review of the Decision of the Court of Appeals of Iowa filed May 15, 2019. In support of this Application, SFM states that the Court of Appeals of Iowa committed errors of law such that further review is appropriate under Iowa R. App. P. 6.1103(1)(b)(1) because the decision is in conflict with Supreme Court of Iowa and Court of Appeals of Iowa case law and is in conflict with Iowa Code section 85.26.

In this case, the Court of Appeals reversed and remanded a finding in favor of Easter Seals by the Iowa Workers’ Compensation Commissioner, which was affirmed by the District Court in its ruling denying Gumm’s Petition for Judicial Review, that Gumm did not sustain a distinct and discreet injury to her left ankle and as such, her alleged cumulative-injury claim failed under *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440 (Iowa 1999). The Commissioner rejected Gumm’s argument that *Floyd v. Quaker Oats*, 646 N.W. 2d 105 (Iowa 2002) should allow Gumm to bring a cumulative injury claim. The Court of Appeals (in a 2-1 decision) acknowledged that *Floyd* was an exception to the general cumulative-injury rule set forth in *Ellingson*, but

decided to extend the exception to encompass the case at hand. The basis of this Application for Further Review is two-fold: (1) the Court of Appeals did not provide the appropriate deference to the Commissioner's ruling, even though it acknowledged and the standard of review for cases involving the Commissioner's application of law to facts, in conflict with well-established Supreme Court of Iowa caselaw; and (2) the Court of Appeals unilaterally extended/expanded a specific exception to the general cumulative-injury law set forth in *Ellingson* – the exception/extension being that a claimant can get around a statute of limitations defense for an acute injury with sequela symptoms/injuries by pleading a cumulative injury to the same body part.

PROCEDURAL AND FACTUAL BACKGROUND

This case involves an appeal from the Iowa Workers' Compensation Commissioner's ruling on Appellant Anita Gumm's (hereinafter "Gumm") Petition for workers' compensation benefits for an alleged work-related cumulative injury to her right ankle. (Arbitration Decision p. 2, App. 17; Ruling on Petition for Judicial Review p. 1, App. 53) Gumm alleged a cumulative aggravation of a prior work injury to her right ankle, which occurred on October 28, 2008. (Arbitration Decision p. 2, App. 17) The Employer, Easter Seal Society of Iowa, Inc. ("Easter Seals"), was insured by Accident Fund Insurance Co. ("Accident Fund"), at the time of the October

28, 2008 injury; Easter Seals was insured by American Compensation Ins. Co. (“American Compensation”), at the time of the alleged cumulative injuries manifestation dates of March 6, 2012 and May 16, 2013; and Easter Seals was insured by SFM Insurance Co. (“SFM”) at the time of the alleged cumulative injuries manifestation date of January 15, 2014, with an effective coverage date of September 1, 2013. (Arbitration Decision p. 2, App. 17)

The Claimant’s treatment from Dr. Barp (her treating physician/surgeon for her right ankle injury) and opinions of Dr. Barp are fully set forth and summarized in the Arbitration Decision, which is attached hereto. A brief overview of Gumm’s right ankle injury and subsequent treatment for sequela symptoms/injuries is important, however, and is provided below. Dr. Barp opined that Gumm’s initial right ankle injury in October of 2008 and all treatment thereafter was a result of the initial ankle injury, which required surgery. (Exhibit 1, pp. 1-4, App. 85-88; Arbitration Decision p. 4, App. 19) and (Exhibit 4, p. 5, App. 239; Arbitration Decision p. 15, App. 30)

The medical evidence in this case is clear: Gumm sustained a significant right ankle injury with sequela injuries/symptoms thereafter. These symptoms were present less than six months after the initial injury and surgery. Further, the symptoms continued in the months and years following,

including a follow-up surgery on May 3, 2010; Gumm's last weekly benefit check was issued on May 21, 2010, for the initial 17% of permanent partial disability benefits that were issued after Gumm was assigned a permanent impairment rating of the same as a result of the initial ankle injury and subsequent ORIF surgery. (Exhibit E, p. 2, App. 261; Exhibit FF, p. 2, App. 266) and (Exhibit 10, p.1, App. 248; Exhibit E, p. 5, App. 264) In total, Gumm received 37.4 weeks of PPD benefits. (Exhibit 10, p.1, App. 248; Exhibit E, p. 5, App. 264) Over the next three years following the last benefit check, Gumm presented to Dr. Barp with on-going complaints. She received an injection in March of 2012. She underwent another surgery on April 11, 2012. (Exhibit 1, pp. 46, 50, and 52, App. 130, 134, 136; Arbitration Decision p. 5, App. 20) She presented to Dr. Barp on May 16, 2013, and reported right ankle complaints for the past 3 to 4 months, and after review of x-rays, Dr. Barp opined Gumm may need ankle arthrodesis surgery as Gumm had degenerative joint disease of the ankle. (Exhibit 1, pp. 63–64, App. 147-148; Arbitration Decision p. 6, App. 21). This was five days before the statute of limitations ran. Gumm did not file a Petition. Gumm's right ankle treatment continued, and on August 2, 2013, Dr. Barp recommended ankle arthrodesis but stated Gumm had to cease smoking before they could proceed with surgery. (Exhibit 1, pp. 66, 67, and 70, App. 150, 151, 154; Arbitration Decision p. 6, App. 21)

Hearing was held in Des Moines, Iowa, on March 12, 2015. (Appeal Decision p. 2, App. 44) The Deputy Commissioner filed an Arbitration Decision finding that Gumm failed to prove she had sustained a cumulative injury at any of the aforementioned alleged manifestation dates. (Arbitration Decision p. 22, App. 37; Ruling on Petition for Judicial Review p. 3, App. 55) Gumm appealed the decision to the Commissioner, and on October 12, 2017, the Commissioner issued an Appeal Decision affirming and upholding the Arbitration Decision in its entirety. (Appeal Decision p. 5, App. 47; Ruling on Petition for Judicial Review p. 3, App. 55) Gumm timely petitioned the District Court for Judicial Review on October 31, 2017, and the District Court issued a Ruling denying Gumm’s Petition for Judicial Review on May 16, 2018. (Ruling on Petition for Judicial Review p. 8, App. 60). Gumm timely filed a Notice of Appeal on June 15, 2018, with the Supreme Court of Iowa.

ARGUMENT

- I. IN DETERMING THE STANDARD OF REVIEW, THE COURT OF APPEALS FAILED TO ADDRESS THE SUBSTANTIAL EVIDENCE ARGUMENTS OF THE APPELLEES AND DID NOT PROVIDE DEFERENCE TO THE COMMISSIONER’S APPLICATION OF LAW TO THE FACTS AS REQUIRED BY IOWA CASELAW**
 - a. The Commissioner ruled that Gumm failed to show by a preponderance of the evidence that she sustained a cumulative injury – and this finding is supported by substantial evidence.**

While the Court of Appeals decision decided this case under the correction of errors at law – that is, was the Commissioner’s application of the law to the facts illogical, irrational, or wholly unjustifiable? – the Court failed to address the substantial evidence argument posited by Appellee SFM and Appellee American Compensation. The ultimate issue in this case – that is, whether Gumm sustained a new cumulative injury or suffered from sequela symptoms/injuries from the initial acute injury – is a substantial evidence question. *McKeever Custom Cabinets v. Smith*, 379 N.W.2d 368, 374 (Iowa 1985) (“Agency fact findings which have substantial evidentiary support in the record as a whole are binding on us.” (citing Iowa Code § 17A.19(8)(f)). Specifically, in sequela-injury situations, the issue is a substantial evidence question. *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 889–90 (Iowa 2014) (“Accordingly, we conclude substantial evidence amply supports the causation finding actually made by the commissioner, and we are not at liberty to disturb it on the ground the evidence could support a different determination.”); *Robbennolt v. Snap-On Tools Corp.*, 555 N.W.2d 229, 233 (Iowa 1996).

The Commissioner’s finding that Gumm sustained a significant injury with sequela symptoms and injuries in the years following the acute right

ankle injury was supported by substantial evidence. The relevant findings are set forth in the Arbitration Decision and Appeal Decision, which are attached hereto pursuant to Iowa App. R. 6.1103(1)(c)(6). Therein, the Commissioner outlined the relevant facts regarding Gumm's cumulative-injury claim, specifically the various medical opinions from the medical experts involved: Dr. Barp (Gumm's treating physician/surgeon for her ankle treatment and procedure) and Dr. Sassman (Claimant's IME physician). In short, the Commissioner found that Gumm provided no credible medical evidence that she sustained a cumulative injury, as it was determined the Dr. Sassman's opinion was not credible. (Hearing Transcript pp. 63–64, App. 80-81; Arbitration Decision pp. 13, 16, 18, App. 28, 31, 33; *cf.* Appellant's Brief p. 7). The Commissioner ruled, however, that the symptoms and complaints regarding Gumm's ankle were sequela symptoms and complaints – which related back to the initial injury. (Appeal Decision p. 4, App. 46) *See DeShaw v. Energy Mfg. Co.*, 192 N.W.2d 777, 780 (Iowa 1971) (citing *Oldham v. Scofield & Welch*, 266 N.W. 480, 482 (Iowa 1936)).

Nonetheless, the Commissioner applied the cumulative injury law set forth in *Ellingson*, and ultimately determined that Gumm sustained sequela injuries. This was supported by substantial medical evidence, as outlined above and in the Deputy's and Commissioner's decisions. Under either

Ellingson or *Floyd*, Gumm has failed to prove she sustained a cumulative injury, because Dr. Sassman's report and opinions set forth therein were determined not to be credible as they were formed under an incomplete and faulty factual history. (Hearing Transcript pp. 63–64, App. 80-81; Arbitration Decision pp. 13, 16, 18, App. 28, 31, 33)

The decision of the Commissioner that the treatment received and symptoms complained of by Gumm in the months and years following the October 2008 acute injury were sequela injuries was supported by substantial evidence, as required by the Supreme Court of Iowa. As such, the Court of Appeals decision should be reversed on this point and the decision of the district court reinstated in its entirety – as Gumm did not sustain a cumulative injury under either *Ellingson* or *Floyd*.

b. Even if Gumm is able to overcome the substantial evidence argument that the Court of Appeals failed to address, the Court of Appeals did not provide any deference to the Commissioner in the Commissioner's application of law to facts, as required by the Supreme Court of Iowa case law.

The Court of Appeals outlined the appropriate standard of review of correction of errors at law when the alleged error is the Commissioner's application of law to the facts. (Court of Appeals Decision p. 3). The Court of Appeals correctly noted:

Our analysis is shaped largely by the deference we

are statutorily obligated to afford the agency. See *Mike Brooks, Inc. v. House*, 843 N.W.2d 885, 888–89 (Iowa 2014). In judicial review proceedings, the district court acts in an appellate capacity, reviewing the commissioner’s decision to correct legal error. See *id.* at 888. On appeal, we apply the standards of Iowa Code chapter 17A (2017) to decide if we reach the same conclusion as the district court. See *id.* at 889. The commissioner is vested with the authority to apply the law to the facts. See *Drake Univ. v. Davis*, 769 N.W. 2d 176, 183 (Iowa 2009). Because whether the commissioner misapplied the cumulative-injury doctrine to Gumm’s situation depends on application of law to facts, we will not disturb the decision unless it is “irrational, illogical, or wholly unjustifiable.” See *Neal v. Annett Holdings, Inc.*, 814 N.W. 2d 512, 526 (Iowa 2012); see also Iowa Code § 17A.19(10)(i), (m). “A decision is ‘irrational’ when it is not ‘governed by or according to reason.’ A decision is ‘illogical when it is contrary to or devoid of logic.’ A decision is ‘unjustifiable’ when it has no foundation in fact or reason.” *Sherwin-Williams Co. v. Iowa Dep’t of Revenue*, 789 N.W. 2d 417, 432 (Iowa 2010) (citations omitted).

(Court of Appeals Dec. p. 3)

Again, substantial evidence argument aside, if the issue was whether the Commissioner’s application of cumulative-injury caselaw to the facts of the case was irrational, illogical, or wholly unjustifiable, the Court of Appeals decision did not address how the Commissioner’s application of *Ellingson* and its distinguishing of *Floyd*, was “not governed by or according to reason”;

“contrary to or devoid of logic”; and/or “ha[d] no foundation in fact or reason.”

The Court of Appeals blocked quoted significant portions of the Commissioner’s decision and the Ruling of the District Court on Petition for Judicial Review but the court did not explain or analyze how the decision that *Ellingson* applied and was dispositive of the case was irrational, illogical, or wholly unreasonable. The Court of Appeals simply concluded:

Our takeaway is that the *Floyd* holding creates a carefully circumscribed exception to the *Ellingson* holding. In other words, if a claimant is precluded by the statute of limitations from bringing an original proceeding or review-reopening, the claimant may recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the original injury without having to show he or she suffered a “distinct and discreet” disability attributable to the post-original-trauma work activities.

The issue on review of this case is not what the takeaway of the Court of Appeals is – rather whether the deference owed to the Commissioner’s finding was without merit in its application of the law to the facts. The Commissioner provided a well-reasoned explanation of why *Floyd* did not apply and why *Ellingson* controlled. This was affirmed by the District Court. The Commissioner’s application of *Ellingson* was not irrational, illogical, or

wholly unreasonable. The Court “do[es] not determine whether the evidence might support a different finding but whether it supports the finding made.” *Ellingson v. Fleetguard, Inc.*, 599 N.W.2d 440, 445 (Iowa 1999). Here, the Court of Appeals opted to extend or expand caselaw in the acute-then-cumulative injury arena beyond *Ellingson* and *Floyd*. If the Commissioner would have extended the *Floyd* exception to *Ellingson* as the court did – finding that *Floyd* should be extended to provide Gumm with a basis for receiving additional benefits over and above those already received and avoid a statute of limitations defense in the process – then the issue on appeal would be the same, but the court would have had to provide deference to the Commissioner’s application. The case at hand presents the contrary scenario – but the requirement for the court to provide deference to the Commissioner remains. Here, the court did not provide any deference to the Commissioner’s application of the law. Instead, the court unilaterally decided to extend a Supreme Court of Iowa case and thus reverse the Commissioner’s ruling. The standard of review argument – that is, the Commissioner’s application of the law to the facts in this case in the cumulative-injury caselaw realm was not illogical, irrational, or wholly unjustifiable – is further supported by the fact that there was a dissent in the Court of Appeals case.

In the dissent, Judge Mullings characterized the *Floyd* case as providing

for an exception to the *Ellingson* case fact that this Court of Appeals decision was 2-1 and included a dissenting opinion, further supports SFM's argument that the Commissioners application of cumulative injury caselaw to the facts of this case was not irrational, illogical, or wholly unjustifiable. Even if the decision of the Commissioner is/was fairly and reasonably debatable, that is not enough – in order for the decision to be disturbed, the Court must show that it was irrational, illogical or wholly unjustifiable.

The Commissioner's finding was fact-intensive. It did not perfectly align with *Floyd* and it did not perfectly align with *Ellingson*. The Court of Appeals did not provide any analysis as to why the Commissioner's and District Court's rulings were irrational, illogical, or wholly unreasonable. As such, the Court of Appeals decision should be reversed and the District Court's ruling reinstated in full.

II. THE COURT OF APPEALS OF IOWA UNILATERALLY EXTENDED THE RULING IN *FLOYD* TO ALLOW CLAIMANT'S A WAY TO CIRCUMVENT IOWA CODE SECTION 85.26.

The reasoning in the Court of Appeals decision creates a slippery slope in workers' compensation law, by essentially allowing a claimant to circumvent Iowa Code § 85.26 any time they want benefits for an acute injury that has been allegedly (or actually) aggravated by work duties but for which

no Petition was filed or Review-Reopening proceeding commenced for the acute injury within the time limitation set forth in Iowa Code § 85.26. Iowa Code § 85.26 provides:

An original proceeding for benefits under this chapter or chapter 85A, 85B, or 86, shall not be maintained in any contested case unless the proceeding is commenced within two years from the date of the occurrence of the injury for which benefits are claimed or, if weekly compensation benefits are paid under section 86.13, within three years from the date of the last payment of weekly compensation benefits.

The Supreme Court of Iowa in *Ellingson v. Fleetguard* held that in order to establish a cumulative injury to the same body part that was affected by a previous acute injury, the Claimant must show he or she “has suffered a distinct and discreet disability attributable to post-[acute injury] work activities rather than as an aggravation of the [acute injury].” 599 N.W. 2d 440, 444 (Iowa 1999). As noted by the court of appeals, the Supreme Court of Iowa in *Floyd v. Quaker Oats*, carved out an exception to the distinct and discreet disability rule set forth in *Ellingson*. The exception was in the circumstance where a claimant had not received a prior award or settlement for an acute, work-related injury and was barred from doing so due to the statute of limitations. *Floyd v. Quaker Oats*, 646 N.W. 2d 105, 108 (Iowa 2002). The Court decided, however, that the increase in disability from the

initial acute injury was compensable under the cumulative theory doctrine. The key fact, according to the Court, was that the dismissal of the Petition for the initial acute injury precluded any consideration of that injury as a compensable event—i.e., the claimant had not recovered any compensation for the underlying, initial injury. *Id.* at 108. The court held, then, that “[g]iven this circumstance, we believe that claimant should be permitted to recover by way of a cumulative-injury claim for any increase in functional disability shown to have occurred as the result of day-to-day activities in the workplace subsequent to the [acute] injury.” *Floyd*, 646 N.W. 2d 105, 108 (Iowa 2002). The “circumstance” in *Floyd* was that no recovery, award, settlement, or benefit had been received/made. Therefore, the Court created an exception to the “distinct and discreet” rule of *Ellingson* that applied in the limited “circumstance”. Importantly, the *Floyd* court analyzed the cumulative-injury law and affirmed “the agency’s conclusion that the evidence supported an award of compensation for a cumulative injury [because] such conclusion was not contrary to law.” *Id.* The same is the case at hand – as discussed in the standard of review argument above – the only difference, however, is that the Commissioner found that the “circumstance” of Gumm in this case was not the same “circumstance” as that of Floyd.

In this case, the Court of Appeals discussed *Ellingson* and *Floyd*,

finding *Floyd* “creates a carefully circumscribed exception to the *Ellingson* holding.” (Court of Appeals Dec. p. 7) The court then decided to extend the exception – and in so doing – has provided a way for all claimants to circumvent statute of limitations defenses in cases where they sustained an acute injury and received treatment for the same in the months and years following, regardless of whether they had been compensated for the initial injury via an award from a Deputy, settlement pursuant to an impairment rating or otherwise, or if they had received any sort of workers’ compensation benefits in the days/weeks/months following the acute injury. As Judge Mullings noted in the dissent: “I read the majority opinion to allow Gumm to pursue additional benefits for the underlying injury because the statute of limitations prevents her from claiming additional benefits for the underlying injury. I respectfully submit such a conclusion is an extension of *Floyd*, which I do not believe is or should be authorized.” (Mullings, J., dissenting, Court of Appeals Dec. p. 10). SFM agrees. An extension of *Floyd* is not appropriate because it makes *Ellingson*’s requirement of a distinct and discreet injury meaningless as well as Iowa Code § 85.26 meaningless. The Supreme Court of Iowa had a chance to change the distinct and discreet requirement of *Ellingson* in *Floyd* but opted to avoid such conflict and find a limited circumstance exception. The Court of Appeals erred in extending said

exception.

Here, the Commissioner found that Gumm failed to show a distinct and discreet disability attributable to work activities over time, not a result of an aggravation of a pre-existing injury, pursuant to *Ellingson*. This was done after careful consideration of all of the medical evidence. It was determined by the Commissioner that Gumm's symptoms and complaints in the years following the October 2008 injury were a sequela of the October 2008 injury. This case involved an acute injury with sequela symptoms/injuries that should have been addressed by way of filing an original Petition, which would have allowed for the parties to sort out the extent of the increased disability since the 17% lower extremity rating previously assigned. This is not a case that involved a claimant that had not received any benefits for an acute work injury like in *Floyd*. Gumm had received benefits and had continued to seek treatment for related symptoms. Gumm failed to timely file a Petition for additional benefits. Extending *Floyd*, as the Court of Appeals did, is an unnecessary and uncalled for extension of cumulative-injury caselaw and essentially makes Iowa Code § 85.26 meaningless. SFM requests the Court reverse the Court of Appeals decision and reinstate the District Court's Ruling on the Petition for Judicial Review.

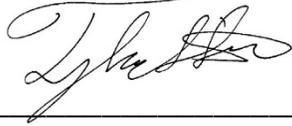
CONCLUSION

WHEREFORE, SFM requests that this Application for Further Review be granted and that the Court of Appeals decision be reversed and the District Court's Ruling be reinstated in its entirety, as the District Court correctly found that the Commissioner's application of the law to the facts in the Commissioner's Appeal Decision was not illogical, irrational, or wholly unjustifiable. In addition, the Commissioner's determination that Gumm did not sustain a cumulative injury is supported by substantial evidence – as such is the standard for determining sequela-type injuries. Finally, the Court of Appeals decision inappropriately extended a narrow exception to the distinct and discreet rule set forth in *Ellingson*, in the *Floyd* case, that allows claimants to now circumvent Iowa Code § 85.26, regardless of whether they have received an award or benefits for acute work injuries that later are aggravated – as any such aggravation now could be classified as a “cumulative injury.” For all of the reasons set forth herein, SFM requests the Court reverse the Court of Appeals and reinstate the District Court's Ruling, denying Gumm's Petition for Judicial Review, in its entirety.

CERTIFICATE OF COMPLIANCE

This application complies with the type-volume limitation of Iowa R. App. 6.1103(4), because this application does not exceed two-fifths of the type-volume limitation of Iowa R. App. 6.903(1)(g)(1) because this application contains 3,887 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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

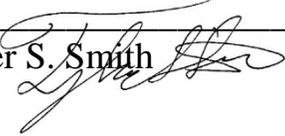


Tyler S. Smith

06/04/19
Date

CERTIFICATE OF SERVICE

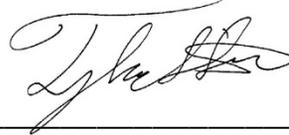
I, Tyler S. Smith, member of the Bar of Iowa, hereby certify that on June 4, 2019, I or a person acting on my behalf served the above Application for Further Review to all counsel of record via EDMS in full compliance with Rules of Appellate Procedure and Rules of Civil Procedure.



Tyler S. Smith

CERTIFICATE OF FILING

I, Tyler S. Smith, hereby certify that I, or a person acting in my direction, did file the attached Application for Further Review and Brief in Support of the Application upon the Clerk of the Iowa Supreme Court via EDMS on this 4th day of June, 2019.

A handwritten signature in black ink, appearing to read "Tyler S. Smith", is written over a horizontal line. The signature is cursive and stylized.

Tyler S. Smith