

**IN THE SUPREME COURT OF IOWA**

No. 19-0241

(Kossuth County No. LACV027055)

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WMG, L.C.,  
Defendant-Appellant,  
vs.

NCJC, INC.,  
Plaintiff-Appellee

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Plaintiff-Appellee's Application For Further Review

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**QUESTION PRESENTED FOR REVIEW**

Whether a plaintiff who prevails on a claim for breach of a contract that includes an attorneys’ fees provision can recover fees through the end of the case, notwithstanding the defendant’s pre-trial offer to confess judgment under Iowa Code chapter 677.

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## **STATEMENT SUPPORTING APPLICATION FOR FURTHER REVIEW**

Pursuant to Iowa Rule of Appellate Procedure 6.1103(1), Plaintiff-Appellee NCJC, Inc. (“NCJC”) respectfully applies for further review of the Iowa Court of Appeals’ May 13, 2020 decision in *NCJC, Inc. v. WMG, L.C.*, Court File No. 19-0241, to the extent the court reversed the District Court’s underlying order. This Court should grant review because, in reversing part of the District Court’s underlying order, the Court of Appeals rendered a decision that conflicts with binding Iowa Supreme Court precedent. In the alternative, if the Iowa Supreme Court has not previously decided the precise issue at hand, then the Iowa Supreme Court should now settle this important question of law.

This case concerns the critical distinction between an award of costs pursuant to Iowa Code chapter 677 and an award of attorneys’ fees pursuant to a contract. The Iowa Supreme Court has repeatedly decided chapter 677 can operate to shift out-of-pocket costs, but it does not operate to shift attorneys’ fees. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996); *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230, 233 (Iowa 1984). This Court’s prior decisions on the topic are sound from both a statutory

interpretation perspective and a public policy perspective. As the Court wrote in *Weaver*:

[W]e have grave doubt whether chapter 677 is an appropriate vehicle for initiating a more widespread practice of allowing the prevailing litigant to recover attorney fees as part of court costs. Only a defendant may take advantage of that statute by making a formal settlement offer and thereby pressuring the plaintiff to accept that offer. If a party who rejects an offer of settlement should sometimes be required to pay the other party's full expense of further litigation, fundamental fairness suggests that defendants as well as plaintiffs should be subjected to that sanction.

*Weaver*, 348 N.W.2d at 233.

The Court's comments in *Weaver* summarize why the law should remain consistent in this area. By excluding attorneys' fees from chapter 677's cost-shifting mechanism, the statute effectively accomplishes its goal of encouraging settlement without disproportionately penalizing plaintiffs. However, if the door is opened for defendants to start using Chapter 677 to shift attorneys' fees, as opposed to just costs, plaintiffs (especially those with limited means) will be at an extreme disadvantage.

Following Iowa Supreme Court precedent, the District Court awarded attorneys' fees to NCJC in this case, despite the fact that the jury's damages award turned out to be less than the amount Defendant-

Appellant WMG, L.C. (“WMG”) had offered to confess before trial. The District Court correctly decided Chapter 677 applies only to awards of costs, not attorneys’ fees.

On May 13, 2020, the Court of Appeals affirmed in part and reversed in part the District Court’s fee award. The Court of Appeals affirmed the District Court’s decision that NCJC was the prevailing party at trial and that NCJC was entitled to recover at least some of its attorneys’ fees. But the Court of Appeals reversed the District Court’s award to the extent it included fees NCJC incurred after WMG’s offer to confess. The latter part of the Court of Appeals’ decision is contrary to this Court’s precedent and should be reversed. This Court should correct the Court of Appeals’ error and affirm the District Court’s attorney fee award in its entirety.

### **STATEMENT OF THE CASE**

NCJC filed this lawsuit to enforce certain terms of a written Farm Lease Cash or Crop Shares (the “Lease”) with WMG. Section 20 of the Lease provides: “If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorney’s fees.”

After trial on NCJC's claim for breach of the Lease, the jury awarded NCJC \$41,453.57 in damages. NCJC was the "prevailing party" according to Iowa law because it obtained a judgment in its favor. As a result, Kossuth County District Court Judge Carl J. Peterson awarded NCJC an additional \$55,000 in attorneys' fees pursuant to Section 20 of the Lease.

In post-trial briefing, WMG argued that its pre-trial offer to confess judgment under Iowa Code chapter 677 made WMG, not NCJC, the "prevailing party" for the purposes of awarding attorneys' fees. On its face, chapter 677 provides a mechanism to shift "costs" only; it makes no reference to attorneys' fees. The Iowa Supreme Court has repeatedly decided chapter 677 offers to confess judgment do not impact attorney fee awards. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996); *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230, 233 (Iowa 1984). The District Court properly rejected WMG's contrary interpretation of chapter 677 and refused to "segregate" its fee award on a pre-offer/post-offer basis.

On appeal, the Iowa Court of Appeals affirmed the District Court's decision to award fees to NCJC as the "prevailing party," but reversed the District Court's award of fees NCJC incurred in the "post-offer period." The Court of Appeals erred when it decided NCJC is not entitled to fees for

services provided after WMG's offer to confess judgment. This Court should reverse that portion of the Courts of Appeals' decision and affirm the District Court's attorneys' fee award to NCJC.

### **STATEMENT OF FACTS**

In February 2012, WMG, as Landlord, and NCJC, as Tenant, executed the Lease. (Joint Appendix ("App.") 307.) Section 20 of the Lease states: "If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorney's fees." (App. 314, § 20.)

On March 31, 2017, NCJC filed a Petition against WMG, asserting two claims for breach of the lease. (App. 10.) NCJC's first claim related to the right of refusal provision in Section 26c of the Lease. (App. 12.) NCJC's second claim related to WMG's inputs reimbursement obligation in Section 4 of the Lease. (App. 13.) WMG answered NCJC's claims and asserted its own counterclaim for slander of title. (App. 20.) The District Court dismissed WMG's slander of title counterclaim on the pleadings and dismissed NCJC's right of first refusal claim on summary judgment. (10/2/17 Ruling on Plaintiff's Motion to Dismiss Counterclaim; App. 79.)

On May 9, 2018, the jury returned a verdict in favor of NCJC and against WMG on the only remaining claim in the case – NCJC’s inputs reimbursement claim. (App. 102.) The jury found that WMG had breached the Lease. (*Id.*) The jury awarded damages to NCJC in the amount of \$41,453.57. (*Id.*)

After trial, the parties filed cross-motions for attorneys’ fees pursuant to Section 20 of the Lease. (App. 104; *id.* 115.) NCJC contended that it was the “prevailing party” because it obtained a \$41,453.57 verdict and judgment in its favor. (App. 115.) WMG argued, among other things, that it was the “prevailing party” because NCJC was awarded less than WMG had offered to confess (\$75,000) before trial pursuant to Iowa Code § 677.4. (App. 104.)

On November 29, 2018, the District Court entered a Ruling on the parties’ cross-motions for attorneys’ fees. (App. 265.) The District Court decided NCJC, not WMG, was the “prevailing party” for the purposes of awarding attorneys’ fees under Section 20 of the Lease. (App. 268-70.) Following binding Iowa Supreme Court precedent, the District Court rejected WMG’s argument about its offer to confess judgment:

An award of attorney's fees is unaffected by a plaintiff's recovery of less than the sum offered at settlement. The legislative intent of Chapter 677 is clear; attorney's fees are not included in the cost shifting, which the statute allows because attorney's fees are not explicitly mentioned in the statute. Therefore, the offer to confess judgment only applies to costs; not applicable to attorney's fees.

(*Id.* (citations omitted).) The District Court concluded: "NCJC, Inc., is clearly the prevailing party based upon the fact that a jury did award a significant sum arising out of their claim for reimbursement." (*Id.*)

The District Court then addressed the reasonableness of NCJC's attorney's fees. (App. 272-77.) The District Court reduced NCJC's award by allowing it to recover only \$300 per hour for NCJC's lead trial counsel (instead of his usual rate of \$560 per hour). (App. 276.) The decrease in counsel's hourly rate reduced NCJC's award by \$50,000. (*Id.*) The District Court then further reduced NCJC's award to account for the fact that NCJC, although it was the overall prevailing party, did not obtain a complete victory. (App. 276-77.) With those reductions, the District Court awarded NCJC \$55,000 in attorneys' fees in addition to the damages awarded by the jury. (App. 277.) NCJC's attorney fee award amounts to roughly half what it spent on the case. (*Compare App. 277 with App. 115-53.*)

On December 12, 2018, WMG moved the District Court to reconsider, enlarge or amend its November 29, 2018 Ruling. (App. 279.) WMG largely rehashed the same arguments the District Court had already rejected. (*See id.*) The District Court denied WMG’s motion on January 18, 2019. (App. 299.) WMG appealed both the November 29, 2018 and January 18, 2019 Rulings. (App. 302).

On May 13, 2020, the Iowa Court of Appeals issued its decision. (Iowa Court of Appeals’ May 13, 2020 Ruling (“Ruling”), attached hereto.) The Court of Appeals affirmed the District Court’s ruling that NCJC, not WMG, was the prevailing party. (*Id.* at 6-7.) But the Court of Appeals reversed the District Court’s decision to award fees NCJC incurred after WMG served its offer to confess judgment. (*Id.* at 11.) NCJC now petitions for review of that part of the Court of Appeals’ decision.

## ARGUMENT

### **I. STANDARD OF REVIEW**

The Iowa appellate courts review trial court decisions regarding attorneys’ fee awards for abuse of discretion. *See Lee v. State*, 874 N.W.2d 631, 637 (Iowa 2016); *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). The appellate courts “will not find an abuse of discretion

unless it is shown ‘that such discretion was exercised on grounds . . . clearly untenable or, to an extent clearly unreasonable.’” *Lynch v. City of Des Moines*, 464 N.W.2d 236, 238 (Iowa 1990) (quoting *State v. Morrison*, 323 N.W.2d 254, 256 (Iowa 1982)). *Accord GreatAmerica Leasing Corp. v. Cool Comfort Air Conditioning & Refrigeration*, 691 N.W.2d 730, 732 (Iowa 2005).

## **II. THE IOWA SUPREME COURT SHOULD REVERSE THE PORTION OF THE IOWA COURT OF APPEALS’ DECISION THAT LIMITS NCJC’S ATTORNEY FEE AWARD TO FEES INCURRED BEFORE WMG’S OFFER TO CONFESS JUDGMENT**

This Court should affirm the District Court’s attorney fee award in its entirety and reverse the Court of Appeals’ decision to limit the award to fees NCJC incurred before WMG’s offer to confess judgment. WMG’s offer had no impact on NCJC’s status as the prevailing party or its right to recover attorneys’ fees.

### **A. NCJC is the “Prevailing Party” and is Entitled to Recover Fees for the Whole Case**

“[A] plaintiff ‘prevails’ when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.”

*Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996) (quoting *Farrar v. Hobby*, 506 U.S. 103, 111-12 (1992)). “A claim materially alters the legal

relationship between the parties once ‘the plaintiff becomes entitled to enforce a judgment, consent decree, or settlement against the defendant.’” *Lee*, 874 N.W.2d at 645 (quoting *Farrar*, 506 U.S. at 113).

To be deemed the “prevailing party,” the plaintiff need only “succeed on any significant issue in the litigation which achieves some of the benefit the [plaintiffs] sought in bringing the suit.” *Farrar*, 506 U.S. at 109 (quoting *Hensley v. Eckerhart*, 461 U.S. 424, 433 (1983)). By definition, a prevailing party is “[a] party in whose favor a judgment is rendered, regardless of the amount of damages awarded.” Black’s Law Dictionary, PARTY (10th ed. 2014). “[B]ecause ‘the prevailing party inquiry does not turn on the magnitude of the relief obtained,’ even an award of nominal damages confers eligibility to receive an attorney fee award under that standard.” *Lee*, 874 N.W.2d at 645 (quoting *Farrar*, 506 U.S. at 113-14).

“Generally speaking, ‘status as a prevailing party is determined on the outcome of the case as a whole, rather than by piecemeal assessment of how a party fairs on each motion along the way.’” *Emery v. Hunt*, 272 F.3d 1042, 1047 (8th Cir. 2001) (quoting *Jenkins v. Missouri*, 127 F.3d 709, 716 (8th Cir. 1997)). “[A] party need not have prevailed on every issue, or every asserted defense, in order to be considered a prevailing party.” *Branstad v.*

*State ex rel. Natural Resources Comm'n*, 864 N.W.2d 553, \*8 (Iowa Ct. App. 2015), *vacated on other grounds*, 871 N.W.2d 291 (Iowa 2015). “[T]he prevailing party question is examined from an overall view of the action, not a claim-by-claim analysis.” 20 Am. Jur. 2d Costs § 59. “Thus, the court should not simply deny fees for particular matters on which the plaintiff did not prevail.” *Emery*, 272 F.3d at 1047.

Once the trial court decides which party prevailed, the court must then evaluate the reasonableness of the prevailing party’s fees. In considering reasonableness, the trial court again “must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case.” *Landals*, 454 N.W.2d at 897. The court “cannot place undue emphasis on the size of the judgment, but must look at the whole picture.” *Lynch*, 464 N.W.2d at 239. Viewing the case as a whole, the trial court may award fees even for time spent on unsuccessful claims. *Id.*

NCJC was the “prevailing party” here. NCJC prevailed by obtaining a jury verdict and judgment for significant portion of the damages (over \$41,000) it sought. *See Lee*, 874 N.W.2d at 645; *Farrar*, 506 U.S. at 109, 113. NCJC was, therefore, entitled to recover fees incurred throughout the case.

## **B. Iowa Code Chapter 677 Does Not Impact NCJC's Attorney Fee Award**

WMG's offer to confess judgment under Iowa Code chapter 677 does not impact NCJC's right to recover attorneys' fees. Chapter 677 sets up a cost-shifting mechanism for defendants who offer to confess judgment. Iowa Code § 677.4 allows a defendant to offer to confess judgment for the amount the plaintiff claims. Iowa Code § 677.5 provides that, if the plaintiff does not accept the offer and does not recover more than what was offered at trial, "the plaintiff shall pay the costs of the defendant incurred after the offer." *Id.* (emphasis added). Iowa Code § 677.10 also states: "If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant's costs from the time of the offer." *Id.* (emphasis added). The statutes mention "costs" only. None of the statutes in Iowa Code chapter 677 refers to attorneys' fees.

The Iowa Supreme Court has made clear that a defendant's offer to confess judgment, even if it is higher than the plaintiff ultimately recovers, "does not preclude [the plaintiff] from recovering attorney fees." *Dutcher*, 546 N.W.2d at 895. In *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230 (Iowa

1984), the Iowa Supreme Court rejected the argument that chapter 677 applies to attorneys' fees. In *Weaver*, the defendant offered to confess judgment for \$17,500 under Iowa Code chapter 677. *Id.* at 231-32. The plaintiff refused the defendant's offer. *Id.* at 232. After a jury trial, the plaintiff received a verdict and judgment for only \$12,902.89 – almost \$4,600 less than the defendant had offered. *Id.* The defendant argued that it was entitled to recover attorneys' fees as "costs" pursuant to chapter 677. *Id.*

Although the Iowa Supreme Court recognized that chapter 677 encourages settlement and should be liberally construed, the Court disagreed with the defendant's interpretation:

We do not agree, however, that the word "costs" should be so liberally stretched as to include attorney fees. As the trial court correctly noted, our legislature has explicitly provided in some statutes that a prevailing party may recover attorney fees as well as costs. **We believe the legislative intent of chapter 677 is clear; attorney fees are not included in the cost-shifting which the statute allows because attorney fees are not explicitly mentioned in the statute.**

*Id.* at 233 (emphasis added). The Court went on to explain that, as a matter of policy, the Court had "grave doubt whether chapter 677 is an appropriate vehicle for initiating a widespread practice of allowing the

prevailing litigant to recover attorney fees as part of court costs.” *Id.* The Court noted that “[o]nly a defendant may take advantage of [chapter 677],” and it would be fundamentally unfair for the statute to create a sanction for plaintiffs only. *Id.*

Applying the Iowa Supreme Court’s binding precedent here, the attorneys’ fees incurred by NCJC and WMG are not “costs” subject to the cost-shifting mechanisms of chapter 677. *See id.; Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 152-53 (Iowa 1992) (“We think ‘costs’ should be read no more broadly in chapter 677 than it has been read in our other statutes and rules regarding costs. . . . This powerful tool need not be made stronger by expanding which costs will be allowable in the context of a confession of judgment.”). Accordingly, WMG’s offer to confess judgment under chapter 677 had no impact on NCJC’s attorney fee award.

### **C. No Iowa Law Requires NCJC’s Fee Award to be Reduced**

In deciding NCJC’s fee award should be cutoff after the date of WMG’s offer to confess judgment, the Court of Appeals argued that *Weaver* does not apply to cases in which a separate statute provides for the taxation of attorneys’ fees as costs. (Ruling at 10.) The court explained:

[T]he *Weaver* court said: “We do not agree . . . that the word ‘costs’ should be so liberally stretched as to include attorney fees.”

Even so, the *Weaver* court expressly distinguished situations in which “[t]he legislature has in selected areas provided for the taxation of reasonable attorney fees as part of costs. Likewise, we distinguish *Weaver* from cases like [*Brockhouse v. State*, 449 N.W.2d 380 (Iowa 1989)] – and the case before us now – in which a separate statute authorizes taxation of attorney fees as part of costs.

In short, we believe *Brockhouse* requires that conclusion that NCJC is not “entitled” to attorney fees “for services provided after the time of [WMG’s] offer.”

(*Id.* (citations omitted).) The “separate statute” the Court of Appeals referred to is Iowa Code § 625.22. But neither *Weaver*, nor *Brockhouse*, nor Iowa Code § 625.22 supports the Court of Appeals’ decision to limit NCJC’s fee award.

1. Iowa Code § 625.22 does not determine NCJC’s right to recover attorney’s fees

First, Iowa Code § 625.22 has no bearing on NCJC’s right to recover attorneys’ fees. Iowa Code § 625.22 states: “When a judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court.” The statute does not determine who can recover attorneys’ fees. The parties’ contract, not the statute, is the source

of the award. The statute is merely a procedural mechanism pursuant to which a court is directed to tax reasonable attorneys' fees if the parties' contract requires an attorney fee award.

As explained above, under the parties' Lease here, NCJC was the prevailing party and has a right to recover fees for the entire case. (*See supra* Section II(A).) NCJC's right to fees does not depend on Iowa Code § 625.22. Iowa Code § 625.22 certainly does not require NCJC's fee award to be reduced.

2. Iowa Code § 625.22 does not determine the effect of WMG's offer to confess

Second, Iowa Code § 625.22 does not determine the effect of WMG's chapter 677 offer to confess judgment. Iowa Code § 625.22 and chapter 677 are in separate parts of the Iowa Code and do not cross-reference one another. Iowa Code § 625.22 does not expand chapter 677 into a fee-shifting statute or abrogate the Iowa Supreme Court's holding that attorneys' fees are not "costs" under chapter 677. *See Weaver*, 348 N.W.2d at 233. The Iowa Supreme Court has never connected Iowa Code § 625.22 and chapter 677, as the Court of Appeals did in this case.

The Court of Appeals' interpretation of Iowa Code § 625.22 and chapter 677 is not only contrary to the statutory text and Iowa Supreme Court precedent – it is also illogical. The Court of Appeals effectively decided that two statutes, neither of which governs fee shifting on its own, somehow govern fee shifting when they are combined. Two negatives do not add up to a positive. Iowa Code § 625.22 and chapter 677, alone or in combination, do not change NCJC's status as the prevailing party or affect its contractual right to recover fees through the end of the case.

3. *Weaver* contradicts the Court of Appeals' interpretation of Iowa Code § 625.22 and chapter 677

Third, in *Weaver*, the Iowa Supreme Court did not “expressly distinguish” cases involving statutes like Iowa Code § 625.22, as the Court of Appeals stated. The Court did not even refer to Iowa Code § 625.22 anywhere in *Weaver*. Rather, the Court listed other statutes with attorney fee provisions in order to illustrate “that the legislature, when it wants to, can and does provide for the assessment of attorney fees against the losing party.” 348 N.W.2d at 232. In the case of chapter 677, however, the legislative intent was clear: “attorney fees are not included in the cost-shifting which the statute allows because attorney fees are not explicitly

mentioned in the statute.” *Id.* at 233. In other words, the Court drew a contrast between statutes that expressly allow attorney fee shifting (like contempt, antitrust, and condemnation statutes), and chapter 677, which does not allow attorney fee shifting. *See id.* at 232-33. Notably, the Court did not identify Iowa Code § 625.22 as a fee-shifting statute. That makes sense because, unlike the statutes listed in *Weaver*, Iowa Code § 625.22 does not itself provide a right to shift fees.

4. *Brockhouse* does not support the Court of Appeals’ interpretation of Iowa Code § 625.22 and chapter 677

Fourth, the Iowa Supreme Court’s decision in *Brockhouse*, on which the Court of Appeals relied, is off point. In *Brockhouse*, the department of transportation (DOT) condemned a small piece of land from the plaintiff. 449 N.W.2d at 381. The county compensation commission assessed the plaintiff’s damages at \$6,400, and the plaintiff appealed to the district court. *Id.* After trial, the jury awarded the plaintiff \$7,500 in damages. *Id.* In addition to damages, the trial court awarded the plaintiff \$9,000 in costs and attorneys’ fees pursuant to Iowa Code § 472.33. *Id.*

The main issue in *Brockhouse* was the proper interpretation of an offer to confess judgment the DOT had made before trial, and whether the offer

was better or worse than the plaintiff recovered at trial. 449 N.W.2d at 381-83. After deciding the DOT's offer was better than the jury's damages award, the Iowa Supreme Court addressed the DOT's secondary argument that the plaintiff's attorney fee award was excessive. *Id.* at 383. In a single paragraph with no analysis or case law, the Court decided the plaintiff was not entitled to fees incurred after the DOT made its offer to confess. *Id.*

In the 31 years that have passed since the Court decided *Brockhouse*, the Court has not cited *Brockhouse* once. The Court has never applied the same fee-shifting logic outside of the condemnation context.

The *Brockhouse* decision does not apply here. The *Brockhouse* Court did not address a contractual attorneys' fees provision or Iowa Code § 625.22. Rather, the Court dealt with Iowa Code § 472.33, which is significantly different from Iowa Code § 625.22.

Iowa Code § 472.33 provides that the condemning authority must "pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court." Thus, Iowa Code § 472.33 itself grants the plaintiff a right to recover fees. Indeed, it was one of the fee-shifting statutes the Court identified in *Weaver* as distinct from the cost-shifting statutes in chapter 677. *See* 348 N.W.2d at 232. Unlike Iowa Code § 472.33,

Iowa Code § 625.22 does not independently determine the plaintiff's right to fees. It merely requires the trial court to assess attorneys' fees if the parties' contract provides for a fee award.

Moreover, on its face, Iowa Code § 472.33 defines "costs" as "including reasonable attorney fees." That might explain why the *Brockhouse* Court decided the plaintiff's attorney fee award was subject to the "cost" provisions of chapter 677. By contrast, while Iowa Code § 625.22 requires the trial court to tax attorneys' fees "as part of the costs," the statute does not state that attorneys' fees are costs. Simply put, there is no legal basis to reduce NCJC's fee award pursuant to the cost-shifting provisions of chapter 677.

**D. The District Court Had Discretion as to the Amount of NCJC's Attorney Fee Award**

Ultimately, it was up to the District Court to decide, in its discretion, how much NCJC's attorney fee award should be. *See Lynch*, 464 N.W.2d at 239; *Landals*, 454 N.W.2d at 897; *Lee*, 874 N.W.2d at 637. The District Court properly exercised its discretion. Although the District Court refused to adopt non-existent "per se" rules about pre- and post-offer fees, the court did account for the issues WMG raised. To be clear, NCJC was awarded

only a fraction of the fees it incurred in the lawsuit. NCJC voluntarily chose not to seek fees that were specifically attributable to its dismissed right of first refusal claim. (See App. 118, ¶ 10.) The District Court then reduced NCJC's award by another \$50,000 based on the court's determination of a reasonable hourly rate. The District Court further reduced NCJC's award due to WMG's offer to confess judgment. (App. 265, 268-70, 272-77.) NCJC would have preferred an award in the full amount it spent on the case, but the District Court was within its discretion to award a lower amount. There are no legal grounds for this Court to disturb the District Court's exercise of its discretion.

### CONCLUSION

The District Court correctly awarded legal fees to NCJC and did not commit any legal error or abuse its discretion in determining the amount of the award. On appeal, however, the Court of Appeals erroneously concluded that NCJC cannot recover fees incurred after WMG made an offer to confess judgment. That part of the Court of Appeals' decision is contrary to the Iowa Supreme Court's binding precedent. NCJC respectfully asks this Court to take review and reverse the Court of Appeals' decision to the extent it reversed the District Court's Rulings.

As NCJC was preparing to file this application for review, it received WMG's own application for review, asking the Court to decide two questions. WMG's first question relates to the application of Iowa Code Section 625.25. The second question relates to Iowa Code section 625.22 and chapter 677. NCJC does not object to the Iowa Supreme Court reviewing WMG's second question, as long as the Court grants NCJC's application for review. However, the Iowa Supreme Court should deny review of WMG's second question, which is a separate issue that is limited to the facts of this case and does not meet any of the criteria for discretionary review.

**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATIONS,  
TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS**

1. This Application For Further Review complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:  
  
This brief contains 4,570 words, excluding the parts of the application exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This application complies with the typeface requirements of Iowa R. App. 6.903(1)(e) and the type-style requirements of Iowa R. App. 6.903(1)(f) because:

3. This application has been prepared in a proportionally spaced typeface using Microsoft Word 2007 in 14 pt Times New Roman font.

/s/ Wesley T. Graham  
Wesley T. Graham

June 1, 2020  
Date

## **CERTIFICATE OF FILING AND SERVICE**

I, Wesley T. Graham, hereby certify that I electronically filed the foregoing document with Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below on the 1st day of June, 2020.

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/s/ Wesley T. Graham

**IN THE COURT OF APPEALS OF IOWA**

No. 19-0241  
Filed May 13, 2020

**NCJC, INC.,**  
Plaintiff-Appellee,

**vs.**

**WMG, L.C.,**  
Defendant-Appellant.

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Appeal from the Iowa District Court for Kossuth County, Carl J. Petersen,  
Judge.

WMG, L.C. appeals the district court's determinations concerning attorney  
fees. **AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH  
INSTRUCTIONS.**

Thomas W. Lipps of Peterson & Lipps, Algona, for appellant.

Wesley T. Graham of Duncan Green, P.C., Des Moines, and Philip J.  
Kaplan of Anthony Ostlund Baer & Louwagie P.A., Minneapolis, Minnesota, for  
appellee.

Considered by Tabor, P.J., and Mullins and May, JJ.

**MAY, Judge.**

WMG, L.C. appeals from a ruling denying its request for attorney fees but granting attorney fees to NCJC, Inc. We conclude (1) WMG was not entitled to attorney fees; (2) NCJC was entitled to some attorney fees; but (3) NCJC was not entitled to fees for services provided after WMG made its offer to confess. We affirm in part, reverse in part, and remand.

**I. Facts and Prior Proceedings**

In 2012, WMG and NCJC entered into a farm lease. NCJC was the tenant, and WMG was the landlord. The lease contained the following clause: “If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorney’s fees.”

In 2016, WMG terminated the lease. NCJC then brought this action. Its two-count petition alleged WMG breached the farm lease. WMG answered, raised affirmative defenses, and pled a counterclaim.

NCJC moved to dismiss WMG’s counterclaim. The court granted NCJC’s motion.

WMG moved for summary judgment as to count II of the petition. While its motion was pending, WMG offered to confess judgment in the amount of \$75,000. NCJC rejected the offer. The court later granted WMG’s motion.

The case proceeded to trial on NCJC’s surviving claim. A jury awarded NCJC \$41,453.57 in damages.

Both parties sought attorney fees and costs. The court denied WMG’s requests. Instead, the court awarded attorney fees to NCJC as “the prevailing party.” It also taxed court costs in favor of NCJC.

On appeal, WMG contends the district court erred in (1) denying its request for attorney fees and (2) granting attorney fees to NCJC. WMG also contends that (3) even if NCJC was entitled to some attorney fees, the district court's award was excessive.

## II. Standard of Review

"We review the court's award of attorney fees for an abuse of discretion." *Boyle v. Alum-Line, Inc.*, 773 N.W.2d 829, 832 (Iowa 2009). "Reversal is warranted only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable." *Id.* (citation omitted). "[M]isapplication of [a] statute constitutes an abuse of discretion." *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 344 (Iowa 2000).

## III. Discussion

This appeal involves the interplay between a contractual attorney-fee clause and three statutory provisions. As noted, the lease's attorney-fee clause states:

If either party files suit to enforce any of the terms of this Lease, the prevailing party shall be entitled to recover court costs and reasonable attorney's fees.

The relevant statutory provisions are Iowa Code sections 625.22, 625.25, and 677.10 (2017). They provide, in pertinent part:

When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court.

*Id.* § 625.22.

No such attorney fee shall be taxed . . . , unless it shall be made to appear that such defendant had information of and a reasonable opportunity to pay the debt before action was brought.

*Id.* § 625.25.

If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay the defendant's costs from the time of the offer.

*Id.* § 677.10.

We find the meaning of statutes in the “words chosen by the legislature.” *State v. Childs*, 898 N.W.2d 177, 184 (Iowa 2017) (citation omitted). And we “generally enforce contracts as written.” *Greene v. Heithoff*, No. 10-1608, 2011 WL 5515167, at \*7 (Iowa Ct. App. Nov. 9, 2011). In all matters, though, we must follow the precedents of our supreme court. See *State v. Hastings*, 466 N.W.2d 697, 700 (Iowa Ct. App. 1990).

With this background in mind, we turn to the parties' specific contentions.

**A. Was WMG entitled to attorney fees?**

WMG contends the district court erred in refusing to award WMG attorney fees for the period after WMG made its offer to confess, which it calls “the post-offer period.” This is true, WMG argues, because although NCJC rejected WMG's \$75,000 offer to confess, NCJC obtained a verdict of only \$41,453.57. Therefore, in the words of section 677.10, NCJC “fail[ed] to obtain judgment for more than was offered by” WMG. As a result, section 677.10 requires NCJC to “pay [WMG's] costs from the time of the offer.” And, WMG points out, under section 625.22, contractual attorney fees should be taxed as “part of the costs.” Therefore, WMG concludes, because NCJC is required to pay WMG's post-offer costs, NCJC is required to pay WMG's post-offer attorney fees.

We disagree. In Iowa, attorney fees are not allowed “in the absence of a statute or agreement expressly authorizing” them. *Van Sloun v. Agans Bros., Inc.*, 778 N.W.2d 174, 182 (Iowa 2010) (citation omitted). No fees can be taxed unless “the case . . . come[s] clearly within the terms of the statute or agreement.” *Id.* (citation omitted).

In this case, no statute creates an *independent right* to attorney fees. Section 677.10 does not mention attorney fees. And section 625.22 only provides an enforcement mechanism<sup>1</sup> for *contractual* attorney-fee clauses. It authorizes taxation of attorney fees *only if* an “agreement” within the parties’ “written contract” requires payment of “an attorney fee.” *Id.* (noting “Iowa Code section 625.22 declares that *when attorney fees are permitted under a contract provision*, the court is permitted to tax a reasonable amount of those fees as a part of costs” (emphasis added)).

So our analysis does not *begin* with sections 625.22 or 677.10. Those provisions do not enter into our thinking unless, as a preliminary matter, we conclude the parties’ “agreement expressly authoriz[es]” WMG to recover attorney fees. *See id.*

We must focus, then, on the language of the parties’ contract. It dictates “the prevailing party” is “entitled to recover” attorney fees. “Prevailing party” is a legal term of art. *See, e.g., Buckhannon Bd. & Care Home, Inc. v. W. Virginia Dep’t of Health & Human Res.*, 532 U.S. 598, 603 (2001). And when parties include a legal term of art in their contract, Iowa courts presume the parties “fully

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<sup>1</sup> As will be explained, though, enforcement is limited by other code sections like section 622.25 and, apparently, section 677.10.

understood the legal import of the words used.” *Knott v. Burlison*, 2 Greene 600, 601 (Iowa 1850). So we find the meaning of “prevailing party” in our law. See *Buckhannon*, 532 U.S. at 603.

Black’s Law Dictionary defines “prevailing party” as one “in whose favor a judgment is rendered, regardless of the amount of damages awarded.” *Prevailing party*, Black’s Law Dictionary (11th ed. 2019). And our supreme court has said a party prevails “when actual relief on the merits of his [or her] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” *Dutcher v. Randall Foods*, 546 N.W.2d 889, 895 (Iowa 1996) (quoting *Farrar v. Hobby*, 506 U.S. 103, 109 (1992)). Here, NCJC obtained a money judgment in its favor and against WMG. Under either definition, NCJC is the prevailing party—not WMG.<sup>2</sup>

Because WMG is not “the prevailing party,” the lease contract does not entitle WMG to attorney fees. So the district court did not abuse its discretion by declining WMG’s request for attorney fees.<sup>3</sup>

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<sup>2</sup> We note the term “prevailing party” is not mentioned—much less defined—by Iowa Code sections 677.10 or 625.22. See also *Tri-State Agri Corp. v. Clasing*, No. 00-1344, 2001 WL 1658852, at \*6 (Iowa Ct. App. Dec. 28, 2001) (“However, we do not believe the fact that a plaintiff becomes responsible for costs because it fails to obtain a judgment for more than was offered by the defendant has any significant bearing on the question of whether a party was ‘successful’ in enforcing its mechanic’s lien under the earlier version of the statute or was the ‘prevailing’ party under the current version.”).

<sup>3</sup> WMG’s also claims it is entitled to fees for the pre-offer period during which it successfully defended against some of NCJC’s claims. WMG has not offered, and we have not found, authority to support this position. See Iowa R. App. P. 6.903(2)(g)(3). Moreover, the contract speaks of “the prevailing party,” singular. Cf. *Sager v. Farm Bureau Mut. Ins. Co.*, 680 N.W.2d 8, 14 (Iowa 2004) (finding the statutory phrase “the insured” referred only to the insured who set fire to the house—not his innocent spouse). And although WMG won some procedural battles, NCJC won the war by obtaining a money judgment against WMG. So we

**B. Was NCJC entitled to any attorney fees?**

Because NCJC was the “prevailing party,” it appears the contract entitles NCJC to recover attorney fees. But WMG contends section 625.25 prohibits NCJC from recovering fees.

To understand WMG’s argument, it helps to consider sections 625.22 and 622.25 together. As explained, section 625.22 permits taxation of attorney fees where, as here, they are authorized by a contractual fee-shifting clause. But section 625.25 limits the effect of section 625.22 by creating a prerequisite to the taxation of fees. It states, in pertinent part: “No such attorney fee shall be taxed . . . *unless* it shall be made to appear that such defendant had *information of and a reasonable opportunity to pay* the debt before action was brought.” Iowa Code § 625.25 (emphasis added).

WMG claims this prerequisite was not fulfilled. We disagree. In its petition, NCJC alleged that, “[d]espite a demand by NCJC” for amounts owed under the lease, “WMG [had] failed and refused to make any payment” to NCJC. And in its answer, WMG “[a]dmitted that WMG has not paid NCJC for the amounts demanded.” So it is undisputed NCJC demanded reimbursement from WMG before bringing this action. And although NCJC reduced its demand during the course of litigation, WMG has not shown NCJC’s pre-suit demand lacked a reasonable basis. We find no abuse of discretion in the district court’s determination that section 625.25 should “not determine the issue of attorney’s fees in this case.”

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see no abuse of discretion in the district court’s determination that WMG was entitled to no attorney fees.

### C. Was NCJC entitled to attorney fees for the post-offer period?

We turn next to WMG's contention that—even if NCJC was entitled to some attorney fees—it was not entitled to fees for the post-offer period. Here again, WMG points to NCJC's failure to obtain a judgment in excess of WMG's offer to confess. Because of this failure, section 677.10 prohibits NCJC from “recover[ing] costs” for the post-offer period. And section 625.22 states: “When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and *tax as a part of the costs* a reasonable attorney fee to be determined by the court.” (Emphasis added.) Therefore, WMG contends, “NCJC cannot recover post-offer attorney fees because such attorney fees, by statute—Iowa Code [section] 625.22—are a component of costs.”

As support for this view, WMG draws our attention to *Brockhouse v. State*, 449 N.W.2d 380, 381 (Iowa 1989). *Brockhouse* arose from the Department of Transportation's (DOT) condemnation of some property. 449 N.W.2d at 381. The county compensation commission assessed damages of \$6400. *Id.* But the property's prior owners—the “condemnees”—were not satisfied with the commission's award. *Id.* So they appealed to the district court. *Id.*

Prior to trial, the DOT offered to confess judgment in the amount of \$10,000. *Id.* The condemnees refused the offer. *Id.* Ultimately, the jury awarded \$7500 to the condemnees. *Id.*

The district court assessed costs against the DOT. *Id.* As part of those costs, the district court awarded attorney fees pursuant to Iowa Code section 472.33 (1987). *Id.* As then codified, section 472.33 required the DOT to “pay all

costs occasioned by the appeal [to the district court], including reasonable attorney fees to be taxed by the court.”<sup>4</sup>

The DOT then appealed to our supreme court. Among other things, the DOT argued the attorney fee award was excessive. *Id.* at 383. The supreme court agreed and stated:

The trial court’s award of attorney fees for the Brockhouses’ attorneys included fees for services provided after the time of the department’s offer. *They are not entitled to these fees.* See Iowa Code § 677.10 (1987). We reverse and remand to the trial court for recomputation of costs.

*Id.* (emphasis added).

We believe *Brockhouse* stands for the proposition that, when section 677.10 (2017)<sup>5</sup> prohibits a plaintiff from obtaining post-offer costs, the plaintiff cannot recover post-offer attorney fees under a statute that authorizes taxation of attorney fees as costs. Applying *Brockhouse* here: Because section 677.10 prohibits NCJC from recovering post-offer costs, NCJC cannot recover post-offer attorney fees

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<sup>4</sup> Iowa Code section 472.33 (1987) provided as follows:

The applicant shall pay all costs of the assessment made by the commissioners and reasonable attorney fees and costs incurred by the condemnee as determined by the commissioners if the award of the commissioners exceeds one hundred ten percent of the final offer of the applicant prior to condemnation. The applicant shall file with the sheriff an affidavit setting forth the most recent offer made to the person whose property is sought to be condemned. Members of such commissions shall receive a per diem of fifty dollars and actual and necessary expenses incurred in the performance of their official duties. *The applicant shall also pay all costs occasioned by the appeal, including reasonable attorney fees to be taxed by the court,* unless on the trial thereof the same or a less amount of damages is awarded than was allowed by the tribunal from which the appeal was taken.

(Emphasis added.)

<sup>5</sup> The text of section 677.10 was the same in 1987 and 2017.

under section 625.22—a statute that authorizes taxation of attorney fees as a part of the costs.

We have considered all of the authorities cited by NCJC. We do not think they permit a different conclusion.

For example, *Dutcher* dealt with attorney fees under employment-law statutes. 546 N.W.2d at 895. *Dutcher* did not mention Iowa Code section 677.10. Nor was it relevant: the plaintiff in *Dutcher* recovered more than the defendant had offered to confess. *Id.* at 895 (“Randall points out that it had made an offer to confess judgment in the amount of \$2000 prior to trial and Dutcher’s recovery of \$2128 exceeds that figure by only \$128.”).

But NCJC relies most heavily on *Weaver Constr. Co. v. Heitland*, 348 N.W.2d 230, 233 (Iowa 1984)—and understandably so. There the supreme court affirmed the district court’s refusal to award attorney fees as “costs” under section 677.10. *Weaver*, 348 N.W.2d at 233. And the *Weaver* court said: “We do not agree . . . that the word ‘costs’ should be so liberally stretched as to include attorney fees.” *Id.*

Even so, the *Weaver* court expressly distinguished situations in which “[t]he legislature has in selected areas provided for the taxation of reasonable attorney fees as part of costs.” *Id.* at 232 (quoting with approval the trial court’s “well-reasoned opinion”); see also *id.* at 233. Likewise, we distinguish *Weaver* from cases like *Brockhouse*—and the case before us now—in which a separate statute authorizes taxation of attorney fees as part of costs. See *Brockhouse*, 449 N.W.2d at 381 (addressing assessment of attorney fees under Iowa Code 472.33 (1987)).

In short, we believe *Brockhouse* requires the conclusion that NCJC is not “entitled” to attorney fees “for services provided after the time of [WMG’s] offer.” 449 N.W.2d at 383. As to that issue, we must reverse.

#### **IV. Conclusion**

We affirm the district court’s denial of WMG’s request for attorney fees. We reverse the district court’s award of attorney fees to NCJC insofar as it includes fees for services provided after WMG’s offer to confess. We remand for entry of a corrected award of attorney fees in favor of NCJC.

**AFFIRMED IN PART, REVERSED IN PART, AND REMANDED WITH INSTRUCTIONS.**



IOWA APPELLATE COURTS

State of Iowa Courts

**Case Number**  
19-0241

**Case Title**  
NCJC, Inc. v. WMG, L.C.

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