IN THE SUPREME COURT OF IOWA

Michael Merrill and Karen Jo Frescoln, Plaintiffs-Appellants, v. **Valley View Swine, LLC, and JBS Live Pork, LLC,** Defendants-Appellees.	**Supreme Court No. 19-0821** Wapello County Case No. LALA105144 – Division A

Appeal from the Iowa District Court in and for Wapello County
The Honorable Annette J. Scieszinski, Judge

Defendants-Appellees Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument

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Routing Statement

The Iowa Supreme Court should retain this appeal because it presents substantial issues of first impression as to the application of Iowa Code Section 657.11(5). Iowa R. App. P. 6.1101(2)(a).

Statement of the Case

This lawsuit involves nuisance claims brought by Plaintiffs against animal feeding operations on an Iowa farm. The Iowa General Assembly restricted these types of claims in litigation reform measures adopted beginning in 1995 through enactment of Iowa Code Section 657.11. That section, by its title, covers "Animal Feeding Operations" in Iowa. The statute protects farmers by, among other things, barring recovery of special damages—damages for loss of use and enjoyment—in nuisance actions against an animal feeding operation unless the plaintiff satisfies specific elements and proof requirements. *See* Iowa Code § 657.11(2). Section 657.11(5) protects farmers from the costs of defending against frivolous claims by holding persons who bring frivolous claims as part of a losing cause of action liable for all costs and expenses incurred in the defense of the action.

Plaintiffs Michael Merrill and Karen Jo Frescoln first filed suit against Defendants Valley View Swine, LLC ("Valley View") and JBS Live Pork, LLC ("JBS") on November 22, 2013, alleging nuisance. Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008. They voluntarily dismissed their claims on January 2, 2014, and filed a second petition against Defendants on April 2, 2014. Notice of Voluntary Dismissal Without Prejudice (Wapello County Case No. LALA105087), App. 0034; Petition and Jury Demand, App 0036.

On June 7, 2016, following two years of litigation and a mere six months before trial, Merrill dismissed his claims against Defendants pursuant to Iowa Rule of Civil Procedure 1.943. Voluntary Dismissal of Plaintiff Michael Merrill, App. 0275. On June 10, 2016, Defendants filed a Motion for Judgment and Costs and Expenses, Including Attorney's Fees, requesting the District Court award all costs and expenses incurred by Defendants in the defense of Merrill's frivolous claims, including attorney fees, pursuant to Iowa Code section 657.11(5). ("Defendants' Motion for Costs and Expenses – Merrill"), App. 0278. Defendants also sought costs under Iowa Code Chapter 625.1 and sanctions pursuant to Iowa Rule of Civil Procedure 1.413(1). *Id.*

Frescoln dismissed her claims for the second time on September 24, 2018, following remand of the matter from the Iowa Supreme Court. Voluntary Dismissal of Certain Plaintiff Without Prejudice, App. 0389. On October 11, 2018, Defendants filed a Motion for Costs and Expenses as to Frescoln. *See* Defendants' Motion for Judgment and Costs and Expenses, Including Attorneys' Fees, as to Plaintiff Karen Jo Frescoln ("Defendants' Motion for Costs and Expenses – Frescoln"), App. 0541. Merrill joined in Frescoln's resistance to Defendants' Motion. *See* Karen Jo Frescoln's Resistance to Motion for Judgment and Costs and Expenses, App. 0547; Joinder of Former Plaintiff Michael Merrill with Former Plaintiff Karen Jo Frescoln in Resistance to Defendants' Motion for Judgment and Costs and Expenses, App. 0545.

The District Court heard oral argument from the parties on Defendants' Motions relating to Merrill and Frescoln on November 20, 2018, and on December 11, 2018, issued its ruling on the motions. *See* Nov. 20, 2018 Tr. of Evidence, App. 1483; Ruling on Motions for [Costs, Expenses, and Fees]; App. 1634.

The Court granted Defendants routine court costs pursuant to Iowa Code Section 625.1, *et seq.* as a result of Plaintiffs' dismissals. Ruling on Motions for [Costs, Expenses, and Fees] at ¶ 2, App. 1643. The Court also

declared the claims of Merrill and Frescoln frivolous pursuant to Iowa Code Section 657.11(5). *Id.* ¶ 3, App. 1643–44. The Court held that quantification of expenses recoverable under Section 657.11(5) was to proceed upon Defendants' application and subsequent hearing. *Id.* ¶ 3(B)(1), App. 1644.

On February 5, 2019, JBS submitted its costs and supporting documents. *See* Defendant JBS Live Pork, LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0784. Valley View submitted its costs on February 8, 2019. *See* Defendant Valley View Swine LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0581. Costs were assessed on a pro-rata basis, pursuant to the Court's formulation, where certain expenditures spanned multiple case divisions, and again on a pro-rata basis, where costs spanned all plaintiffs in Division A. *See* Ex. A to JBS Live Pork LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0590; Attachment A to Defendant Valley View Swine LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0790. On March 22, 2019, the Court heard argument on Defendants' Motions. *See* March 22, 2019 Tr. of Evidence, App. 1565.

On April 19, 2019, the Court entered judgment on the costs and expenses submitted by Defendants. Judgment Entry on Costs and Expenses Re: Former Plaintiffs Merrill and Frescoln, App. 1646. The Court awarded deposition expenses submitted and properly apportioned by Defendants,

transcription expenses, payments to the Special Master, and expert witness billings submitted by JBS and Valley View. *Id.* ¶¶ 4(A)(1)–(2), 4(B)(1)–(2), App. 1647–51, 1651–56. The Court recognized that Plaintiffs raised no objection to the reasonableness of the expenses claimed but resisted recovery of any expenses whatsoever. *Id.* n.3, App. 1647. Plaintiffs filed a Notice of Appeal on May 16, 2019.

The Statement of Facts that follows provides further context for those relevant events.

Statement of Facts

This appeal arises from the District Court's award of all costs and expenses incurred by Defendants in the defense of Plaintiffs' frivolous suits.

The animal feeding operation at issue in this case is located in Wapello County, Iowa, and owned by Valley View Swine. It consists of two sites, Site 1 and Site 2. Exs. 2, 3 to Cargill Pork Motion for Summary Judgment ("MSJ"). In early 2013, Nick Adam and his sons, Jeffrey and Shawn, as members of Valley View, entered into discussions with Cargill Pork, LLC ("Cargill Pork")[1] to develop a hog feeding operation as part of the family's interest in growing its farm. Ex. 39 to Cargill Pork MSJ, pp. 10:14–11:3.

Construction on Site 1 and Site 2 began in April 2013. On August 13, 2013, the Iowa DNR issued an Authorization to use Site 1, finding the barn was constructed in compliance with DNR regulations. Ex. 5 to Cargill Pork MSJ. On August 14, 2013, the Iowa DNR issued Authorization to use Site 2, finding the barn was constructed in compliance with DNR rules and regulations. Ex. 7 to Cargill Pork MSJ.

[1] Cargill Pork was a wholly-owned subsidiary of Cargill Meat Solutions Corporation. Ex. 8 to Cargill Pork MSJ, ¶ 4. On October 30, 2015, ownership in Cargill Pork was transferred to Swift Pork Company and Cargill Pork became JBS Live Pork, LLC. *See* Notice of Name Change and Motion to Change Case Caption.

Those rules and regulations constitute a comprehensive body of law governing the construction and operation of animal feeding operations in Iowa. Specific conditions must be met by the applicant in order to ensure proper waste management and protection of soil and waterways, including design requirements for manure management structures and a manure management plan approved by the State. *See* Exs. 4, 6 to Cargill Pork MSJ; Iowa Admin. Code Ch. 65; Iowa Code § 459.306. The construction must also maintain minimum separation distances from existing residences established by the Iowa Legislature. Iowa Code § 459.202. In 2013, the applicable minimum required separation distance for an operation the size of Site 1 and Site 2 was 0.36 miles, or 1,875 feet. Iowa Admin. Code Ch. 65; Ex. 41 to Cargill Pork MSJ.

On November 22, 2013, a mere three months after Site 1 became operational and only two months after Site 2 became operational, Plaintiffs filed suit in the Iowa District Court in and for Wapello County. Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008. Plaintiffs' initial Petition included 70 individual plaintiffs and asserted claims for temporary nuisance and negligence against Valley View Swine, Nick Adam, Jeffrey Adam, Shawn Adam (collectively "the Adam Defendants"), Tri-L Farms, Inc., Larry Hickenbottom, Josh Hickenbottom,

Richard Warren, and Cargill Pork. *Id.* Plaintiffs failed to fulfill the mediation requirement of Iowa Code section 657.10 prior to filing their Petition, and on January 2, 2014, dismissed the case. Notice of Voluntary Dismissal Without Prejudice (Wapello County Case No. LALA105087), App. 0034.

On April 2, 2014, Plaintiffs re-filed the suit in Wapello County naming 69 plaintiffs and again asserting claims of temporary nuisance and negligence against Valley View Swine, the Adam Defendants, Tri-L Farms, Inc., Larry Hickenbottom, Josh Hickenbottom, Richard Warren, and Cargill Pork. Petition and Jury Demand, App. 0036. On September 2, 2014, the District Court ordered the case severed into divisions based upon the plaintiffs' allegations against three diverse defendant groups. Order on Motions and Directing Proceedings. Division A included claims against Valley View Swine, the Adam Defendants, and Cargill Pork; Division B included claims against Tri-L Farms, Inc. and the Hickenbottoms; and Division C included claims against Richard Warren and Cargill Pork. *Id.* The Divisions were joined for the purposes of discovery. *Id.*

On October 29, 2014, the District Court implemented a bellwether procedure by which Plaintiffs and Defendants would each select two plaintiff households, with separate bellwether trials to proceed in Divisions A, B, and C. Order Regarding Discovery and Scheduling. Deb Chance,

Jason Chance, Kara Chance, Karen-Jo Frescoln, Robin Honomichl, Timothy Honomichl, Morgan Honomichl, Q.H., C.H., and Michael Merrill were selected as the Division A bellwether plaintiffs.

The cases filed under Wapello County Case No. LALA105144 dramatically changed composition after they were initially filed. On November 3, 2014, Division B Plaintiffs dismissed Division B in its entirety. Notice of Voluntary Dismissal. During the course of the litigation, Division A Plaintiffs filed five iterations of their Petition, and, more than six years after filing suit, fully dismissed the matter on September 24, 2019. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036; Amended Petition and Jury Demand, App. 0080; Second Amended Petition and Jury Demand, App. 0101; Third Amended Petition and Jury Demand, App. 0574; Dismissal with Prejudice – All Remaining Plaintiffs. Division C Plaintiffs filed six Petitions prior to trial, eliminating 26 Plaintiffs during the course of litigation, after which the remaining Plaintiffs dismissed suit. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036; Amended Petition and Jury Demand; Second Amended Petition and Jury Demand; Third Amended Petition and Jury Demand; Fourth Amended Petition and Jury Demand.

This trend has continued in other Iowa District Court nuisance suits against JBS by plaintiffs represented by the same counsel.[2] For example:

- On May 16, 2014, counsel for Plaintiffs filed Case No. LALA002187 in Poweshiek County, asserting negligence and temporary nuisance claims on behalf of 15 plaintiffs against Doug Hoksbergen, PSL, Inc., and Cargill Pork. The case proceeded through discovery, but was dismissed on March 30, 2016, only 62 days before trial.
- On July 21, 2015, counsel for Plaintiffs filed Adair County Case No. LACV005896 on behalf of 14 plaintiffs, naming Cargill Pork as a defendant. The matter was severed into Divisions A and B (representing Adair County plaintiffs and Union County plaintiffs, respectively), expanded to 25 plaintiffs, and dismissed on August 30, 2016.
- On December 2, 2015, counsel for Plaintiffs filed Davis County Case Nos. LALA012580, LALA012581, and LALA012582 on behalf of 56 plaintiffs against JBS. Those cases were consolidated and reduced to 16 plaintiffs. On November 2, 2016, Plaintiffs dismissed the case without prejudice.
- On March 27, 2018, counsel for Plaintiffs re-filed suit in Davis County on behalf of 12 plaintiffs. The matter was removed to the Iowa District Court for the Southern District of Iowa as Case No. 4:18-cv-00123. The final plaintiff dismissed his claims with prejudice on September 24, 2019.

[2] The matters described were initially filed by attorney David E. Sykes, who was joined *pro hac vice* by attorneys from the Speer Law Firm in Kansas City, Missouri and the Middleton Firm in Savannah, Georgia. On November 15, 2016, the Speer Law Firm and the Middleton Firm withdrew as counsel for Plaintiffs. *See* Withdrawal of Appearance. Mr. Sykes remained counsel of record, and was joined by Steven P. Wandro, Jennifer H. De Kock, and Benjamin Arato of Wandro & Associates, P.C.

- Counsel for Plaintiffs have filed, amended, and ultimately dismissed similar nuisance suits against other producers in Des Moines, Henry, Linn, Louisa, and Poweshiek Counties.[3]

Following dismissal of Wapello County Case No. LALA105144 – Division B, Divisions A, C, and Poweshiek County Case No. LALA002187 were consolidated for purposes of discovery and related deadlines. Order for Trial and Pretrial Directions. Counsel for the parties conducted the depositions of witnesses who possessed information related to all three matters at one time, with a portion of the examination reserved for general background, followed by questioning relating to each specific matter in turn.

[3] The additional below-listed cases involving substantively the same claims and counsel have been filed in Iowa District Courts:

Caption	Case Number	County	Status
Lappe et al. v. Pro Ag Investors, LLC et al.	LALA004642	Des Moines	Dismissed
City of Mount Union et al. v. Pro Ag Investors et al.	LALA011873	Henry	Defense Verdict
Davis et al. v. Maschhoff Pork, LLC et al.	LACV084348	Linn	Dismissed
Bergthold v. Pro Ag Investors, LLC et al.	LALA018794	Louisa	Dismissed
Wilkerson et al. v. Pro Ag Investors, LLC et al.	LALA018795	Louisa	Dismissed
Wilson et al. v. Pro Ag Investors, LLC et al.	LALA018795	Louisa	Dismissed
Ahrens et al. v. Prestage Farms of Iowa, LLC	CVEQ027257	Poweshiek	Dismissed

Division C was tried first, beginning February 1, 2016. Order for Trial and Pretrial Directions. Poweshiek County Case No. LALA002187 was to follow beginning May 31, 2016, with trial in this matter, Division A, set to begin August 15, 2016. *Id.*

On October 6, 2015, Defendants filed motions for summary judgment in each case, arguing Iowa Code section 657.11(2) is a valid and enforceable statute that bars Plaintiffs' claims. Cargill Pork MSJ; Defendants Valley View Swine, LLC, Nick Adam, Jeffrey Adam, and Shawn Adam's Motion for Summary Judgment. That same day, Plaintiffs filed a Motion for Partial Summary Judgment, seeking to strike Defendants' affirmative defense under section 657.11(2) and requesting a declaratory ruling holding section 657.11's statutory immunity unconstitutional as applied to Plaintiffs. Plaintiffs' Motion for Partial Summary Judgment as to Affirmative Defenses of Defendants. The District Court held hearings on Plaintiffs' and Defendants' submissions on November 14, 2015 and December 15, 2015.

On January 9, 2016, the District Court ruled Iowa Code section 657.11(2) was unconstitutional as applied to all Division C bellwether plaintiffs. *See* Ruling on Pretrial Motions. In February 2016, a Wapello County jury heard and decided Division C. After 16 days of trial, the jury

returned defense verdicts, finding no nuisance on the properties of each of the nine plaintiffs.

Following trial, JBS filed a Motion for Costs and Expenses, asserting the claims of Plaintiffs David Bowen, Bonita Miller, and Rod Miller were frivolous within the meaning of Iowa Code Section 657.11(5) and seeking statutory recovery for all costs and expenses, including attorney fees, incurred in defending those claims. *See* JBS Live Pork, LLC's Motion for Costs and Expenses, App. 0123. The District Court held that as a matter of law, JBS raised a defense under Iowa Code Section 657.11 and recovery under subsection (5) was therefore available to JBS. Order on Post-Verdict Motions and Judgment Entry, App. 0260. The District Court found Mr. Bowen, Ms. Miller, and Mr. Miller's claims frivolous within the meaning of the statute and held each plaintiff liable for his or her portion of costs incurred by JBS in defense of their claims. *Id.* at 3, App. 0262; Order on Motion for Reconsideration and Order on Motion to Enlarge and Amend, App. 0270.

On June 7, 2016, two months before trial was set to begin, Merrill dismissed his claims against Defendants pursuant to Iowa Rule of Civil Procedure 1.943. *See* Voluntary Dismissal of Plaintiff Michael Merrill, App. 0275. On June 10, 2016, Defendants filed a Motion for Judgment and Costs

and Expenses, Including Attorney's Fees, requesting the District Court award all costs and expenses incurred by Defendants in defense of Merrill's frivolous claims, including attorney fees, pursuant to Iowa Code Section 657.11(5). App. 0278. Defendants also sought costs under Iowa Code Chapter 625.1 and sanctions pursuant to Iowa Rule of Civil Procedure 1.413(1). *Id.*

On June 8, 2016, the District Court ruled on the dispositive motions in Division A, denying JBS and Valley View Swine's motions for summary judgment in a summary ruling. *See* Ruling on Pretrial Motions. The ruling held that Iowa Code Section 657.11(2) is unconstitutional as applied to the bellwether plaintiffs and violates Article I, Section 1 of the Iowa Constitution. *Id.*

On June 13, 2016, Defendants submitted an Application for Interlocutory Review to the Iowa Supreme Court. On July 15, 2016, the Iowa Supreme Court granted Defendants' Application and stayed District Court proceedings. On appeal, Defendants challenged the District Court's interlocutory ruling denying summary judgment and holding Iowa Code section 657.11(2) unconstitutional, seeking reversal and remand for entry of judgment in favor of Defendants on the basis of Section 657.11's protections.

The Iowa Supreme Court heard argument and on July 19, 2018, issued its ruling in *Honomichl v. Valley View Swine, LLC*, 914 N.W.2d 223 (Iowa 2018). The Iowa Supreme Court reversed the ruling of the District Court finding Iowa Code Section 657.11(2) unconstitutional as applied to Plaintiffs, holding Section 657.11(2) facially constitutional and remanding for a fact-based analysis applying the test set forth in *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004).

The Court ruled that plaintiffs must show they "(1) 'received no particular benefit from the nuisance immunity granted to their neighbors other than that inuring to the public in general[,]' (2) 'sustain[ed] significant hardship[,]' and (3) 'resided on their property long before any animal operation was commenced' on neighboring land and 'had spent considerable sums of money in improvements to their property prior to construction of the defendant's facilities.'" *Honomichl*, 914 N.W.2d at 237. The Court suggested this fact-based analysis may take place after trial on the merits or in pretrial litigation but did not provide guidance on how or when such pretrial hearing may be held. *Id.* at 238. Justices Waterman and Mansfield concurred specially, declaring that the highly deferential rational-basis test should be applied to adjudicate the constitutional challenge to Section

657.11(2) and that, pursuant to this test and the changing regulatory landscape, *Gacke* was wrongly decided. *Id.* at 239–40.

On July 19, 2018, following the Iowa Supreme Court's ruling, the case was remanded to the District Court. *See* Procedendo. On September 24, 2018, Frescoln dismissed her claims against Defendants pursuant to Iowa Rule of Civil Procedure 1.943. *See* Voluntary Dismissal of Certain Plaintiff Without Prejudice, App. 0389. Though Frescoln's dismissal stated that it was without prejudice, as her second voluntary dismissal, it was, in fact, with prejudice. *Id.*

On October 11, 2018, Defendants filed a Motion for Costs and Expenses as to Frescoln. *See* Defendants' Motion for Costs and Expenses – Frescoln, App. 0541. Merrill joined in Frescoln's resistance to Defendants' Motion. *See* Karen Jo Frescoln's Resistance to Motion for Judgment and Costs and Expenses, App. 0547; Joinder of Former Plaintiff Michael Merrill with Former Plaintiff Karen Jo Frescoln in Resistance to Defendants' Motion for Judgement and Costs and Expenses, App. 0545. The District Court heard oral argument from the parties on Defendants' Motions for Costs and Expenses relating to Merrill and Frescoln on November 20, 2018, and on December 11, 2018, issued its ruling on the motions. *See* Nov. 20,

2018 Tr. of Evidence, App. 1483; Ruling on Motions for [Costs, Expenses, and Fees], App. 1634.

The District Court ruled that a second dismissal, for any reason, under Iowa Rule of Civil Procedure 1.943 constitutes an adjudication against the dismissing party on the merits of the litigation, triggering application of Iowa Code Chapter 625 on assessment of court costs and related expenses. *Id.* ¶ 1(A)(1). App. 1635. The Court further ruled that Section 657.11(5) is properly invoked in situations of voluntary, pretrial claim dismissal, permitting recovery of "all costs and expenses" with the exception of attorney fees. *Id.* ¶ 1(B), App. 1635–37.

The Court undertook a fact-based analysis of Merrill's claims and circumstances and concluded his claims were "trivial without sound basis in fact, and lacked seriousness of legitimate purpose," and were "exaggerated and frivolous," such that Merrill should "bear responsibility for a prorated amount of the defendants' costs and expenses of defense." *Id.* ¶ 2(A), App. 1639–40.

The Court observed that despite articulating "weighty claims" in his Petition, Merrill "did not produce evidence of any material impact that his infrequent detection of generalized swine odor imposed upon his actual use of his property." *Id.* Nor was Merrill able to tie the odor he allegedly

detected to the Valley View barns "either by his direct experience or circumstantially through other evidence. And, he made no real effort to do so." *Id.* Ultimately, Merrill "presented no substantial evidence of nuisance as defined by Iowa Code Section 657.1." *Id.*

The Court also analyzed Frescoln's claims and circumstances and similarly held that her claims were "exaggerated and frivolous and she should bear responsibility for a prorated amount of defendants' costs and expenses." *Id.* ¶ 2(B), App. 1640–42. The Court concluded that "Frescoln's claims in this case are without substance of property ownership, and do not establish soundness in fact when all of the evidence she produces and that she fails to produce, is reconciled." *Id.*

The Court stated that Frescoln "routinely conflates complaints made on behalf of her grandchildren and her husband, with her own experience and claims." *Id.* The Court saw "scant corroborative evidence of an actual effect [of odor] on activity." *Id.* Rather, "[h]er litigation purpose is clear: to stop CAFO operation due to the type of operation it is, which is not a legitimate purpose under Iowa nuisance law." *Id.*

On May 16, 2019, Plaintiffs filed a Notice of Appeal, challenging the District Court's December 11, 2018 Ruling holding that Plaintiffs' cases were frivolous and permitting recovery by Defendants of costs pursuant to

Iowa Code Chapter 625 and all costs and expenses incurred in the defense of the action pursuant to Iowa Code Section 657.11(5), and the District Court's April 19, 2019 Judgment Entry.

Argument

1. The District Court Properly Effected the Legislative Purpose of Iowa Code Section 657.11 in Protecting Defendants from the Costs of Defending Nuisance Suits by Assessing All Costs and Expenses Incurred in Defense of Plaintiffs' Frivolous Lawsuit

A. Error Preservation and Standard of Review

Plaintiffs preserved the issue of the District Court's application of Iowa Code Chapter 625 and Iowa Code Section 657.11(5) for appellate review by resisting Defendants' Motions for Costs and Expenses. Plaintiffs timely filed a Notice of Appeal on issues presented in pleadings and hearings before the District Court. *See* Notice of Appeal.

The Court reviews challenges to a district court's interpretation of a statute for errors at law. *Branstad v. State ex rel. Natural Res. Comm'n*, 871 N.W.2d 291, 294 (Iowa 2015). When interpreting the language of a statute, the Court applies well-established principles of statutory interpretation:

> The purpose of statutory interpretation is to determine the legislature's intent. We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. We also consider the legislative history of a statute, including prior enactments, when ascertaining legislative intent. When we interpret a statute, we assess the statute in its entirety, not just isolated words or phrases. We may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction.

Id. at 295 (quoting *Schaefer v. Putnam*, 841 N.W.2d 68, 75 (Iowa 2013)).

Guidelines for statutory interpretation are further embedded in Iowa law. Pursuant to Iowa Code Section 4.4, in enacting a statute it is presumed that:

1. Compliance with the Constitutions of the state and of the United States is intended.
2. The entire statute is intended to be effective.
3. A just and reasonable result is intended.
4. A result feasible of execution is intended.
5. Public interest is favored over any private interest.

Iowa Rule of Appellate Procedure 6.904(3)(m) provides additional guidance to the Court, stating that, "in construing statutes, the court searches for the legislative intent as shown by what the legislature said, rather than what it should or might have said."

B. Iowa Code Section 657.11(5) Allows Recovery of "All Costs and Expenses Incurred in the Defense of the Action" in Order to Protect and Preserve Animal Agricultural Production Operations in the State of Iowa

Iowa Code Section 657.11's preamble clearly sets forth the Legislature's intent:

> The purpose of this section is to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits, which negatively impact upon Iowa's competitive economic position and discourage persons from entering into animal agricultural production. This section is intended to promote the expansion of animal agriculture in this state by protecting

> persons engaged in the care and feeding of animals. The general assembly has balanced all competing interests and declares its intent to protect and preserve animal agricultural production operations.

Iowa Code § 657.11(1). As described in the report of Dr. Dermot Hayes, Professor of Economics and Finance at Iowa State University, the pork and hog industries in Iowa were predicted to contribute more than $1.1 billion in value added to the state's economy in 2015. Ex. 14 to Cargill Pork MSJ. This amounts to $372 for every person in the state. *Id.* A total of 13,305 jobs were created by the pork industry, with an additional 21,917 jobs created by downstream manufacturing and 31,500 jobs in services supported by the income and property taxes paid by the pork and hog industries. *Id.* Statistics show that operation of Valley View facilities, together with the JBS Ottumwa processing plant and the Hedrick feed mill, benefits Wapello and other nearby counties to an even higher degree, creating jobs locally and funding public works and services through taxes. *Id.*

These benefits have been eroded by the large volume of nuisance suits filed by Plaintiffs' counsel. As described above, there have been as many as 15 individual suits pending at one time in 9 Iowa counties, involving hundreds of plaintiffs. Plaintiffs have pursued both integrators, like JBS, and individual farmers like Valley View and the Adam Defendants, imposing a significant burden on the industry at the macro and micro levels. Further,

Plaintiffs' counsel has pursued a practice of filing suit with large numbers of plaintiffs, litigating the case until shortly before trial, and then dismissing.

In an editorial published in *The Fairfield Ledger* shortly after trial of Case No. LALA105144 – Division C in Wapello County, Jefferson County Farmers and Neighbors ("JFAN"), a local activist organization associated with Plaintiffs, described the intended impact of nuisance suits:

> This trial was the first of many CAFO lawsuits now in litigation with the Speer, Middleton and Sykes legal team throughout Southeast Iowa. CAFO nuisance cases pose a significant commitment of time, money, public inquiry and uncertainty for CAFO owners. It's believed the Warren family and Cargill/JBS incurred monumental legal fees in the hundreds of thousands of dollars over a taxing 2–3 year litigation period.
>
> * * *
>
> In JFAN's opinion, these lawsuits aren't going away. There will be wins and losses, but anytime a CAFO nuisance case goes to court, it serves as a significant deterrent, and the pork industry groans.
>
> Anyone considering a CAFO should think long and hard about the ramifications of building a confinement against their neighbors' wishes.

See Court Ex. 1 to April 13, 2016 Hearing, App. 0268. As articulated in JFAN's op/ed piece, also published in nearly 30 other publications state-wide, Plaintiffs' objective is to affect the pork industry generally, and interfere with animal agricultural producers such as Defendants even though

they are lawfully pursuing their trade. *See* Court Ex. 2 to April 13, 2016 Hearing, App. 0269.

In addition to consuming the resources of integrators and producers, these suits impose a significant burden on Iowa District Courts. This matter was on the docket for the Iowa District Court for Wapello County for nearly six full years and involved significant motion practice. Plaintiffs in Division A re-cast their petition five times since their initial filing. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036; Amended Petition and Jury Demand, App. 0080; Second Amended Petition and Jury Demand, App. 0101; Third Amended Petition and Jury Demand, App. 0574.

This significant consumption of judicial resources is particularly troubling where the claims of plaintiffs are frivolous and the General Assembly already took actions to reform and curb this type of broadside attack on an important segment of Iowa's farming economy. In Division C, the District Court determined the claims of three of the nine Plaintiffs were frivolous following a three-week trial, resulting in a cost of $101,447.33 to JBS to defend the claims. Order on Motion for Reconsideration and Order on Motion to Enlarge and Amend, App. 0270.

Here, the District Court awarded JBS $7,630.60 in costs attributable to Merrill and $7,652.28 in costs attributable to Frescoln. *See* Judgment Entry on Costs and Expenses Re: Former Plaintiffs Merrill and Frescoln, App. 1646. The Court awarded Valley View $1,686.67 and $1,531.97 respectively. *Id.* Yet these amounts are only the tip of the iceberg. Pursuant to the Court's ruling, those awards do not include attorney fees, which were significant for Defendants. *Id.* Nor do they include travel expenses or administrative expenses. *Id.*

Plaintiffs' depositions were taken in July 2015. *See* Ex. A to Defendants' Motion for Costs and Expenses – Merrill, App. 0293; Ex. A to Defendants' Motion for Costs and Expenses – Frescoln, App. 0405. By September 4, 2015, when discovery closed, the substance (or lack thereof) of Plaintiffs' claims was fully known by all parties. *See* Rule 1.507 Trial Scheduling Order and Discovery Plan. Despite the apparent triviality of Plaintiffs' claims, Merrill remained a plaintiff in Division A until June 7, 2016, and Frescoln until September 24, 2018,[4] forcing Defendants to address Plaintiffs' claims in lengthy summary judgment filings and on appeal to the

[4] Plaintiffs' counsel even admitted that she was "deeply concerned about the discrepancies that we saw between [Frescoln's] stated claims and what our understanding of the law was." *See* Ex. E to Defendants' Reply to Plaintiff Karen Jo Frescoln's Resistance to Motion for Judgment and Costs and Expenses, Including Attorneys' Fees, App. 0567.

Iowa Supreme Court. *See* Voluntary Dismissal of Plaintiff Michael Merrill, App. 0275; Voluntary Dismissal of Certain Plaintiff Without Prejudice, App. 0389.

During the pendency of Plaintiffs' frivolous claims, Defendants were without remedy or ability to rid themselves of the claims or prevent themselves from incurring additional costs and expenses. Though the Iowa Supreme Court has suggested that an "evidentiary pretrial hearing" may be held to determine whether Section 657.11(2) prevents a plaintiff from recovering special damages, the Court has not indicated when or how that hearing might take place.[5] *See Honomichl*, 914 N.W.2d at 238.

Iowa Code Section 657.11(5) acts as a final safety net then, for animal agricultural operators who have been subjected to repeated frivolous claims, as have Defendants. Section 657.11(5) fulfills the Legislature's clearly stated purpose of protecting animal agricultural producers operating lawfully "from the costs of defending nuisance suits" by broadly permitting recovery of *all* costs and expenses incurred in the defense of the action. Iowa Code §§

[5] Continuing ambiguity regarding application of Iowa Code Section 657.11(2) contributes to the filing of frivolous suits by plaintiffs who do not have a clear understanding of the law and who are later held responsible for costs under subsection (5). Abrogation of *Gacke v. Pork Xtra, L.L.C.*, 684 N.W.2d 168 (Iowa 2004), or further clarity from this Court on the procedures to be followed by district courts for a timely evidentiary hearing would benefit both plaintiffs and defendants.

657.11(1); 657.11(5) (emphasis added). Because it only becomes operational when a plaintiff is a losing party, it imposes no penalty on a plaintiff that dismisses their claims, even if they are frivolous. Only when a plaintiff maintains their frivolous suit through trial or after repeated filings is he or she properly held responsible for all costs and expenses incurred in the defense of the action.

C. As the Prevailing Parties, Defendants are Entitled to "Costs" Pursuant to Iowa Code Chapter 625 and "All Costs and Expenses Incurred in the Defense of the Action" Pursuant to Iowa Code Section 657.11(5)

Plaintiffs' second dismissals are adjudications on the merits and dismissals with prejudice. The District Court properly held that Defendants are entitled to "costs" pursuant to Iowa Code Chapter 625 and "all costs and expenses incurred in the defense of the action" pursuant to Iowa Code Section 657.11(5).

i. Plaintiffs' dismissals are dismissals with prejudice

Pursuant to Iowa Rule of Civil Procedure 1.943:

> A party may, without order of court, dismiss that party's own petition, counterclaim, cross-claim, cross-petition or petition of intervention, at any time up until ten days before the trial is scheduled to begin. Thereafter a party may dismiss an action or that party's claim therein only by consent of the court which may impose such terms or conditions as it deems proper; and it shall require the consent of any other party asserting a counterclaim against the movant, unless that will still remain for an independent adjudication. A dismissal under this rule

> shall be without prejudice, unless otherwise stated; but if made by any party who has previously dismissed an action against the same defendant, in any court of any state or of the United States, including or based on the same cause, such dismissal shall operate as an adjudication against that party on the merits, unless otherwise ordered by the court, in the interests of justice.

Plaintiffs' dismissal of their claims in Case No. LALA105087 on January 2, 2014, operates as a dismissal without prejudice pursuant to Rule 1.943. However, dismissal of Plaintiffs' claims in Case No. LALA105144 – Division A, an action against the same Defendants, "operate[s] as an adjudication against the party on the merits." Iowa R. Civ. P. 1.943. A decision on merits "is a final disposition of the cause, and constitutes a bar to another action." *Mahaffa v. Mahaffa*, 298 N.W. 916, 918 (Iowa 1941).

In *CRST Van Expedited, Inc. v. E.E.O.C.*, 136 S. Ct. 1642 (2016), the United States Supreme Court analyzed the term "prevailing party" in the context of a fee-shifting statute. The Court held that a defendant need not obtain a favorable judgment on the merits in order to be a "prevailing party":

> Common sense undermines the notion that a defendant cannot "prevail" unless the relevant disposition is on the merits. Plaintiffs and defendants come to court with different objectives. A plaintiff seeks a material alteration in the legal relationship of the parties. A defendant seeks to prevent this alteration to the extent it is in the plaintiff's favor. The defendant, of course, might prefer a judgment vindicating its position regarding the substantive merits of the plaintiff's allegations. The defendant has, however, fulfilled its primary objective whenever the plaintiff's challenge is rebuffed, irrespective of the precise reason for the court's decision. The

> defendant may prevail even if the court's final judgment rejects the plaintiff's claim for a nonmerits reason.

Id. at 1651. Because one purpose of fee-shifting provisions is "to deter the bringing of lawsuits without foundation," "[i]t would make little sense if Congress' policy of 'sparing defendants from the costs of frivolous litigation' depended on the distinction between merits-based and non-merits-based frivolity." *Id.* at 1652 (quoting *Fox v. Vice*, 131 S. Ct. 2205, 2210 (2011)). The "touchstone of the prevailing party inquiry must be the material alteration of the legal relationship of the parties." *Id.* at 1651.

Plaintiffs' second dismissal pursuant to Iowa Rule of Civil Procedure 1.943 was a dismissal with prejudice which alters the legal relationship of the parties, resulting in Plaintiffs "losing" their cause of action and exposing them to costs pursuant to Iowa Code Chapter 625 and Iowa Code Section 657.11(5).

ii. Defendants are entitled to costs pursuant to Iowa Code Chapter 625

Because Plaintiffs' dismissals operate as adjudications on the merits, making Defendants the "successful" parties and Plaintiffs the "losing" parties, Defendants' costs are recoverable against Plaintiffs pursuant to Iowa Code Chapter 625. As the District Court observed, Chapter 625 does not condition recovery of court costs and allowable expenses on the occurrence

of a trial. *See, e.g.*, Iowa Rule of Civil Procedure 1.951 (defining "judgment" as the adjudication of rights of the parties without limitation as to how and when that occurs); Iowa Code § 625.11 (assessing costs upon dismissal of the action by a plaintiff, even when the result of a plaintiff's death).

Defendants' costs as defined by Chapter 625 include, at minimum, expenses associated with the depositions of Merrill and Frescoln and any costs associated with the Special Master attributable to Merrill and Frescoln. *See* Iowa Code § 625.14 (permitting taxation of "the necessary expenses of taking depositions by commission or otherwise" and "the compensation of referees"); *see also* Ex. A to JBS Live Pork LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0590; Attachment A to Defendant Valley View Swine LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0790; Judgment Entry on Costs and Expenses Re: Former Plaintiffs Merrill and Frescoln, App. 1646.

iii. Defendants are entitled to "all costs and expenses" pursuant to Iowa Code Section 657.11(5)

The legislature exclusively holds the power to create, amend, or eliminate causes of action, as well as define remedies available pursuant to those causes of action. *Bechtel v. City of Des Moines*, 225 N.W.2d 326, 332 (Iowa 1975). In Section 657.11(5), the legislature used the word "all" to grant broad recovery to parties who must defend frivolous lawsuits. As

defined by Merriam-Webster's Dictionary, "all" means "the whole amount" or "as much as possible." Merriam-Webster's Collegiate Dictionary 29 (10th ed. 1999). Section 657.11(5)'s grant of fees then, is substantial and intended to exceed those allowed by other fee-shifting statutes which delineate the costs which may be recovered. *See, e.g.*, Iowa Code Chapter 625.

This interpretation aligns with the clear intent of the statute as expressed in the preamble: "to protect animal agricultural producers who manage their operations according to state and federal requirements from the costs of defending nuisance suits . . . ." Iowa Code § 657.11(1). It also serves to fairly compensate those who have not been able to avail themselves of Iowa Code Section 657.11(2)'s protections and penalize plaintiffs who file and maintain frivolous suits in order to "negatively impact Iowa's competitive economic position and discourage persons from entering into animal agricultural production." *Id.*

D. Plaintiffs' Claims Were Frivolous

Iowa Code section 657.11(5) provides:

> If a court determines that a claim is frivolous, a person who brings the claim as part of a losing cause of action against a person who may raise a defense under this section shall be liable to the person against whom the action was brought for all costs and expenses incurred in the defense of the action.

Where the legislature does not define the words of a statute, the court "may refer to prior decisions of this court and other, similar statutes, dictionary definitions, and common usage." *Bernau v. Iowa Dep't of Transp.*, 580 N.W.2d 757, 761 (Iowa 1998). Merriam-Webster's Dictionary defines the word "frivolous" as something "of little weight or importance," or "having no sound basis (as in fact or law)." Merriam-Webster's Collegiate Dictionary 468 (10th ed. 1999). Alternately, the word is defined as "lacking in seriousness." *Id.* Applying this common meaning of the term in light of the stated legislative intent as articulated in the statute's preamble, a court should consider the seriousness of a claim within the framework of compensating animal agricultural producers for costs of litigating a trivial claim.

Plaintiffs' claims were frivolous as contemplated by Section 657.11(5) because Plaintiffs decided to sue long before they experienced any alleged odor, Plaintiffs could not establish causation, and Plaintiffs' claims were lacking in seriousness.

i. Plaintiffs filed suit before incurring any alleged damages

Frescoln's first recorded observation of odor in the calendar she produced occurred on December 23, 2013, more than a month after she filed suit. *See* Ex. C to Defendants' Motion for Costs and Expenses – Frescoln at

p. DivAFRESCOLN000001, App. 0441. Indeed, Frescoln testified that she had decided "before the first pig set foot on that property that it was going to be a nuisance, and if it was built, [she was] going to sue." Ex. A to Defendants' Motion for Costs and Expenses – Frescoln at pp. 166:6–18, App. 0425. Before the Valley View barns were populated and prior to filing suit, Frescoln visited the Fairfield public library to research damages and determined that she would request $100,000 per year in damages—damages she had not yet even experienced. *Id.* at pp. 218:1–221:24, App. 0430. Frescoln's claims were motivated not by any alleged odors or cognizable damages, but rather by her opinion that confined animal feeding operations are "sinful." *Id.* at pp. 135:19–21, 189:13–23, App. 0419, 0428.

Merrill filed suit against Defendants in November 2013, and again in April 2014, both before experiencing any swine odor. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036. Merrill testified that between January and July 2015, he smelled hog odor 6 to 12 times, but was only able to identify a total of less than five hours as to which he experienced odor. *See* Tr. of M. Merrill Dep. at pp. 103:20–104:6, 181:1–185:3, App. 1236–37, 1314–18.

Merrill estimated that in 2014, he experienced odor 8 to 16 times. *Id.* pp. 105:21–106:3, App. 1238–39. On those occasions, he did not cut his

activities short, but found them less enjoyable. *Id.* pp. 185:4–186:1, App. 1318–19.

Merrill admitted he did not smell any hog odor from any source in 2013, despite having filed his first Petition on November 21, 2013. *Id.* p. 106:10–14, App. 1239. Merrill further admitted that the use and enjoyment of his property was not affected in 2013. *Id.* p. 107:7–10, App. 1240. The first time Merrill allegedly smelled odor was summer 2014. *Id.* pp. 117:23–118:5, App. 1250–51.

Merrill's "vendetta" against Defendants dates to May 2013, when Merrill engaged attorneys before the barns had even been built. *Id.* pp. 304:16–18, 276:5–19, App. 1437, 1409. Merrill agreed to be a plaintiff in this lawsuit before he had experienced any alleged odor. *Id.* pp. 291:19–23. App. 1424. By his own admission, at the time he filed his first petition on November 22, 2013, and his second petition on April 4, 2014, Merrill had not experienced any of the effects alleged in his pleadings. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036. However, Merrill maintained this lawsuit until June 7, 2016, demanding $250,000 to $750,000 in damages. *See* Voluntary Dismissal of Plaintiff Michael Merrill, App. 0275; Tr. of M. Merrill Dep. at pp. 253:6–254:3, App, 1386.

ii. Plaintiffs could not establish causation

In her Petitions and Answers to Interrogatories, Frescoln made allegations against Valley View and JBS which were not substantiated by her testimony. *See* Petition and Jury Demand (Wapello County Case No. LALA105087), App. 0008; Petition and Jury Demand, App. 0036; Amended Petition and Jury Demand, App. 0080; Second Amended Petition and Jury Demand, App. 0101; Ex. D to Defendants' Motion for Costs and Expenses – Frescoln, App. 0518. For example, Frescoln claimed that she has "observed manure runoff, seepage and other discharges of manure on a frequent basis when Defendants have land-applied manure to the surrounding fields." *See* Ex. D to Defendants' Motion for Costs and Expenses – Frescoln ¶ 12, App. 0527. Yet Frescoln testified that she has not seen any manure runoff associated with Valley View. Ex. A to Defendants' Motion for Costs and Expenses – Frescoln at p. 139:7–8, App. 0420. She has not witnessed any seepage of manure associated with Valley View. *Id.* at p. 139:9–10, App. 0420. She has not witnessed any manure spilling from trucks associated with Valley View. *Id.* at p. 139:4–6, App. 0420. Despite making allegations in her Petition relating to dead hogs, Frescoln admitted she has never seen any dead hogs at the Valley View sites. *Id.* at pp. 136:23–137:1, App. 0419. She has never seen any trucks carrying dead hogs. *Id.* at p. 137:4–6, App. 0419.

Frescoln, both at the time of filing her Petition and at the time of deposition, had no understanding of the relationship between Valley View and JBS. *Id.* at pp. 248:25–249:4, App. 0431. She has no knowledge of JBS's role in the operation of the Valley View barns. *Id.* at p. 141:14–16, App. 0420. She has no knowledge or understanding of the operation or management practices at the Valley View barns. *Id.* at p. 141:17–19, App. 0420. Frescoln filed suit against JBS in this matter based not on any evidence of negligence or nuisance, but because JBS "helped them put up the barns" and because JBS buys and sells the hogs. *Id.* at pp. 246:17–19; 249:12–17, App. 0431.

Frescoln's property is in close proximity to at least two other known animal feeding operations and Frescoln admitted she can smell them on occasion. *Id.* at pp. 163:6–164:6, App. 0424. However, Frescoln maintained the odors she allegedly smelled originated at the Valley View property. *Id.* at p. 150:7–14, App. 0422.

Merrill also smells odor from other animal feeding operations. *See* Tr. of M. Merrill Dep. at p. 82:3-11, App. 1215. He admitted he cannot distinguish between odors coming from those operations or the Valley View barns. *Id.* pp. 83:24–85:6, App. 1216–18. However, he "deduced" that the

odors he allegedly experiences come from Valley View because he believes the others to be too far away. *Id.* pp. 80:13–19, 82:15–25, App. 1213, 1215.

Despite making significant claims in his Petitions about flies, land application of manure, disposal of dead hogs, truck traffic, emission of particulates, and health effects, Merrill has "no idea how to care for a pig." *Id.* pp. 221:14–222:10, App. 1354–55. He has no knowledge regarding disposal of dead hogs. *Id.* p. 217:18–20, App. 1350. He has not experienced any issues with dust or particulate matter. *Id.* p. 88:8–10, App. 1221. He does not have any issues with truck traffic relating to the barns. *Id.* p. 88:11–12, App. 1221. He cannot identify any occasions in which he experienced odor from land application and does not know where manure from the Valley View sites is applied. *Id.* pp. 112:12–113:5, 220:19–24, App. 1245–46, 1353.

Merrill believes he may have experienced an increase in the number of flies at his home in 2014 but admitted he has no idea where the flies came from. *Id.* pp. 202:3–203:1, 228:9–230:17, App. 1335–36, 1361–63. His health has not been affected by the barns and he has never seen a doctor to discuss the health threats alleged in his Petition. *Id.* p. 236:2–7, App. 1369.

Merrill has never been inside an animal feeding operation, nor has he been to a livestock farm. *Id.* pp. 56:14–57:3, App. 1189–90. He has no

knowledge of Defendants' management practices. *Id.* pp. 219:12–20, 267:16-18, App. 1352, 1400. He does not know how employees are trained. *Id.* p. 267:21–25, App. 1400. He has no knowledge of technologies or methods that are available to address odor or are implemented by Valley View. *Id.* pp. 271:3–272:5, App. 1404–05. Merrill could not even identify the Valley View barns on a map. *Id.* pp. 74:13–75:21, App. 1207.

Neither Merrill nor Frescoln offered any evidence that they actually experienced odors, nor that those odors originated at the Valley View barns. As such, neither Merrill nor Frescoln could establish general or specific causation.

iii. Plaintiffs' claims were lacking in seriousness

Frescoln does not own or reside at the property for which she made a claim. *See* Ex. A to Defendants' Motion for Costs and Expenses – Frescoln at p. 70:18–20, App. 0412. Frescoln resides at 1553 240th Street in Libertyville, Iowa, 5.65 miles from Valley View Site 1, and 6.51 miles from Valley View Site 2. *Id.* at p. 7:12–15, App. 0408. Frescoln has lived at that property since 2013, a year prior to construction of the Valley View barns at issue. *Id.* at pp. 7:14–15, App. 0408.

Frescoln's claim did not relate to the Libertyville property where she resides. *Id.* at p. 70:18–20, App. 0412. Rather, Frescoln's claims related to a

parcel of farmland she owns at 2256 Ash Avenue, Batavia, Iowa. Frescoln's parcel does not include the home, garage, or portions of land surrounding the home and garage. *Id.* at pp. 82:19–83:3, App. 0414. Those portions of the property are owned and occupied by Frescoln's daughter, her husband, and their two children. *Id.* at pp. 20:11–21:22, App. 0409. Frescoln's daughter, her husband, and their two children were never plaintiffs in this lawsuit.

Frescoln did not make a claim for diminution of property value. *Id.* at p. 154:11–13, App. 0423. The only structures on the land she has an ownership interest in are an old railroad car, a grain bin, and a barn that has been unused for more than 15 years and "that maybe one day will blow down we hope." *Id.* at pp. 87:15–21; 88:15–89:5, App. 0425. Frescoln testified that she has no plans to improve any of the structures. *Id.* at p. 94:12–17, App. 0416. Frescoln rents out the grain bin, and her son-in-law harvests and sells hay from Frescoln's pasture ground. *Id.* at pp. 94:18–95:2; 171:8–21, App. 0416, 0426.

The majority of documents produced by Frescoln relate to the homestead at Ash Avenue. For example, the observations on the calendar pages produced by Frescoln were recorded during time she spent babysitting her grandchildren at the residence. *Id.* at pp. 21:12–22:15, App. 0409–10; Ex. C to Defendants' Motion for Costs and Expenses – Frescoln at pp.

DivAFRESCOLN000001–16, DivAFRESCOLN000025, App. 0441–56, 0459. The photographs produced by Frescoln were taken inside the home at Ash Avenue. Ex. C to Defendants' Motion for Costs and Expenses – Frescoln at pp. DivAFRESCOLN000017, DivAFRESCOLN000024, App. 0457, 0458. Similarly, videos taken by Frescoln were filmed next to the house on property owned by Frescoln's daughter.

The only evidence relating to property for which Frescoln has an ownership interest are documents from the Jefferson County Assessor, a warranty deed (which conveys land only to Frescoln's husband) and mortgage, and photographs of Jefferson Wapello road taken from outside Frescoln's vehicle. *Id.* at pp. DivAFRESCOLN000026–46, DivAFRESCOLN000047–48, DivAFRESCOLN000050–77, DivAFRESCOLN000078–83, App. 0460–80, 0481–82, 0483–510, 0511–16. Because Frescoln did not make a claim for diminution of property value, the mortgage and other property-related documents are irrelevant; leaving the photographs of Jefferson Wapello road as the sole piece of evidence supporting Frescoln's claim. Frescoln's claim, supported only by five photographs, is the very definition of frivolous.

The allegations Frescoln made which directly relate to the parcel of property she owns are similarly trivial. As observed above, Frescoln

complained that she could not enjoy camping on the farmland because of odors but admitted she had not been camping since at least 2011, long before the Valley View barns were built. *See* Ex. A to Defendants' Motion for Costs and Expenses – Frescoln at p. 28:6–14, App. 0411. She has not gardened since at least 2014 when she "ran into some snakes." *Id.* at pp. 75:24–76:7, App. 0413. Frescoln claimed the odor prevented her from hunting on her property but has not had a hunting license since at least 2013. *Id.* at pp. 202:1–203:3, App. 0429. Frescoln's primary grievance appears to relate to her alleged inability to construct or maintain fencing on her property to "possibly" put cattle on the land again because of odor. *Id.* at pp. 23:2–12; 183:15–24, App. 0410, 0427. For this, Frescoln sought $250,000 to $750,000 in damages. *Id.* at p. 151:2–9, App. 0422.

Merrill's claim was similarly lacking in substance. Merrill resides at 205 Jefferson Street in the town of Batavia, Iowa. *See* Tr. of M. Merrill Dep. at p. 8:8–9, App. 1141. Merrill's residence is 2.36 miles from Valley View Site 1 and 3.69 miles from Site 2. *See* Ex. 17 to Cargill Pork MSJ. Merrill's property is more than 6.5 times the legally required setback distance from Valley View Site 1 required by Iowa law, and more than 10 times the required setback distance from Valley View Site 2. *See* Ex. 41 to Cargill MSJ, Iowa Admin. Code Ch. 65, App. D, Tables 6–6b.

Merrill testified that he is not prevented from engaging in activities at his property. On only a handful of occasions has any activity been made less enjoyable or been cut short 30 to 45 minutes. Tr. of M. Merrill Dep. at p. 181:6–7. App. 1314. He has not made any lifestyle changes since the barns were built. *Id.* pp. 245:24–246:1, App. 1378–79. Business from the automotive shop he runs at his home has remained steady. *Id.* p. 219:5–11, App. 1352. Merrill continues to have gatherings at his home and visitors have never expressed that they experience odor. *Id.* p. 126:2–12, App. 1259.

Merrill produced only 62 pages of documents in support of his claims, which consist of, in their entirety:

a. West Bend Insurance Declaration. *See* Ex. B to Defendants' Motion for Costs and Expenses – Merrill at pp. 1–4, App. 0311–14.

b. Mortgage and Warranty Deed. *Id.* pp. 5–48, App. 0315–58.

c. Typewritten Note referring to August 14, 2014 to Sept. 3, 2014. *Id.* p. 49, App. 0359.

d. Calendar Pages from December 2014 to December 2015 reflecting no entries related to odor and repeatedly stating the word "no." *Id.* pp. 50–62, App. 0360–72.

Like Frescoln, Merrill's production failed to substantiate or lend any weight to his claims, which were the very definition of "frivolous" pursuant to Iowa Code Section 657.11(5). Accordingly, the District Court did not err by awarding JBS and Valley View all costs and expenses incurred in the defense of Merrill and Frescoln's frivolous claims.

2. Attorney Fees are Not Available to Plaintiffs Who Have Had Costs and Expenses Assessed Against Them for Filing and Maintaining Frivolous Suits

A. Error Preservation and Standard of Review

Plaintiffs request attorney fees for the first time here, on appeal. "[A] claim for trial attorney fees is untimely when made for the first time on appeal." *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d 163, 181 (Iowa 2006) (citing *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) ("It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.")).

Generally, a party has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (2003) (citing

Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co., 510 N.W.2d 153, 158 (Iowa 1993)). There is no such statutory provision in this case.[6]

Therefore, in order for Plaintiffs to recover attorney fees, Defendants' conduct in this appeal must independently satisfy the standard for an award of common law attorney fees. *See Williams*, 659 N.W.2d at 581. To obtain common law attorney fees, Plaintiffs must prove "that the culpability of the [Defendants'] conduct exceeds the 'willful and wanton disregard for rights of another' standard required to prove punitive damages." *Id.* (citing *Hockenberg Equip. Co.*, 510 N.W.2d at 159). Defendants' conduct "must rise to the level of oppression or connivance to harass or injure another," which "lies far beyond a showing of mere 'lack of care' or 'disregard for the rights of another.'" *Id.* (citing *Hockenberg Equip. Co.*, 510 N.W.2d at 159–60). Even where evidence shows that a party acts in bad faith, bad faith is not enough to support an award of Iowa common law attorney fees. *East Iowa Plastics, Inc. v. PI, Inc.*, 889 F.3d 454, 458–59 (8th Cir. 2018).

[6] The cases cited by Plaintiffs in support of their claim arise from proceedings to modify a divorce decree. *See In re Marriage of Okland*, 699 N.W.2d 260 (Iowa 2005); *In re Marriage of Wood*, 567 N.W.2d 680 (Iowa Ct. App. 1997). In such matters, attorney fees are expressly authorized by Iowa Code Section 598.36. *Id.* Iowa Code Section 598.36 is inapplicable here.

The Iowa Supreme Court has applied this standard on eight occasions and denied common law attorney fees in all but one. *East Iowa Plastics, Inc.*, 889 F.3d at 458. In the sole case awarding common law attorney fees, a county treasurer filed to collect unpaid taxes. *See Williams*, 659 N.W.2d at 575. The treasurer then fabricated two letters she claimed she had sent to taxpayers and "compounded the fraud" by offering the letters as evidence at trial. *Id.* at 580–81. It was not until that point that the treasurer "crossed the line" into oppressive or conniving conduct. *Id.* at 581.

B. Defendants' Actions in Recovering Statutorily Authorized Costs and Expenses for Defending Themselves Against Frivolous Suits Are Not Oppressive or Conniving

Plaintiffs' request for attorney fees is not supported by law or fact. Plaintiffs argue that costs are limited by statute and must be strictly construed yet ask the Court to award significant and unsupported costs not authorized by any statute. Plaintiffs level weighty allegations against Defendants, contending Defendants' actions were "cruel and tyrannical." However, the only action Plaintiffs complain of appears to be Defendants' filing of their Motions and the District Court's favorable ruling on those Motions.

Plaintiffs' allegation that Defendants submitted costs relating to litigation not involving Plaintiffs is false, as demonstrated by the complex

accounting performed by Defendants and the District Court. *See* Ex. A to JBS Live Pork LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0590; Attachment A to Defendant Valley View Swine LLC's Rule 1.904(2) Motion to Enlarge and Amend, App. 0790; Judgment Entry on Costs and Expenses Re: Former Plaintiffs Merrill and Frescoln, App. 1646. Applying the District Court's formula, Defendants isolated costs attributable only to this lawsuit, and further divided that number by the number of individual plaintiffs in Division A. Plaintiffs did not contest this accounting before the District Court and did not properly preserve error on this issue.

Plaintiffs' argument appealing to the disparity in the wealth of the parties is similarly unavailing. The wealth of the parties is not a factor considered by courts evaluating common law attorney fees. *Hockenberg Equip. Co.*, 510 N.W.2d at 159 ("[R]ecovery of attorney fees requires a showing of culpability beyond the showing required for punitive damages."). Even if it were, the amount of costs and expenses assessed against Plaintiffs by the District Court pales in comparison to the amounts incurred by Defendants during the course of defending this and other meritless nuisance lawsuits. Plaintiffs' argument suggests that individuals with frivolous claims should be permitted to sue agricultural operations with impunity, as any attempt by defendants to recover costs incurred in defense of those frivolous

actions will be deemed to be "oppressive or conniving conduct" and result in reciprocal costs being assessed against defendants. *See East Iowa Plastics, Inc.*, 889 F.3d at 458. Such a result is absurd and does not comport with fundamental concepts of justice embodied by Iowa law nor the intent of Iowa Code Section 657.11.

Even if Defendants' simple act of filing a request for and receiving costs and expenses as a result of Plaintiffs' frivolous suits "crossed the line," a claim for trial attorney fees is untimely when made for the first time on appeal. *Fennelly*, 728 N.W.2d at 181. Plaintiffs did not request attorney fees before the District Court. Therefore, they are eligible for an award of common law attorney fees only if Defendants' conduct *during this appeal* exceeds bad faith—a standard so strict that in only one case on record has the Court awarded common law attorney fees. *See East Iowa Plastics, Inc.*, 889 F.3d at 458. The conduct alleged by Plaintiffs occurred at the District Court level and is therefore unactionable here.

Finally, Plaintiffs' use of Plaintiffs' bond costs for this appeal—an appeal which Plaintiffs elected to pursue and which Defendants are defending, at additional costs to themselves—in lieu of providing evidence of their reasonable attorney fees, is without merit. An applicant for attorney fees bears the burden "to prove both that the services were reasonably

necessary and that the charges were reasonable in amount." *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009). Attorneys are therefore "generally required to submit detailed affidavits which itemize their fee claims." *Id.* (citing *Dutcher v. Randall Foods*, 546 N.W.2d 889, 896 (Iowa 1996) ("[T]he party opposing the fee award then has the burden to challenge . . . the reasonableness of the requested fee.")).

Plaintiffs' request for attorney fees is submitted without any accounting relating to the attorneys' time spent on the matter or rate charged. Plaintiffs' request for fees in excess of the amount of Plaintiffs' bond costs is an attempt to shift costs properly assessed against them to Defendants, causing Defendants to pay not only their own costs for defending the appeal, but Plaintiffs' costs for bringing the appeal.

Plaintiffs have provided no evidence or law to support an award of attorney fees. Accordingly, Plaintiffs' request should be denied.

Conclusion

For the reasons stated in this brief, the District Court's ruling awarding costs pursuant to Iowa Code Chapter 625 and all costs and expenses incurred in the defense of the action pursuant to Iowa Code Section 657.11(5) should be upheld, and no appellate attorney fees should be awarded to Plaintiffs.

Request for Oral Argument

Defendants-Appellees JBS Live Pork, LLC and Valley View Swine, LLC request the opportunity for oral argument on their appeal.

DATED: November 4, 2019

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that in compliance with Iowa Rule of Appellate Procedure 6.701, the foregoing **Defendants-Appellees Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on November 4, 2019:

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The undersigned hereby certifies that on the 4th day of November, 2019, **Defendants-Appellees Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was filed with the Clerk of the Supreme Court via EDMS, in accordance with Iowa Rule of Appellate Procedure 6.701(2).

ATTORNEY'S COST CERTIFICATE

The undersigned certifies the actual cost of reproducing the necessary copies of the preceding **Defendants-Appellees Valley View Swine, LLC and JBS Live Pork, LLC's Final Brief and Request for Oral Argument** was $0.00 and that amount has been actually paid by the attorneys for the Defendants-Appellees.

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

The undersigned certifies this 4th day of November, 2019, that this Brief complies with:

1. The type-volume limitation of Iowa Rule of Appellate Procedure 6.903(1)(g)(1) because, according to the word count software used to prepare this Brief, it contains 10,475 words, excluding the parts of the brief exempted by Iowa Rule of Appellate Procedure 6.903(1)(g)(1); and

2. The typeface requirements of Iowa Rule of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Office Word 2007 SP2 word processing software in 14-point Times New Roman font.

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