IN THE SUPREME COURT OF IOWA
Supreme Court No. 20-0195

DANIELLE PUTMAN,

Appellant,

vs.

SHAWN J. WALTHER and AMY M. WALTHER

Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR BLACK HAWK COUNTY
HONORABLE KELLY ANN LEKAR, JUDGE

APPELLANT'S REPLY BRIEF

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STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. Was error preserved on Putman's claim that Magee Construction's report was adequately disclosed as an expert opinion and if not adequately disclosed, then the error was harmless?

II. Does the Magee Construction report create a genuine issue of material fact on the issues of causation and damages for a violation Iowa Code § 558A, Iowa's Real Estate Disclosure Act?

ARGUMENT

On the merits, the Walthers' brief completely ignores Putman's Iowa Code § 558A claim as it relates to their failure to disclose the true condition of the SW corner of the basement in good faith and/or their failure to exercise ordinary care in obtaining information to put Putman on notice of a severe water problem in the basement. Instead, the Walthers claim the Magee estimate "does not indicate a causal connection between a removal of a sump pump and pit and the June 29, 2018 water infiltration." (Walthers' Br. at 16). This argument is a red-herring. The district court found that Putman pled a violation of Iowa Code § 558A and clearly considered this claim in granting summary judgment[1].

Despite the Walthers repeated argument that Putman failed to include any of the facts or documents now claimed in her brief, Putman specifically referenced Magee Construction in her summary judgment resistance and affidavit and the district court made specific findings of fact concerning the contents of the Magee Construction estimate (hereinafter "Magee report"), including that it was attached to the original Petition, in its order granting

[1] "Although the Petition did not specifically refer to Code of Iowa § 558A, the allegations of the Petition essentially pled a cause of action under that Chapter." (App. 150).

summary judgment.[2] As a result, the contents of the Magee report are plainly part of this record on appeal.

In their brief, the Walthers argue Putman failed to preserve error on her claims that the Magee report was adequately disclosed and that the failure to disclose was harmless error. (Walthers' Br. at 9). The district court expressly found all of the evidence referenced by Putman in her summary judgment resistance, including the Magee report were not expert opinions which were formally designated nor were they disclosed as experts in Putman's discovery responses. The district court implicitly rejected any claim that formal expert disclosure of Magee Construction and the Magee report as an expert opinion were unnecessary under any legal theory by granting summary judgment. Likewise, the district court implicitly found the failure to designate Magee Construction as an expert was not substantially justified or harmless by granting summary judgment.

The Court should find Putman preserved error and reverse and remand for further proceedings because the Magee report was adequately disclosed

[2] "In late June or early July, 2018, Plaintiff observed water in the basement. She contracted Magee Construction Company to inspect the water damage in the house. In the subsequent report, Magee Constructed noted water damage, indications of previous water infiltration, and an estimated repair cost of $11,571.48. Exhibit C, pg. 1-3 (July 19, 2018), attached to petition (October 25, 2018) (App. 149).

pursuant to the arguments made here and in her proof brief. When the Magee report is considered in summary judgment rather than excluded, it creates a genuine issue of material fact on the issue of causation and damages for a violation of Iowa Code § 558A against the Walthers.

I. Putman preserved error on her claim that the Magee report was adequately disclosed as an expert opinion that creates a genuine issue of material fact on both causation and damages.

"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." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). The issue of Putman's failure to formally designate and disclose an expert opinion on causation and damages was clearly raised by the Walthers. (App. 106-108). In response, Putman filed a resistance to summary judgment and affidavit which included references to Magee Construction and other evidence which she argued created a genuine issue of material fact on the issue of both causation and damages. (App. 111-112, 151). The district court expressly rejected this argument and ruled that although the Magee report was disclosed by way of being attached to Putman's original petition and its contents specifically made part of the summary judgment record, it could not be considered because it was not formally designated as an expert opinion.

The issue of whether Magee Construction and the Magee report were properly disclosed was clearly before the district court.

A. The district court implicitly rejected any claim that formal expert disclosure of the Magee report as an expert opinion was unnecessary and the failure to designate Magee Construction as an expert was harmless error.

The Walthers contend that Putman did not preserve error on the issue of whether the failure to designate Magee Construction and the Magee report as an expert opinion was harmless error or substantially justified and filed no motion to seek a ruling on that issue. See Iowa R. Civ. P. 1.904(2) (Walthers' Br. at 9). Admittedly, the district court's holding did not expressly find whether the alleged failure to formally designate Magee Construction and the Magee report as an expert opinion was harmless error or substantially justified, but it implicitly did so, in granting summary judgment in favor of the Walthers.

In *33 Carpenters Constr., Inc. v. State Farm Life & Cas. Co*., 939 N.W.2d 69, 75 (Iowa 2020), the Court explained it is appropriate to reach an issue on appeal when "the district court must have implicitly rejected the argument by granting summary judgment." *Id.; see also United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 783-84 (Iowa 2016) (reaching a legal question that may not have been preserved but that the district court "necessarily determined" granting summary judgment). In *33 Carpenters*

Constr., State Farm filed a motion for summary judgment claiming that the contract between 33 Carpenters was unenforceable because 33 Carpenters was not a licensed public adjuster, as required under Iowa Code § 522C. 33 Carpenters resisted summary judgment by arguing that the Iowa Insurance Commissioner had the sole authority to enforce the provisions of Iowa Code § 522C such that State Farm could not sue the statute to invalidate its assignment agreement. The district court ruled that 33 Carpenters could not recover from State Farm and granted State Farm's motion for summary judgment finding that the assignment was invalid under Iowa law because 33 Carpenters acted as an unlicensed public adjuster as defined by Iowa Code § 522C.2. *Id.* In granting summary judgment, the district court did not reach the question of whether the Iowa Insurance Commissioner had the sole authority to enforce the provision of Iowa Code § 522C even though it was raised by 33 Carpenters and 33 Carpenters filed no motion to seek a ruling on that issue. *Id.* at 75. On appeal, 33 Carpenters raised the Iowa Code § 522C issue again. In deciding that error was minimally preserved, the Court explained, "[w]e assume the district court rejected each defense to a claim on its merits, even though the district court did not address each defense in its ruling." *Id.*

This case is similar. The dispute with the Walthers during summary judgment was limited to the evidentiary issue of whether Putman designated an expert on the issues of causation and damages. In resisting summary judgment, Putman directed the district court to Magee Construction and the Magee report as an expert opinion creating a genuine issue of material fact on both causation and damages. In ruling that the Walthers were entitled to summary judgment, the district court necessarily determined that Putman was required to formally designate Magee Construction as an expert and the failure to do so was not harmless or substantially justified and excluded the Magee report in the court's summary judgment analysis.

In *Jensen v. Sattler*, 896 N.W.2d 582, 585 (Iowa 2005), the Court was faced with an error preservation claim made by the sellers, after the buyers appealed and argued the plain language of Iowa Code § 558A.6(1) permitted a buyer to recover upon a showing the transferor did not exercise ordinary care in obtaining information required to be disclosed. The Court found no merit in the sellers' error preservation claim and held the following:

> "Jensen alleged a violation of the statute in his petition. The Sattlers filed a motion for summary judgment and a reply brief in which they repeatedly insisted Jensen had to prove fraud to recover under the statute. It is true the summary judgment record is not a model of clarity. Jensen generally resisted summary judgment, however, and in hindsight it is plain the district court's ruling barred Jensen from introducing evidence to show the Sattlers did not exercise ordinary care in obtaining information to disclose on the form. Jensen preserved

> error. See e.g. *State v. Miller*, 229 N.W.2d 762, 768 (Iowa 1975) (if a trial court's ruling is dispositive on the issue of admissibility, it is considered final for purposes of appeal and no further objection is necessary)"

Id. at 585.

In this case, the Walthers filed a motion for summary judgment and subsequent motions in limine in which they repeatedly argued Putman was required to prove both causation damages only through an expert opinion. The Walthers argued that since Putman failed to properly designate an expert, her claims should fail. Putman generally resisted summary judgment and a hearing was held which was unreported. Like *Jensen*, the summary judgment record is not a model of clarity. It is clear the district court carefully reviewed the record, made findings of fact regarding the Magee report and found it could not be used to create a genuine issue of material fact on causation and damages because it was not disclosed as an expert opinion and excluded it. Like the buyers in *Jensen*, Putman preserved error.

B. Putman's resistance in response to the Walthers claim that she did not disclose an expert on causation and damages does not limit her arguments on appeal.

Although Putman did not raise every argument she now asserts on appeal, the claim that Magee Construction and the Magee report was disclosed to all parties and created a genuine issue of material fact on causation and damages does not limit her arguments on appeal in support of this claim. In

Feld v. Borkowski, 790 N.W.2d 72, 82 (Iowa 2010) (Appel, J., concurring part and dissenting in part) the Court discussed error preservation as it relates to a claim and an argument raised below. "As noted by Sarah Cravens, the [United States] Supreme Court has made it clear that once a claim is properly presented, a party is not limited to arguments presented below." *Id. quoting*, Sarah M.R. Cravens, *Involved Appellate Judging*, 88 Marq. L. Rev. 251, 259 (2004). In *Feld*, Justice Appel noted the Iowa Supreme Court's approach was generally not inconsistent with the approach of the United States Supreme Court under which "a party is not limited to arguments presented below so long as the purportedly new arguments support a properly presented claim. *Feld*, 790 N.W.2d at 83 (Appel, J., concurring in part and dissenting in part).

Here, Putman may raise the arguments in her proof brief as additional support for the resistance to the Walthers claim she did not timely designate nor disclose an expert on causation and damages. *See e.g. JBS Swift & Co v. Ochoa,* 888 N.W.2d 887, 893 (Iowa 2016)(finding a litigant preserved error because although it did not cite to a specific subsection of a statute in the district court, it did so on appeal as "additional ammunition" for the argument made below); *Pierce v. Staley*, 587 N.W.2d 484, 486-87 (Iowa 1998) (finding a litigant's overall argument that she owed no tort law duty preserved error on all elements of the relevant legal test*); Frederick v. Shorman*, 259 Iowa 1050,

1056-57, 147 N.W.2d 478, 482 (1966) (reaching an issue closely related to the defendant's contentions, even though the specific articulation of the issue was apparently not asserted below).

II. *Hansen* establishes that expert testimony on causation and damages may be allowed even if it is not formally designated as an expert opinion.

The Walthers argue that Putman's reliance on *Hansen v. Central Iowa Hospital Corporation, d/b/a Iowa Methodist Medical Center*, 686 N.W.2d 476 (Iowa 2004) is misplaced. (Walthers' Br. at 11). Contrary to the Walthers argument in their brief regarding the *Hansen* case, the plaintiffs in *Hansen* disclosed, but did not formally designate a treating physician who could testify about causation and damages pursuant to requirements of Iowa Code § 668.11. Similarly, Putman disclosed Magee Construction in interrogatory answers as a potential witness and attached a copy of the Magee report on causation and damages in her petition over a year before trial, but did not formally designate Magee Construction as an expert pursuant to the requirements of the trial scheduling order. On appeal, the plaintiffs in *Hansen* argued they were not required to designate a treating physician as an expert on causation and damages within one hundred eighty days of the defendant's answer because the treating physician formulated all of his opinions about causation during his treatment and not in anticipation of litigation. *Id.* at 480.

The Iowa Supreme Court held that the causation opinion was not within the ambit of Iowa Code § 668.11 and allowed the testimony on both causation and damages despite it not being formally designated within the time limits mandated by the statute.

The Court should take a similar view of Magee Construction and the Magee report in this case. Putman asserts, like the plaintiffs in *Hansen*, the Magee report on causation and damages was formed during the treatment of her first water infiltration problem and not in anticipation of litigation. Like *Hansen*, Magee Construction and the Magee report was clearly disclosed, but was not formally designated since Magee Construction was not retained as an expert and the Magee report was not formed during or in anticipation of litigation. As a result, Magee's opinion should not fall within the ambit of the expert designation requirements of Iowa R. Civ. P. 1.508 and the trial scheduling order.

Arguably, Magee Construction and the Magee report would fall under the ambit of Iowa R. Civ. P. 1.500(2)(c) and the deadline pursuant to Iowa R. Civ. P. 1.500(2)(d) and the trial scheduling order. However, Putman more than complied with this mandate by disclosing Magee Construction and the Magee report more than one year before trial. Even though Magee Construction was not formally designated as an expert, Magee Construction

and the Magee report was adequately disclosed to put the Walthers on notice and this evidence should be considered in the district court's summary judgment analysis consistent with the approach in *Hansen*.

A. In the alternative, to the extent Putman did not strictly comply with the deadlines in the trial scheduling order, then error was harmless under Iowa R. Civ. P. 1.517(3).

The record reflects the Walthers were on notice of the Magee report by way of it being attached to the petition over a year before trial and on notice that Magee Construction was a potential witness in interrogatory answers.[3] The lack of a record that the Walthers filed a motion to supplement discovery, a motion to compel, or raise an objection to this evidence in any way is revealing that the Walthers were using the dispositive motion deadline as a tactical tool.[4] *See e.g*. *Hantsbarger v. Coffin*, 501 N.W.2d 501, 505-06 (Iowa 1993) (holding it is appropriate to consider the aggrieved party's lack of action in deciding whether to impose sanctions for failure to comply with disclosure requirements). The Walthers simply ignored the Magee report and waited until after the dispositive motion deadline and then argued no such opinion

[3] Although the interrogatory answer to the Walthers specifically naming Magee Construction as a potential witness is not included in Putman's resistance to summary judgment, the Walthers' do not dispute this fact. Instead, they argue it is not part of the record.

[4] The Walthers also did not argue Magee Construction or the Magee report were not disclosed in discovery responses and should be excluded at trial at the motion in limine hearing on January 3, 2020. (App. 121-148).

existed. The district court then abused its discretion in excluding this evidence as a sanction and not considering the factors for exclusion of evidence. *See Whitley v. C.R. Pharm. Serv., Inc*., 816 N.W.2d 378, 388-89 (Iowa 2012) (listing four factors to consider to set sanctions for noncompliance with discovery).

III. Putman's resistance to summary judgment and the district court's findings of fact of the Magee report create a genuine issue of material fact on causation and damages for a violation of Iowa Code § 558A.

Next, the Walthers argue "there is no record from which to appeal from in order to determine what Magee Construction would have testified to." (Walthers' Br. at 13). This assertion completely ignores the findings of fact made by the district court regarding what the Magee report says. The Magee report is part of the record as it was attached to Putman's original Petition and is clearly reviewable on appeal.

The Walthers assert that the Magee estimate contains no causation opinion. (Walthers' Br. at 16). This argument is meritless. It is undisputed that the Walthers' disclosure form asked about "any known water, seepage, or other problems." (App 8-12). The Walthers checked the box "Yes." *Id.* When asked to describe the known water, seepage or problems, the Walthers disclosed "2010 sewer back up [&] SW wall seepage a few times." *Id.* When asked about any known physical problems, including flooding, settling,

drainage or grading problems, the Walthers checked "No". *Id.* On July 16, 2018, Magee inspected the basement and found (1) water infiltration in the SW corner; (2) the floor of the SW corner bedroom raised off the concrete floor 2 ½ inches which indicates a previous water infiltration from the exterior; (3) an existing basement window visible from the exterior in the SW corner behind mulch/dirt which revealed a wall was built to channel water flow on the south side of the home; (4) and an old drain line capped off and a clean out which were under the carpet and pad of the family room in the basement. (App. 13-37). The report further stated, "**Water came in through the wall at the SW corner of the basement**," and "I do not know what the south wall looks like behind the drywall, but it is **obvious the infiltration of water/rain on June 29, 2018 which was over 2" according to the US Weather Service came through this wall**." *Id.* (Emphasis Added). The Magee report unmistakably found the water from the June 29, 2018 rain event came ***in through the SW corner wall*** and determined the water damage from this rain event was over eleven thousand dollars and provided an estimate to repair the damages. *Id.*

Contrary to the Walthers assertion that the Magee report does not note any sort of reason why and how the water got in, nor does is it connect it to any alleged non-disclosure, the Magee report does exactly what the Walthers

contend it does not when viewed in the light most favorable to Putman. (Walthers' Br. at. 16). The Magee report shows the rain water came in exclusively through the SW corner wall and was obvious. The water damage caused by the condition of the SW corner wall was obviously a much more serious problem than the Walthers disclosure that the SW corner wall only caused water to seep in a few times. Magee Construction tested the walls of all the rooms in the basement with a moisture meter and "had water in the drywall a foot up from the floor." (App. 13). This evidence when reviewed in the light most favorable to Putman reveals that the Walthers did not disclose the true condition of the SW corner wall and the resulting water problems in good faith.

Furthermore, Magee Construction found modifications that were obviously designed to mitigate a water problem in the basement. For example, Magee Construction reported finding an existing basement window on the SW side exterior behind mulch and dirt and a wall designed to channel the water flow on the south side of the structure. (App. 13). Magee Construction also found modifications to the SW corner bedroom floor which was raised up approximately 2 1/2". *Id.* When viewed in the light most favorable to Putman, this evidence shows the disclosures of seepage a few times made by

the Walthers in the seller disclosure form on known water problems were not made in good faith.

Even if the Walthers claim they were unaware of these modifications that were designed to mitigate a water problem then they plainly failed to exercise ordinary care in obtaining the information that was required to be disclosed to put Putman on notice. In their brief, the Walthers never directly address this issue. Instead, they attempt to misdirect the Court by making the claim that there is no witness to connect the presence or non-presence of a sump pit to alleged damages. (Walther Br. at 17). This argument ignores Putman's validly pled and preserved Iowa Code § 558A claim as it pertains to disclosure of known water problems in good faith and/or the failure to exercise ordinary care in obtaining the information that was necessary to put Putman on notice of a dire water problem in the basement that Magee described as "obvious."

CONCLUSION

Putman respectfully requests the Court reverse the district court and remand for further proceedings.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

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