

**IN THE SUPREME COURT OF IOWA**

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**SUPREME COURT NO. 21-0227**

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**TODD RAND,  
PLAINTIFF/APPELLANT,**

vs.

**SECURITY NATIONAL CORPORATION d/b/a  
SECURITY NATIONAL BANK, an Iowa Corporation,  
DEFENDANT/APPELLEE.**

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On Appeal from the District Court for Woodbury County  
Honorable Steven J. Andreasen

Woodbury County No. EQCV038478

**APPELLEE'S PROOF BRIEF**

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## STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. The District Court Correctly Granted Summary Judgment In Favor Defendant SNB On Plaintiff's Claim for Breach of Fiduciary Duty

Iowa Code § 633.160 (2021)

Iowa Code § 633.197 (2021)

Iowa Code § 633.200 (2021)

Iowa Ct. R. 7.2

*Behrens v. Wedmore*, 698 N.W.2d 555 (S.D. 2005)

*Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429 (Iowa 2019)

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*Matter of Estate of Bruene*, 350 N.W.2d 209 (Iowa 1984)

*Matter of Estate of Lamb*, 584 N.W.2d 719 (Iowa Ct. App. 1998)

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II. The District Court Correctly Granted Summary Judgment in Favor of SNB on Plaintiff's Claim for Negligent Misrepresentation

Iowa R. App. P. 6.903 (2)(g)(3)

*Kunde v. Estate of Bowman*, 920 N.W.2d 803 (Iowa 2018)

*Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405 (Iowa 1997)

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III. The District Court Correctly Granted Summary Judgment Dismissing Plaintiff's Fraud Claims

*Gigilos v. Stavropoulos*, 204 N.W.2d 619 (Iowa 1973)

*Youngblut v. Youngblut*, 945 N.W.2d 25 (Iowa 2020)

IV. The District Court properly granted summary judgment with respect to Plaintiff's damage claims for attorney's fees, emotional distress, and punitive damages

Iowa Code § 668A.1 (2021)

8 Iowa Practice, Civil Litigation Handbook § 18:17

Iowa Uniform Jury Instruction 700.1

*Cedar Falls Bldg. Center, Inc. v. Vietor*, 365 N.W.2d 635 (Iowa Ct. App. 1985)

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*Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987)

*Dier v. Peters*, 815 N.W.2d 1 (Iowa 2012)

*Doe v. Central Iowa Health Syst.*, 766 N.W.2d 787 (Iowa 2009)

*East Iowa Plastics, Inc. v. PI, Inc.*, 889 F.3d 454 (8th Cir. 2018)

*Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451 (Iowa Ct. App. 2020)

*Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*,

510 N.W.2d 153 (Iowa 1993)

*Lawrence v. Grinde*, 534 N.W.2d 414 (Iowa 1995)

*McClure v. Walgreen Co.*, 613 N.W.2d 225 (Iowa 2000)

*Miranda v. Said*, 2012 WL 2410945 (Iowa Ct. App. 2012)

*Miranda v. Said*, 836 N.W.2d 8 (Iowa 2013)

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*Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627 (Iowa 1990)

*Williams v. Van Sickel*, 659 N.W.2d 572 (Iowa 2003)

## **ROUTING STATEMENT**

This appeal should be retained by the Iowa Supreme Court. The main issue in this appeal is an attempt to transform a probate fee dispute into a tort action in which punitive damages are sought. The appeal presents a substantial question of enunciating legal principles, which is appropriately retained by the Iowa Supreme Court. Iowa R. App. P. 6.1101(2)(f).

## **STATEMENT OF THE CASE**

The Defendant-Appellee, Security National Corporation d/b/a Security National Bank (hereafter referred to as “SNB”) agrees with the statement of the case articulated by the Appellant.

## **STATEMENT OF FACTS**

This case stems from a dispute about probate fees in the Matter of the Estate of Roger E. Rand. Plaintiff, Todd Rand, is one of four children of the late Roger Rand, who died on August 29, 2016. Roger’s four children, plus Roger Rand’s girlfriend, are the five beneficiaries under his January 2005 will. Exhibit 2, at Article II–V, VII–VII;<sup>1</sup> Exhibit 3, First Codicil to Last Will and Testament of Roger E. Rand. That will—drafted by the Crary, Huff Ringgenberg, Hartnett & Storm, P.C.

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<sup>1</sup> All references to exhibits in this brief are to the applicable one of the exhibits attached to SNB’s motion for summary judgment.

(hereinafter “the Crary Law Firm”)—designated Defendant Security National Bank as the personal representative of Roger Rand’s estate. Exhibit 2, at Article XVI.

Soon after Roger Rand’s death, Defendant Security National Bank was notified that it had been named as the Personal Representative of his Estate. *See* Exhibit 4, Gagnon Depo. Transcript, May 7, 2019, at 42:20–43:3. Todd Rand and employees of Defendant Security National Bank met at the bank in Sioux City on August 30, 2016. Exhibit 4, at 51:4–52:25. Shortly thereafter the will was admitted to probate.

On or about September 20, 2016, Tammi Gagnon sent a letter to each beneficiary which Plaintiff read shortly thereafter. Petition, at Exhibit 3; Exhibit 5, Rand Depo. Transcript v. I, May 8, 2019, at 103:6–104:10. That letter forms the basis of Plaintiff’s complaints, and the Estate Administration Overview sent on that date stated the following regarding probate fees:

Iowa law under the supervision of the District Court authorizes the compensation of the Executor and attorney handling the Estate. The fees are based on the appraised value of the assets of the Estate reported for inheritance tax purposes, whether taxable or not. The appraised value is taken as of the date of death. The fees are computed as follows:

6% of the first \$1,000  
4% of the next \$4,000  
2% of the remaining value

One-half of these fees may be paid at the time the inheritance tax return is prepared and one-half when the Estate is closed.

Under certain circumstances, the Executor is allowed to charge a fee for extraordinary services. If extraordinary services are provided, the Security National Bank will be charging an hourly fee.

Months before a fee application was submitted, Todd Rand employed attorney Stan Munger as his personal attorney on February 9, 2017. *See* Exhibit 7, Letter from Stanley Munger to Larry Storm. On February 9, 2017, attorney Munger inquired of Mr. Storm of the Crary Law Firm about his firm's fees, and Defendant's fees. Exhibit 7.

On February 16, 2017, Mr. Storm replied by letter and informed attorney Munger that the attorney fees and personal representative fees are fixed by the Court. Exhibit 8, Letter from Larry Storm to Stanley Munger, February 16, 2017. Mr. Storm cited Iowa Code Section 633.197 for compensation of the personal representative for ordinary services and Section 633.198 for compensation of the attorneys for the personal representative for ordinary services. Exhibit 8. Specifically, the letter stated that "the Personal Representative will be filing an Application for Fees for ordinary services for the Personal Representative at some time in the future requesting that the Court allow reasonable fees in accordance with the Iowa statutes and probate code." Exhibit 8, at 1.

On October 23, 2017, Defendant Security National Bank filed an Application for Fees for the Personal Representative's ordinary services and for the Attorney's ordinary and extraordinary services. Security National Bank's Application sought

the maximum statutory fee. Exhibit 9, Application for Order Fixing Fees for Ordinary Services and Application for Interim Order Fixing Fees for Extraordinary Services.

After receiving the Application, Plaintiff's counsel filed his Resistance and Objection on November 2, 2017. Exhibit 10, Beneficiary Todd R. Rand's Resistance and Objection to Application for Order Fixing Fees for Ordinary Services and Application for Interim Order Fixing Fees for Extraordinary Services, November 2, 2017. The objection was tried over three days in January and May 2018.

By order of August 24, 2018, the Cray Law Firm was awarded \$205,000 for ordinary services and \$107,000 for extraordinary services. Exhibit 11, at 22. Defendant was awarded \$160,000 for ordinary services. Exhibit 11, at 22. The fee award to SNB was less than half of the statutory maximum fee.

Plaintiff was not satisfied with the August 24, 2018 fee order of Judge Deck in the probate proceedings. Plaintiff filed his Petition in this case on September 18, 2018 seeking to impose tort liability and punitive damages. In the course of discovery, Plaintiff has answered interrogatories and has given a deposition. In his supplemental answers to interrogatories, Plaintiff asserts that he is seeking the following damages:

- a. Punitive damages \$1,000,000.00 or 1% of Security National Bank's net worth, whichever is greater. Plaintiff's rationale is that this is a fair punishment based on Security National Bank's breach of fiduciary obligations to him and their cover up.

- b. Plaintiff's emotional distress damages—up to \$250,000.00. Plaintiff calculated this based on his belief that the emotional distress caused by Security National Bank and their attorneys asking for approximately \$1,000,000.00 in fees, \$524,431.77 more than the Court eventually awarded them, and discovering that his father's estate was being probated by an executor that was untrustworthy and didn't have his or his families [sic] best interest in mind is worth \$250,000.00 under the Iowa Uniform Jury Instructions for Emotional Distress Damages.
- c. Plaintiff calculates that he paid Munger, Reinschmidt & Denne \$22,874.68 in attorney fees to object to Security National Bank's unreasonable fee request and to have a hearing on this issue and get it resolved.

Exhibit 15, Plaintiff's Second Supplemental Answers to Defendant's Interrogatories, at Interrogatory 10 (citations omitted).

On May 17, 2019, the Court issued an order approving interim extraordinary fees of Personal Representatives and Attorneys. Exhibit 14, Order Approving Interim Extraordinary Fees of Personal Representative and Attorneys as Requested in the Second Application for Interim Order Fixing Fees for Extraordinary Services, May 17, 2019. Plaintiff did not object to the second application nor did he appeal the Order. Exhibit 14, at 1.

### **STANDARD OF REVIEW**

The standard of review for rulings on summary judgment is for correction of errors of law. *Mason v. Vision Iowa Bd.*, 700 N.W.2d 349, 353 (Iowa 2005).

Evidence is viewed in the light most favorable to the party opposing summary judgment. *Murtha v. Cahalan*, 745 N.W.2d 711, 713–14 (Iowa 2008).

“When a motion for summary judgment is properly supported, the nonmoving party is required to respond with specific facts that show a genuine issue for trial.” *Otterberg v. Farm Bureau Mut. Ins. Co.*, 696 N.W.2d 24, 27 (Iowa 2005). An issue of fact is “material” only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law. *Smith v. CRST Int’l Inc.*, 553 N.W.2d 890, 893 (Iowa 1996). “A party resisting a motion for summary judgment cannot rely on the mere assertions in his pleadings but must come forward with evidence to demonstrate that a genuine issue of material fact is presented.” *Stevens v. Iowa Newspapers, Inc.*, 728 N.W.2d 823, 827 (Iowa 2007).

“Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.” *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) (internal quotations omitted) (citing *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). “Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment.” *Bitner v. Ottumwa Community Sch. Dist.*, 549 N.W.2d 295, 300 (Iowa 1996).



## ARGUMENT

### **I. The District Court Correctly Granted Summary Judgment In Favor Of SNB On Plaintiff's Claim For Breach Of Fiduciary Duty.**

#### **A. Preservation of Error.**

SNB agrees that Plaintiff's breach of fiduciary duty claim was raised and ruled on by Judge Andreasen who decided the issue adversely to Plaintiff by dismissing the case. District Court Ruling, at 8-16, 39. Thus, the issue was raised and decided in the Summary Judgment Ruling, and error has been preserved.

#### **B. The District Court correctly determined that Plaintiff could not bring a common law tort cause of action based upon the SNB fee application in the Roger Rand Estate.**

The threshold question in this appeal is whether Plaintiff can bring common law tort causes of action based upon the fee dispute in the Estate of Roger Rand; or whether the probate code remedies and procedures preclude a common law tort remedy. The District Court, after carefully reviewing the probate code, determined that Plaintiff did not have a common law tort cause of action when the alleged breaches of fiduciary duties were exclusively based upon statutory duties of an executor arising under the probate code.<sup>2</sup>

#### **1. The statutory remedy for breach of fiduciary duty by a probate fiduciary precludes an independent cause of action in tort for this probate fee dispute.**

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<sup>2</sup> The District Court also applied this ruling to the Plaintiff's negligent misrepresentation and fraud claims.

Where the probate code defines the executor's duties and creates a remedy for a breach of fiduciary duty, a beneficiary of the estate does not have an independent common law cause of action for breach of those duties in tort. Instead, the probate remedies provided by statute must be utilized. When, as here, those probate remedies have been fully utilized, a tort remedy cannot be utilized to provide additional and potentially inconsistent relief. The logic of the District Court's ruling on this point is impeccable and self-evident:

This Court concludes under the record presented as part of the Motion for Summary Judgment that Plaintiff is precluded from filing a separate breach of fiduciary duty cause of action against Defendant as a separate action at law outside of the Probate Court and Estate proceedings. In this regard, a "common law" breach of fiduciary duty claim as outlined above must be premised upon a relationship between the parties that creates an element of trust or fiduciary responsibilities. In the within matter, the relationship between Plaintiff and Defendant that would give rise to such fiduciary responsibilities on the part of Defendant was the relationship as executor-beneficiary. This fiduciary relationship is created and, thus, defined solely and exclusively by the Probate Code Chapter 633.

The *Kurth* case cited by Plaintiff, for example, has no application to the within matter. It involved a breach of fiduciary duty claim based upon a bank-depositor relationship of the parties, not otherwise covered by statute or rules. In the within matter, Defendant has and had no other relationship with Plaintiff and no other responsibilities, element of trust, and fiduciary responsibility except in its role as executor and Plaintiff's role as beneficiary in the Estate proceeding and under Iowa Code Chapter 633.

Additionally, as discussed above, Chapter 633 specifically provides the bases and procedures for beneficiaries such as Plaintiff to assert breach of fiduciary claims against an executor such as Defendant. Chapter 633 also specifically provides remedies for any such breaches of fiduciary

duty. Chapter 633 also provides procedures for asserting such breach of fiduciary duty claims.

To allow a beneficiary such as Plaintiff to avoid, ignore, or disregard these provisions within Chapter 633 and file a separate action at law against an executor for breach of fiduciary duty would effectively defeat the intent and purpose of the legislature when it enacted such provisions within Chapter 633 to address these claims. For example, pursuant to Section 633.33, such breach of fiduciary duty claims are equitable. The legislature in enacting Section 633.33, therefore, expressed an intent to have such breach of fiduciary duty claims resolved by the Court applying equitable principles. Such provision and intent would be defeated and meaningless if a beneficiary could simply file a separate law action asserting the exact same breach of fiduciary duty claims and submit such claims to a jury with no application of equitable principles.

District Court Ruling, at 9-10.

In challenging the District Court's ruling, Plaintiff asserts that the probate court does not have jurisdiction over the tort claims that he brings here. For that assertion, Plaintiff cites *Matter of Estate of Lamb*, 584 N.W.2d 719,723 (Iowa Ct. App. 1998) ("Matters not essential to or related to rights derived from an interest in a decedent's estate are not rights, duties and remedies in the probate code and the probate code does not have jurisdiction."). The *Lamb* case states the applicable rule, but the Plaintiff is incorrect in his application of it. A claim of breach of fiduciary duty and fraud related to the fees sought by an executor is a matter that is "essential to or related to rights derived from an interest in a decedent's estate." Such a dispute must be administered according to the processes set forth in the probate code, and cannot later be the subject of a common law tort action.

In this case, all of Plaintiff's complaints relate to the fee application sought by SNB in its administration of the Estate of Roger Rand as the executor of the Estate. Common sense and the Iowa probate code lead to the conclusion that disputes over probate fees are matters that are essential to or related to rights derived from an interest in a decedent's estate. The rules setting out compensation for an executor are statutory. *See* Iowa Code §§633.197 *et seq.* There are additional probate rules governing a fee application. *See* Iowa Ct. R. 7.2. Unquestionably, issues concerning the compensation of an executor are expressly governed by the probate code. If the probate code deals expressly with an issue, it is "essential to or related to rights derived from an interest in a decedent's estate."

Similarly, claims against an executor for breach of fiduciary duty and fraud are dealt with explicitly in the probate code. The liability of fiduciaries is set forth in Part 6 of the Probate Code (Iowa Code Section 633.155–162). The Section specifically providing for liability of a fiduciary for breach of duty is set forth in Section 633.160. This Section states that:

Every fiduciary shall be liable and chargeable in the fiduciary's accounts for neglect or unreasonable delay in collecting the credits or other assets of the estate or in selling, mortgaging or leasing the property of the estate; for neglect in paying over money or delivering property of the estate the fiduciary shall have in the fiduciary's hands; for failure to account for or to close the estate within the time provided by this probate code; for any loss to the estate arising from the fiduciary's embezzlement or commingling of the assets of the estate with other property; for loss to the estate through self-dealing; for any

loss to the estate arising from wrongful acts or omissions of any cofiduciaries which the fiduciary could have prevented by the exercise of ordinary care; and for *any other negligent or willful act or nonfeasance in the fiduciary's administration of the estate by which loss to the estate arises.*

Iowa Code § 633.160 (2021) (emphasis added). Issues concerning the conduct of an executor, including claims of negligent or intentional misconduct, are expressly dealt with in the probate code. Liability of probate fiduciaries must be considered “essential to or related to rights derived from an interest in a decedent’s estate.”

The probate code entrusts disputes regarding compensation and claims of fiduciary misconduct to the probate court, and sets out the remedy in both instances. The district court may reduce the compensation requested by an executor, and the district court may surcharge an executor for misconduct that results in loss to an estate. Because the probate code establishes the procedure and the remedy for claimed misconduct of an executor, a tort lawsuit cannot be brought outside of probate. *See, e.g., Ferguson v. Exide Techs., Inc.*, 936 N.W.2d 429, 433 (Iowa 2019) (noting that “[w]here the legislature has provided a comprehensive scheme for dealing with a specified kind of dispute, the statutory remedy provided is generally exclusive.”) (citation omitted); *Id.* at 435 (“we need not provide an alternative court remedy when the legislature already provided one”).

In the Estate of Roger Rand, Plaintiff challenged the fees requested by the executor, and asserted breach of fiduciary duty. *See* Exhibit 10, at 5 (“• Once the

Personal Representative starts acting in that capacity, it is acting as a fiduciary to the Estate and beneficiaries and it has a duty to clearly and unambiguously disclose to them that it intended to charge and ask the Court for permission to charge the maximum allowed by the Iowa Probate Code. • The Bank has a fiduciary duty to the Estate and the beneficiaries of the Estate to not charge an unreasonably high fee and the schedule they set out in Exhibit B sets out an unreasonably high fee.”). Plaintiff has already had a forum where his claims of breach of fiduciary duty were asserted and weighed.

The District Court granted Plaintiff relief regarding the fees of SNB, reducing the amount of ordinary fees requested by the Executor. That decision is final, with the Plaintiff having chosen not to appeal it. Providing a separate tort to relitigate fee disputes is unnecessary and an impermissible collateral attack where, as here, the legislature has provided a comprehensive scheme for adjudicating probate fees and claims of malfeasance by executors. If probate fiduciaries are subjected to tort liability for filing fee applications, after their fees have been finally determined by the District Court sitting in probate, that will have a chilling effect on the willingness of persons to serve as executors and will add significant delay and expense to the probate process.

None of the fiduciary duty cases cited by Plaintiff, whether from Iowa or other jurisdictions, dealt with a dispute over probate fees. *Kurth v. Van Horn*, cited by the

Plaintiff as an example, was a lawsuit brought against a bank alleging fraud and breach of fiduciary duty with respect to a commercial loan. *Kurth*, 380 N.W.2d 693, 694 (Iowa 1986). It was not brought in probate because there was no estate. *Kurth* did not involve a fee dispute in probate. Fee disputes unquestionably fall within the jurisdiction of the probate court. *Matter of Estate of Lamb*, 584 N.W.2d 719, 723 (Iowa Ct. App. 1998) (“We also reject Duane's claim that the petitioner's request for attorney fees and expenses related to their efforts to compel delivery of Wava's will was a private dispute outside of the district court's probate jurisdiction. Iowa Code section 633.285 provides:

After being informed of the death of the testator, the person having custody of the testator's will shall deliver it to the court having jurisdiction of the testator's estate. Every person who willfully refuses or fails to deliver a will after being ordered by the court do so shall be guilty of contempt of court. The person shall also be liable to any person aggrieved for the damages which may be sustained by such refusal or failure.

The rights, duties, and remedies included within the terms of this statute cannot be fairly described as matters nonessential to or unrelated to rights derived from an interest in a decedent's estate.”); *see also* Iowa Code §§633.197 *et seq.*

**2. Principles of Collateral Estoppel bar relitigation of the fee dispute in tort.**

No matter how the Plaintiff attempts to dress up his claims, this is a fee dispute and a collateral attack on the fee order entered in the probate proceedings. As the District Court noted:

Similarly, Plaintiff in the within matter is effectively attacking the Executor and attorney fee order in the Estate proceeding when he already had a direct attack on such claims. Plaintiff is effectively attacking Defendant's action as Executor in the administration of the Estate when a direct attack (breach of fiduciary duty) is available in the Estate proceeding. Plaintiff is effectively asserting these collateral attacks in hopes of submitting to a jury claims for damages that would be more generous than available in probate.

District Court ruling, at 13. The District Court is correct. Plaintiff claims that he lost the chance to negotiate for lower *probate fees*. He claims he was misled about the formula for determining *probate fees*. He claims to be emotionally distressed because he was not told the truth about how *probate fees* could be negotiated. The forum and procedure for challenging the probate fees is exclusively entrusted to the Probate Court, according to the provisions of the Probate Code. No independent tort lawsuit has been recognized by the Iowa Courts for such disputes, and summary judgment was properly granted in favor of Security National Bank.

Plaintiff alleges that he was damaged because the fees claimed by SNB and the Crary Law Firm were excessive. However, the fair and reasonable value of the services provided by the Personal Representative and the Attorney for the Estate of Roger Rand has already been conclusively determined by Judge Deck sitting in probate and the doctrine of issue preclusion bars re-litigation of this issue. "In



general, the doctrine of issue preclusion prevents parties to a prior action in which judgment has been entered from relitigating in a subsequent action issues raised and resolved in the previous action.” *Hunter v. Des Moines*, 300 N.W.2d 121, 123 (Iowa 1981).

Before issue preclusion may now be employed in any case, these four prerequisites must be established: (1) the issue concluded must be identical; (2) the issue must have been raised and litigated in the prior action; (3) the issue must have been material and relevant to the disposition of the prior action; and (4) the determination made of the issue in the prior action must have been necessary and essential to the resulting judgment.

*Hunter*, 300 N.W.2d at 123; *see also Matter of Estate of Bruene*, 350 N.W.2d 209, 213 (Iowa 1984). “As we have noted in prior cases, the doctrine may be utilized in either a defensive or an offensive manner.” *Hunter*, 300 N.W.2d at 123. “The phrase ‘defensive use’ of the doctrine of [issue preclusion] is used here to mean that a stranger to the judgment, ordinarily a defendant in the second action, relies upon a former judgment as conclusively establishing in his favor an issue which he must prove as an element of his defense.” *Goolsby v. Derby*, 189 N.W.2d 909, 913 (Iowa 1971).

Issue preclusion may properly be applied [defensively] as between nonmutual parties where the four prerequisites delineated above are satisfied and where the party against whom the doctrine is invoked defensively “was so connected in interest with one of the parties in the former action as to have had a full and fair opportunity to litigate the relevant claim or issue and be properly bound by its resolution.”

*Hunter*, 300 N.W.2d at 123 (quoting *Bertran v. Glens Falls Ins. Co.*, 232 N.W.2d 527, 533 (Iowa 1975)). “All orders and decrees of the court sitting in probate are final decrees as to the parties having notice and those who have appeared without notice.” Iowa Code § 633.36 (2021). Probate finality, as codified in Iowa Code §633.36 is an important public policy. The steps to the probate process must be carried out in an orderly fashion to facilitate the timely transfer of assets and the closing of estates. Allowing an independent tort action to collaterally attack final orders is inconsistent with the statutorily-recognized policy of probate finality and inserts delay, uncertainty, and additional expense into the probate process.

On August 24, 2018, the Woodbury County Court, sitting in probate, addressed the issue of reasonable and proper fees for both the Personal Representative and the Attorney for the Estate of Roger Rand. Exhibit 11. This Order followed three days of hearings which were attended by, among others, Plaintiff, Plaintiff’s attorney, and representatives of SNB and the Crary Law Firm. Exhibit 11, at 1. Following its review of the evidence, the Court denied portions of the requested fees, holding that the reasonable fee for the Personal Representative was \$160,000.00 and the reasonable fee for the Attorney’s ordinary services was \$205,000.00. Exhibit 11, at 22. The Court further determined that the Attorney was entitled to extraordinary fees of \$107,000.00 and extraordinary expenses of \$3,568.23 for the period up to and including September 30, 2017. Exhibit 11, at 22.

This final ruling has the preclusive effect, under collateral estoppel principles, of barring Plaintiff's attempt to relitigate and seek greater damages from SNB related to the probate fee dispute.

**C. The District Court properly determined that the alleged breaches of fiduciary duty asserted by Plaintiff are not recognized under Iowa law.**

Plaintiff's allegations with respect to the alleged fiduciary duties of SNB are as follows:

12. Included in its obligation as fiduciary, Security National Bank has an obligation to fully and accurately notify the beneficiaries, including Todd Rand, of its fees and how its fees as a Personal Representative are capped by a statutory maximum.
13. Security National Bank as a fiduciary has the obligation to be honest with the beneficiaries of estates it administers as Personal Representative.
14. Security National Bank has the fiduciary obligation not to misrepresent to beneficiaries that the Iowa statutory maximum fee is the fee that it is required to charge rather than the maximum fee it may charge.
15. Likewise Security National Bank has a fiduciary duty to disclose to beneficiaries that it may hire an attorney at less than the statutory maximum probate fee.

Petition, at ¶¶ 12–15. The District Court properly determined that these allegations did not accurately state Iowa law and are not fiduciary duties imposed upon the executor of an estate, holding as follows:

For purpose of this Summary Judgment Motion, the Court agrees with Plaintiff that a fiduciary relationship existed between Defendant and Plaintiff. Not all actions, conduct, or circumstances occurring as part of a fiduciary relationship, however, involve fiduciary “duties.” *See, e.g., Stender v. Blessum*, 897 N.W.2d 491, 506-508 (Iowa 2017) (discussing and noting specific “duties” of attorney-client fiduciary relationship). *See also, Behrens v. Wedmore*, 698 N.W.2d 555, 573-577 (S.D. 2005) (concluding that attorney’s failure to charge a reasonable fee or failure to timely communicate basis for fee in violation of Rules of Professional Conduct did not involve or violate a “fiduciary duty”).

The Executor under Chapter 633 has no duty to advise beneficiaries of the law applicable to Executor fees and attorney fees. An Executor of an Estate has no duty to advise beneficiaries that a request to have the Executor removed and a successor appointed can be filed in accordance with Chapter 633. The Executor has no duty to advise beneficiaries that they have a “right” to hire a different attorney to represent the Estate; there is no duty and no such right exists. The attorney is hired and represents the Executor, and beneficiaries have no unilateral authority to “hire” or “fire” that attorney. Similarly, an Executor has no duty to advise beneficiaries of a “right” to negotiate either the Executor fees or attorney fees; again, there is no duty and no such “right” exists.

District Court Ruling, at 14-15.

The District Court correctly held that none of these alleged fiduciary duties exist within the statutory requirements of Iowa Code Chapter 633. With respect to fees, the obligations of a fiduciary are determined by the Iowa code and probate rules. The procedure followed by SNB in seeking executor fees was entirely consistent with Iowa statutes and rules. Iowa Rule of Probate Procedure 7.2 provides, in relevant part, that:

7.2(1) Every report or application requesting an allowance of fees for personal representatives or their attorneys shall be written and verified as provided in Iowa Code section 633.35.

7.2(2) When fees for ordinary services are sought pursuant to Iowa Code sections 633.197 and 633.198, proof of the nature and extent of responsibilities assumed and services rendered shall be required. Unless special circumstances should be called to the court's attention, the contents of the court probate file may be relied upon as such proof.

Iowa Ct. R. 7.2. SNB filed a written and verified application for order fixing fees for ordinary services fees on October 20, 2017, which followed the requirements of Iowa Code section 633.35. Exhibit 9. Following receipt of notice of hearing on the application for fees, Plaintiff filed his resistance and objection on November 2, 2017. Exhibit 10.<sup>3</sup> The Court decided the matter after full discovery and three days of testimony, rendering its opinion in August 2018. Exhibit 11.

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<sup>3</sup> Months before the application for executor fees were filed, Plaintiff had hired an attorney to represent him on the issue of probate fees. On February 9, 2017, attorney Munger inquired of Mr. Storm of the Crary Law Firm by letter about his fees, as well as Defendant's fees. Exhibit 7. On February 16, 2017, Mr. Storm replied by letter and informed attorney Munger that the attorney fees and personal representative fees are fixed by the Court. Exhibit 8. Mr. Storm cited Iowa Code Section 633.197 for compensation of the personal representative for ordinary services and Section 633.198 for compensation of the attorneys for the personal representative for ordinary services. *Id.* The letter stated that "the Personal Representative will be filing an Application for Fees for ordinary services for the Personal Representative at some time in the future requesting that the Court allow reasonable fees in accordance with the Iowa statutes and probate code." *Id.*

Plaintiff did not allege that any acts of SNB violated express provisions of Chapter 633. Plaintiff's claims are not grounded on any Iowa statute or rule, but seek to change long-standing Iowa practice regarding fees in probate. *In re Estate of Johnson*, 2006 WL 3615055, at \*1 (Iowa Ct. App. 2006) (“We have stated, ‘It is customary, as followed in this case, for the attorney and executor fees to be set by the court on application by the executor prior to the final report, usually following the submission of the probate inventory.’ Furthermore, ‘It is equally common for the maximum ordinary fee allowed by statute to be requested and approved by the court....’”) (citing *Estate of Randeris v. Randeris*, 523 N.W.2d 600, 606 (Iowa Ct. App. 1994)). Iowa Rule of Probate Procedure 7.2 does not require any sort of antecedent notice to beneficiaries concerning the language of Iowa Code Section 633.197. *See* Iowa Ct. R. 7.2. Nor does it require an executor to advise beneficiaries that there may be other executors or attorneys who might do work on an hourly basis, rather than requesting the statutory maximum fee. *Id.* The beneficiaries of the estate received the statutorily prescribed notice and Plaintiff successfully challenged the fees requested by the executor and attorney for the estate.

The Probate Code does not require personal representatives to submit an itemized claim or report. While itemization is required of fiduciaries other than personal representatives, Iowa Code Section 633.200 specifically excludes personal representatives from the itemization requirement. That statute provides that “[t]he

court shall allow and fix from time to time the compensation for fiduciaries, *other than personal representatives*, and their attorneys for such services as they shall render as shown by an itemized claim or report made and filed setting forth what services consist of during the period of time they continue to act in such capacities.” Iowa Code § 633.200 (emphasis added). There were no deficiencies in the manner in which the fee application was handled. Every aspect of it followed the applicable Iowa statutes and rules.

A violation of the Iowa Code provisions regarding compensation of personal representatives and executors does not give rise to a claim for a breach of fiduciary duty. The Probate Code identifies the acts that it considers to be a breach of fiduciary duty. Iowa Code § 633.160 (2021). Making a claim for compensation pursuant to Iowa Code Section 633.197 is not one of those acts. *Id.* Instead, the list of items which constitute a breach of fiduciary duty are “neglect or unreasonable delay in collecting the credits or other assets of the estate”, “neglect in paying over money or delivering property of the estate”, “failure to account for or to close the estate within the time provided by this probate code”, “any loss to the estate arising from the fiduciary's embezzlement or commingling”, “loss to the estate through self-dealing”, “loss to the estate arising from wrongful acts or omissions of any cofiduciaries which the fiduciary could have prevented”, and “any other negligent

or willful act or nonfeasance in the fiduciary's administration of the estate by which loss to the estate arises.” Iowa Code § 633.160 (2021).

While it is clear that an executor is a fiduciary, not all duties of an executor are fiduciary duties or give rise to a claim for breach of fiduciary duty. Not all conduct by a fiduciary can give rise to a claim for breach of fiduciary duty. In Iowa, for example, lawyers are clearly fiduciaries. *Stender v. Blessum*, 897 N.W.2d 491, 506 (Iowa 2017) (“At the outset, we recognize that the creation of an attorney-client relationship does impose on attorneys certain fiduciary duties.”). Yet, while attorneys are fiduciaries, “[t]he creation of an attorney–client relationship does not, however, impose upon the attorney fiduciary duties that extend on indefinitely.” *Id.* A violation of a lawyer disciplinary rule (e.g. a sexual relationship between attorney and client) does not, “by itself, give[] rise to an independent cause of action for breach of fiduciary duty.” *Id.* The fiduciary duties a lawyer owes a client are limited to “safeguarding the client’s confidences . . . and property . . .; avoiding impermissible conflicting interest . . .; dealing honestly with the client . . .; adequately informing the client . . .; following instructions of the client . . .; and not employing adversely to the client powers arising from the client-lawyer relationship.” *Id.* at 509 (citing Restatement (Third) of the Law Governing Lawyers §§ 16(3) and 49).



Similarly, Iowa Code Section 633.160 establishes the acts which, if committed by a fiduciary, would constitute a breach of *fiduciary* duty. An executor may have other duties which are imposed upon it by statute—such as the requirement of seeking court approval for fees—which are not fiduciary duties. Therefore, even if that statutory duty is not fulfilled, it does not necessarily follow that an independent cause of action for breach of fiduciary duty is created. Only a breach of the duties contained in Iowa Code Section 633.160 can give rise to a cause of action for breach of fiduciary duty.

On this point, an opinion of the South Dakota Supreme Court is instructive. In *Behrens v. Wedmore*, the South Dakota Supreme Court addressed whether a breach of fiduciary duty claim should have been given to the jury in a legal malpractice case where the lawyer allegedly asserted that his fee would be a flat 1% of the transaction after most of the work had been done. *Behrens v. Wedmore*, 698 N.W.2d 555 (S.D. 2005). With respect to the fee dispute, the South Dakota Supreme Court held that the case did not present a claim for breach of fiduciary duty. The South Dakota Supreme Court noted that, “in analyzing this issue, we see no legal error because a failure to charge a reasonable fee or a failure to timely communicate the basis of a fee in violation of Rule 1.5 does not automatically establish a breach of a fiduciary duty.” *Id.* at 575. The *Behrens* opinion further explained:

In this case, Behrens were not entitled to a breach of fiduciary duty instruction because they were unable to establish that the failure to

communicate the basis of the fee, or the dispute over the reasonableness of the fee, involved a breach of a fiduciary duty; i.e., one involving confidentiality or loyalty. We note that numerous courts have discussed breach of fiduciary duty when an attorney embezzles, engages in conflicts of interest, or violates obligations of loyalty, thus violating the common-law duty of a fiduciary. However, no such facts were presented in this case. Therefore, we believe that, absent some showing of misuse of trust, conflict of interest, breach of loyalty, or other conduct involving honesty and fair dealing in the attorney-client relationship, an untimely disclosure and subsequent disagreement over the reasonableness of a fee does not necessarily involve a breach of a fiduciary duty.

*Id.* at 576–77. Applying the rationale of *Behrens* to the facts of this case, an untimely or incomplete disclosure of the fee that Security National Bank intended to seek does not by itself create a breach of fiduciary duty absent a concurrent violation of Iowa Code Section 633.160 (such as embezzlement and self-dealing). *See also Martin v. Bell Orr Ayers & Moore, P.S.C.*, 2018 WL 4037818, \*10 (Ky. App. 2018) (“We hold Kentucky does not recognize a claim of legal malpractice or breach of fiduciary duty based solely on a fee dispute between an executor or attorney of an Estate and the client in a probate case.”); *cf. Sears Roebuck & Co. v. Goldstone & Sudalter*, 128 F.3d 10, 17 (1<sup>st</sup> Cir. 1997) (“However, attorneys, like fiduciaries generally, are entitled to receive compensation for their services, and may pursue their legitimate interests in receiving payment in the ordinary fashion. Thus, seeking to enforce a valid fee contract is an exception to the general requirement that fiduciaries subordinate their interests to those of their clients.”). The District Court properly

rejected Plaintiff's attempt to transform a dispute about ordinary executor's fees into a breach of fiduciary duty claim. The obligations of an executor with respect to a fee application simply are not fiduciary duties.

## **II. The District Court Correctly Granted Summary Judgment in Favor of SNB on Plaintiff's Claim for Negligent Misrepresentation.**

### **A. Preservation of Error.**

SNB agrees that this issue was raised in its motion for summary judgment and was ruled on by Judge Andreasen. The District Court decided the issue adversely to Plaintiff. District Court Ruling, at 16-21, 39. The issue was raised and decided in the Summary Judgment Ruling, and error has been preserved.

### **B. The District Court Properly Determined that Plaintiff could not establish the elements of a claim for negligent misrepresentation.**

The District Court noted that Plaintiff's negligent misrepresentation claim relied upon an identical set of facts as the Plaintiff's breach of fiduciary duty claim:

In the within matter, Plaintiff's alleged misrepresentations are essentially identical to the factual allegations supporting Plaintiff's breach of fiduciary duty cause of action. The alleged misrepresentations are the information given and statements made by Defendant in regard to executor and attorney fees. Based upon the record submitted and viewing that record in a light most favorable to Plaintiff, the Court concludes that Defendant is entitled to Judgment of dismissal as a matter of law in regard to this negligence and misrepresentation cause of action. The only "misrepresentation" alleged by Plaintiff is governed by the Probate Code.

District Court Ruling, at 19. Ultimately, the District Court determined that a remedy for negligent misrepresentation did not exist in tort for this fee dispute, and that Plaintiff's sole recourse was to pursue the remedies provided in the Probate Code:

Again, a negligence claim requires proof of a duty to act, a breach of that duty, and resulting damages. In the within matter, the only duty that existed between Defendant and the Plaintiff was the fiduciary duty of Defendant as Executor to Plaintiff as a beneficiary under the Probate Code and in the Estate proceedings. For the same reasons discussed above, this Court concludes that such breach of duty claims (whether captioned as fiduciary or negligence) are exclusively addressed within the Probate Code and the Estate proceedings and that a separate cause of action at law is not recognizable.

*Id.* at 21. The logic and caselaw cited in the District Court's analysis with respect to the breach of fiduciary duty claim apply with equal force to the tort of negligent misrepresentation. There is a statutory remedy for breach of fiduciary duty which provides a remedy for any other negligent or willful act or nonfeasance in the fiduciary's administration of the estate. *See* Iowa Code § 633.160 (2021).

**1. The District Court properly found that Plaintiff could not establish that he relied upon the September 2016 letter.**

While the finding that Plaintiff did not have a tort remedy was correct and sufficient by itself, the District Court also discussed the merits of the negligent misrepresentation claim. The District Court correctly found that in most instances Plaintiff alleged a failure to inform, which is not a misrepresentation upon which a negligent misrepresentation claim can be based:

Plaintiff's other claims, however, involve a failure to inform or mere silence. Plaintiff's factual allegations that Defendant failed to inform or advise him of the "rights" to retain a different executor, negotiate a lower executor fee, retain a different attorney for the executor, and/or negotiate or enter into a different fee arrangement or contract with the attorney for the Estate, therefore, cannot form the basis of the negligent misrepresentation claim.

*Id.* at 19. On this point, the District Court correctly cited Iowa precedent. *See Wilden Clinic, Inc., v. City of Des Moines*, 229 N.W.2d 286, 292-293 (Iowa 1975) (noting that mere silence or concealment of a fact or information is not misrepresentation unless there is some affirmative legal duty to communicate such fact or information to the other party).

The District Court then analyzed the only remaining alleged misrepresentation, found in the September 2016 letter, in which SNB arguably asserted that the schedule in Iowa Code § 633.197 provided the fee calculation, rather than stating the maximum fee calculation. On that point, the District Court properly found that there was no evidence that the Plaintiff relied upon the September 2016 letter:

Viewing the record in a light most favorable to Plaintiff and for the reasons discussed more in regard to the Fraud claim, the Court concludes that no reasonable jury could find that Plaintiff relied upon the alleged "misrepresentation" made regarding fees in the September 2016 correspondence.

District Court Ruling, at 21. "The tort of negligent misrepresentation requires proof that the plaintiff justifiably relied on the representation made by the defendant."

*Pollmann v. Belle Plaine Livestock Auction, Inc.*, 567 N.W.2d 405, 409 (Iowa 1997).

In denying the fraud claim, the District Court properly made this observation about the reliance element:

Plaintiff retained counsel in the Estate proceedings no later than February 2017 when his attorney exchanged correspondence with the attorney for the Estate. At that time (February 2017 at the latest), Plaintiff would have known through counsel for Defendant that the ordinary fees of Defendant as Executor and attorneys for the Estate were to be determined by the Court; that the maximum ordinary fees to be awarded would be the percentages of the value of the assets that were set forth in the initial September 2016 letter; and that Defendant as Executor was intending to apply for Executor fees and attorney fees in accordance with the Probate Code, specifically including those statutory maximums. Any misrepresentation regarding fees in the initial September 2016 (no reference to “maximum” allowed) were therefore corrected through that February 2017 correspondence between counsel. No reasonable jury could find that Plaintiff took some action or failed to take some action to his detriment between September 2016 and February 2017 in reliance upon Defendant’s statement that the Executor and attorney fees were based upon the value of the assets and were computed based upon those percentages as reflected in the September 2016 correspondence.

District Court Ruling, at 25-26. The District Court is correct. There is no evidence in this case that Plaintiff actually relied on the September 2016 letter. Instead, Plaintiff challenged the fees sought by SNB. *See* Exhibits 9-11.

**2. The District Court properly found that Plaintiff cannot establish that he suffered damages due to the September 2016 letter.**

Plaintiff alleges that he potentially has additional damages because the September 2016 letter foreclosed him from the opportunity to seek another executor that would agree to do the job for less than SNB. The existence of a willing, cheaper

and competent, alternate executor (that would have been acceptable not only to Plaintiff but also to the other beneficiaries of the Estate) is pure speculation, unsupported by anything in the record.

On damages, the District Court held as follows:

More importantly, the court in the Estate proceeding already ordered lower executor fees and lower attorney fees than the statutory amounts requested and represented to Plaintiff in the September 2016 correspondence. Plaintiff's claimed damages and remedy has, therefore, already been received. No reasonable jury could find additional monetary damages in this regard.

In regard to the executor fee issue, Plaintiff also conceded in his deposition that he and the other beneficiaries would not have been suitable co-executors because they were not on good terms. There is no factual issue raised, therefore, and no reasonable jury could find that the probate court would have appointed the beneficiaries as successor co-executors who would have waived a fee, thus reducing the executor fees further below the amount ordered in the Estate proceeding.

District Court Ruling, at 30.

As the Iowa Supreme Court has recently noted, “[s]ummary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.” *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) (internal quotations omitted) (citing *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)). Plaintiff has no evidence of damages with respect to the alleged negligent

misrepresentation, and the District Court properly dismissed the negligent misrepresentation claim.<sup>4</sup>

Perhaps recognizing the lack of actual evidence of a willing, cheaper and competent, alternate executor (that would have been acceptable not only to Plaintiff but also to the other beneficiaries of the Estate), Plaintiff asserts a “lost chance of contracting” theory. Plaintiff cites *Wendland v. Sparks*, 574 N.W.2d 327, 332 (Iowa 1998) for the proposition that the lost opportunity to contract is a viable claim in Iowa. *Wendland*, however, is a lost chance of survival medical malpractice case. *Wendland* has not been applied outside of the negligent diagnosis context, and has never been applied in a probate fee dispute or any contractual situation in Iowa.

Lost opportunity to contract is not a recognized tort doctrine in Iowa. In an appropriate situation, a party may seek a contract remedy for reimbursement based upon a “reliance interest” for lost opportunities to make other contracts. *Potter v. Oster*, 426 N.W.2d 148, 150 (Iowa 1988). Nothing in the *Potter* case obligates an Iowa Court to speculate as to the existence of a hypothetical executor that would accept unreasonably low compensation for performing that role. Any contract theory

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<sup>4</sup> Plaintiff’s discovery answers note that he is not seeking compensatory damages for the alleged misrepresentation. Instead, he is only seeking punitive damages, emotional distress damages, and recovery of attorney’s fees for contesting the fee application. Exhibit 15, Plaintiff’s Second Supplemental Answers to Defendant’s Interrogatories, at Interrogatory 10 (citations omitted).



of recovery, moreover, is of no benefit to Plaintiff in this attempted tort lawsuit, since Plaintiff has already exercised and received the relief that can be awarded under contract law.

The fee proceedings in the probate of the Estate of Roger Rand have determined the fair value of the ordinary services provided by the Executor on a quasi-contract or *quantum meruit* basis. *In re Estate of Johnson*, 2006 WL 3615055, 728 N.W.2d 224 (Table) (Iowa Ct. App. 2006) (“Sections 633.197 and 633.198, which permit the award of ordinary fees to an estate's executor and attorney, are founded on the theory of quantum meruit. *In re Estate of Bolton*, 403 N.W.2d 40, 43 (Iowa Ct.App.1987). The executor and attorney for an estate are entitled to the reasonable value of their ordinary services. *Id.*”). No other contract remedy is available, since a quantum meruit proceeding is exclusive of a cause of action on an express contract. *Kunde v. Estate of Bowman*, 920 N.W.2d 803, 807 (Iowa 2018). Plaintiff successfully took the opportunity to challenge the requested fees in the probate action. No damages for lost opportunity to contract are available to him.<sup>5</sup>

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<sup>5</sup> The District Court also noted that any compensatory damages would belong to the Estate of Roger Rand, rather than Plaintiff. District Court Ruling, at 29 (“[I]f the fact finder were to find that Defendant breached its fiduciary duty as alleged by Plaintiff, the resulting compensatory damages would presumably be reduced fees either negotiated with Defendant or charged and paid to a different executor or different attorneys. These reduced fees would have increased the value of the Estate. Plaintiff even asserts such diminution of value as damages. Such diminution of value, however, is to the Estate. It is to be addressed within the Estate proceeding

### **III. The District Court Correctly Granted Summary Judgment Dismissing Plaintiff’s Fraud Claims.**

#### **A. Preservation of Error.**

SNB agrees that the claim of fraud was raised in its motion for summary judgment and was ruled on by Judge Andreasen. The District Court decided the issue adversely to Rand. District Court Ruling, at 21-27, 39. Thus, the issue was raised and decided in the Summary Judgment Ruling, and error has been preserved.

#### **B. The District Court properly found that Plaintiff could not maintain his common law cause of action for fraud.**

The District Court correctly determined that Plaintiff did not have a common law cause of action for fraud. In discussing the existence of remedies in probate under Iowa Code § 633.160, the District Court cited the recent Iowa Supreme Court case of *Youngblut v. Youngblut*, 945 N.W.2d 25 (Iowa 2020). While noting that *Youngblut* dealt with a different question—whether a cause of action for tortious

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and is not a monetary damage that Plaintiff can recover individually in a separate legal action. *See, e.g.*, Iowa Code Section 633.162, 633.160.”).

On appeal, Plaintiff baldly claims that he “should be able to bring tort claims in District Court for damages, whether those damages were suffered by him personally or by the Estate.” Appellant’s Brief, at 57. But Plaintiff cites no authority for the proposition that he should individually be able to recover belonging to the Estate of Roger Rand, and that assertion should be considered to be waived. *See* Iowa R. App. P. 6.903(2)(g)(3) (“Failure to cite authority in support of an issue may be deemed waiver of that issue”).

interference with a bequest is available when no will contest has been filed—the District Court observed that the Iowa Supreme Court has found that tort remedies for fraud are not available where a probate remedy exists and has already been utilized. The District Court explained that in *Youngblut*:

The Court further cited prior case law in which it was held that heirs could not bring a separate, stand-alone fraud action against the executor and other beneficiary of a Will because the action was a collateral attack on the order of the probate court admitting the Will and a direct attack was available to the plaintiffs within the probate proceeding. *Youngblut*, 945 N.W.2d at 30 (citing *Gigilos v. Stavropoulos*, 204 N.W.2d 619, 622 (Iowa 1973)).

District Court Ruling, at 12. In *Gigilos v. Stavropoulos*, the Iowa Supreme Court’s holding was succinct: “The fact the parties disagree on whether there was fraud is not material on the question of the appropriateness of a motion for summary judgment. It is not material because defendants rightly insist the plaintiffs, in point of law, cannot assert such fraud *in this collateral proceeding.*” *Gigilos v. Stavropoulos*, 204 N.W.2d 619, 622 (Iowa 1973) (emphasis added). As in *Youngblut* and *Gigilos*, a direct attack was available on the probate fee application, and that remedy was utilized by Plaintiff in the probate proceedings. The claim of fraud that was unavailable in *Gigilos* due to collateral estoppel is unavailable here for the same reason.

While concluding that no cause of action for fraud exists outside of the probate proceedings, the District Court went on to consider the merits of the fraud claim and

correctly held that no reasonable jury could have found in favor of the Plaintiff with respect to fraud. With respect to the element of reliance, the District Court noted that Plaintiff hired counsel and contested the probate fee application, and could not show any reliance on the September 2016 letter:

[T]he Court concludes that no reasonable jury could find that Plaintiff incurred attorney fees as a result of the September 2016 correspondence and misrepresentation of the law on fees. In fact, Plaintiff's retention of counsel and incurrence of attorney fees directly contradicts his claim. If Plaintiff relied on the misrepresentation that the statutory percentages were required by law as claimed, he would not have hired an attorney or resisted the fee application. He would have accepted it as the law. Plaintiff, therefore, did not hire an attorney because of the misrepresentation; he hired an attorney because Defendant was going to request the statutory maximum Executor and attorney fees as indicated in that September 2016 letter.

District Court Ruling, at 31-32.

**IV. The District Court properly granted summary judgment with respect to Plaintiff's claim for attorney's fees, emotional distress, and punitive damages.**

In the remaining portions of Appellant's brief, Plaintiff asserted that the District Court erred in dismissing his claims for attorney's fees, emotional distress and punitive damages.

**A. Preservation of Error.**

SNB agrees that these issues were raised in its motion for summary judgment and were ruled on by Judge Andreasen. The District Court decided these issues

adversely to Rand. District Court Ruling, at 31-39. Thus, the issues were raised and decided in the Summary Judgment Ruling, and error has been preserved.

**B. The District Court properly granted summary judgment with respect to Plaintiff's claim for attorney's fees.**

While Plaintiff alleges that he has been damaged in the amount that he paid his attorney to contest the fee application, the District Court properly determined that Plaintiff had no compensable claim for attorney's fees. Iowa law creates no burden shifting with respect to resisting probate fee applications, and Plaintiff has no contractual basis for asserting entitlement to attorney fees. "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 Sickle*, 659 N.W.2d 572, 579 (Iowa 2003); *see also Thornton v. Am. Interstate Ins. Co.*, 897 N.W.2d 445, 474 (Iowa 2017) ("Iowa follows the American rule: the losing litigant does not normally pay the victor's attorney's fees.").

In order to justify an award of attorney's fees "the opposing party's conduct must rise to the level of oppression or connivance to harass or injure another." *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 159-60 (Iowa 1993). "Oppressive conduct denotes conduct that is difficult to bear, harsh, tyrannical, or cruel." *Williams*, 659 N.W.2d at 579 (internal quotation omitted). "Connivance is defined as voluntary blindness or an intentional failure to discover or prevent the wrong." *Id.* (internal quotation

omitted). “These terms envision conduct that is intentional and likely to be aggravated by cruel and tyrannical motives.” *Hockenberg*, 510 N.W.2d at 159. “Such conduct is more than mere bad faith and must be more extreme than the willful and wanton disregard for the rights of another required for punitive damages.” *East Iowa Plastics, Inc. v. PI, Inc.*, 889 F.3d 454, 458 (8th Cir. 2018).

“The Supreme Court of Iowa has applied this standard on at least eight occasions, and denied common law attorney’s fees in all but one.” *East Iowa Plastics*, 889 F.3d at 458. “In the one outlier case, a county treasurer had filed suit .... [and] in an effort to foreclose a showing of reliance, the county treasurer (an elected public official) fabricated two letters that she claimed she had sent to the taxpayers.” *Id.* “She then ‘compounded the fraud by offering [the letters] as evidence at trial. ... *At this point* ... the treasurer crossed the line’ into oppressive or conniving conduct.” *Id.* (alterations in original) (quoting *Williams*, 659 N.W.2d at 581). Additionally, the Iowa Supreme Court has specifically rejected an award of common law attorneys’ fees in a case where the plaintiff was forced to engage in costly litigation as a result of the defendant’s fraudulent misrepresentation. *Dier v. Peters*, 815 N.W.2d 1, 10, 14 (Iowa 2012) (“Dier has alleged that he was forced to engage in custody litigation as a result of Peters’ fraudulent misrepresentation .... [W]hile Dier may pursue recovery of monies provided to Peters or spend for the benefit of the minor child (assuming he was not under a court order to make these

payments), he may not recover attorneys' fees and costs incurred in the prior custody litigation with Peters.”).

In this case, Plaintiff makes no allegations that rise nearly to the level of the fabrication of evidence by a public official with the intent to deceive the Court. *Compare* *Petition with Williams*, 659 N.W.2d at 581. The actions of SNB were not in bad faith, as SNB did not ask for an improper amount of executor fees and followed the statutory process for requesting those fees. Plaintiff alleges conduct that doesn't even rise to the level of the conduct of the defendant in *Dier*, a case where the Supreme Court properly barred recovery of common law attorney's fees. As Plaintiff has failed to even allege conduct sufficient to overturn the strong presumptions and policies inherent in the American rule, his claim for common law attorney's fees was properly dismissed.

**C. Plaintiff's claim for emotional distress was properly dismissed at the summary judgment stage.**

The District Court properly dismissed Plaintiff's request for emotional distress damages. Plaintiff asserted that he has emotional distress damages because Defendant and their attorneys asked for the maximum statutory amount of fees and because of his “discovery that his father's estate is being probated by an executor that was untrustworthy and didn't have his or his family's best interest in mind.” Exhibit 15, at Interrogatory 10. But emotional distress damages arising out of a probate fee dispute are not recoverable for two reasons. First, this is not the type of

case which is so coupled with matters of mental concern or solicitude that a breach of duty will necessarily or reasonably result in mental anguish or suffering. Second, Plaintiff did not provide any expert evidence of emotional distress.

First, a party may not recover damages for emotional distress premised on negligence without physical harm. *Lawrence v. Grinde*, 534 N.W.2d 414, 420 (Iowa 1995). Iowa courts have carved out an exception “where the nature of the relationship between the parties is such that there arises a duty to exercise ordinary care to avoid causing emotional harm.” *Id.* As the Iowa Court of Appeals stated:

We must look to see whether the relationship was so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering would result from its breach.

*Miranda v. Said*, 2012 WL 2410945, at \*4 (Iowa Ct. App. 2012) (internal quotations omitted) (citing *Lawrence*, 534 N.W.2d at 421). There must be “both a close nexus to the action at issue and extremely emotional circumstances. *Lawrence*, 534 N.W.2d at 420. The emotional distress must “naturally ensue from the acts complained of.” *Id.* at 423.

This is not such a case. The District Court properly distinguished this case from one in which emotional distress is recoverable under *Miranda v. Said*, 836



N.W.2d 8, 14 (Iowa 2013). This is a probate fee dispute. As the District Court noted:

The type of relationship between Defendant and Plaintiff does not meet the high standard set forth by Iowa law for recovery of emotional distress damages absent physical injury. The relationship is not “so coupled with matters of mental concern or solicitude, or with the sensibilities of the party to whom the duty is owed, that a breach of that duty will necessarily or reasonably result in mental anguish or suffering, and it should be known to the parties from the nature of the [obligation] that such suffering will result from its breach.” *Miranda*, 836 N.W.2d at 15.

District Court Ruling, at 34.

Although emotional distress damages have been allowed for certain intentional torts in Iowa, they have not been allowed for fraudulent misrepresentation. *Cornell v. Wunschel*, 408 N.W.2d 369, 382 (Iowa 1987). The rationale for this limitation is that people will necessarily experience some degree of emotional distress as a secondary consequence of monetary loss. 8 Iowa Practice, Civil Litigation Handbook § 18:17.

Second, even if Plaintiff was allowed to pursue a claim for emotional distress damages, Plaintiff in this case must present evidence of emotional distress damages and that these damages were caused by the allegedly negligent conduct. *See* Iowa Uniform Jury Instruction 700.1; *Doe v. Central Iowa Health Syst*, 766 N.W.2d 787 (Iowa 2009) (holding that there was insufficient evidence of mental distress caused by Defendant’s negligence). Plaintiff needs expert testimony to prove causation of

emotional distress damages unless the causation is so obvious that it is within the common knowledge and experience of a lay person. *Vaughn v. Ag Processing, Inc.*, 459 N.W.2d 627, 637 (Iowa 1990). In this case, not only is there no expert testimony regarding causation, there is no expert evidence that Plaintiff has emotional distress.<sup>6</sup> Should this Court conclude that the facts of this case could give rise to an emotional distress claim, it should still affirm the District Court due to Plaintiff's failure to present expert evidence of emotional distress and expert evidence regarding causation. *Slaughter v. Des Moines Univ. Coll. of Osteopathic Med.*, 925 N.W.2d 793, 808 (Iowa 2019) (internal quotations omitted) ("Summary judgment is not a dress rehearsal or practice run; it is the put up or shut up moment in a lawsuit when a [nonmoving] party must show what evidence it has that would convince a trier of fact to accept its version of the events.") (citing *Hammel v. Eau Galle Cheese Factory*, 407 F.3d 852, 859 (7th Cir. 2005)).

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<sup>6</sup> Plaintiff's deadline to designate experts was September 3, 2019. Plaintiff designated the following expert witnesses: former District Court Judge Ed Jacobson and Plaintiff, Todd Rand. Neither will testify as to any medical opinions. Plaintiff's Designation of Expert Witness, July 26, 2019. In his Supplemental Answer to Interrogatory 8, Plaintiff stated he has been seen by Genell Sandberg, Ph.D., but has only produced those counseling records in discovery subject to his objection. Exhibit 15, at Interrogatory 8. Furthermore, those counseling records do not speak to any emotional distress caused by Defendant's alleged negligence. At his deposition, taken on October 19, 2019, Plaintiff stated that he had received no treatment for any such emotional distress. Exhibit 17, at 58:24–62:22.

The District Court properly found that Plaintiff's claim for emotional distress damages failed because this is not the type of dispute where emotional damages are recoverable. While the District Court did not rest its ruling on this basis, this Court should also affirm the dismissal of emotional distress damages based on the failure of Plaintiff to put into the summary judgment record proper expert evidence of the existence of emotional distress and that the alleged emotional distress was caused by Plaintiff seeing the application for interim fees filed by the personal representative.

**D. Plaintiff's claim for punitive damages was properly dismissed by the District Court.**

The District Court found that Rand had no claim for compensatory damages. It necessarily follows from that ruling that the claim for punitive damages must also be denied. *See, e.g., Est. of Fields by Fields v. Shaw*, 954 N.W.2d 451, 464 (Iowa Ct. App. 2020) (noting that where underlying negligence claim has been dismissed, the claim for punitive damages must also be dismissed). The District Court ruling should also be affirmed on the ground that there was no sufficient showing of malice. SNB was legally entitled to request the amount of executor fees that it requested.<sup>7</sup>

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<sup>7</sup> Plaintiff was not misled about the fees that SNB intended to seek or how they would be calculated. With respect to the alleged misrepresentation in the September 2016 letter, the District Court found that the letter sent to the beneficiaries accurately and truthfully represented what SNB intended to request as an Executor fee. District Court Ruling, at 24 ("The statement, 'The fees are computed as follows: 6% of the first \$1,000; 4% of the next \$4,000; 2% of the remaining value' is also at least

In Iowa, a party seeking punitive damages must prove “by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another.” Iowa Code § 668A.1(1)(a).

We have defined “willful and wanton” in the context of this statute to mean that “the actor has intentionally done an act of unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and which thus is usually accompanied by a conscious indifference to the consequences.”

*McClure v. Walgreen Co.*, 613 N.W.2d 225, 230 (Iowa 2000) (quoting *Fell v. Kewanee Farm Equip. Co.*, 457 N.W.2d 911, 919 (Iowa 1990)). “Punitive damages serve ‘as a form of punishment to deter others from conduct which is sufficiently egregious to call for the remedy.’” *Id.* (quoting *Coster v. Crookham*, 468 N.W.2d 802, 810 (Iowa 1991)). “Such damages are appropriate only when actual or legal malice is shown.” *Id.* at 231. “No punitive damages are allowed with a ‘mere mistake.’” *Cedar Falls Bldg. Center, Inc. v. Vietor*, 365 N.W.2d 635, 640 (Iowa Ct. App. 1985). “More than negligent conduct is required to support a punitive damage award.” *Van Sickle*, 783 N.W.2d. at 689; *see also Cedar Falls*, 365 N.W.2d at 640

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partially accurate. Those are the correct percentages under Iowa Code Section 633.197. Those percentages under Section 633.197 also establish the Executor and attorney fees. As part of the initial September 2016 letter from Defendant to the Beneficiaries, such statement also accurately and truthfully represented what Defendant intended to charge or request as an Executor fee.”).

(“More than mere negligence must be shown.”). “Punitive damages are not allowed in breach-of-contract claims in the absence of malice, fraud, or other illegal acts.” *Clark-Peterson Co., Inc. v. Independent Assoc., Ltd.*, 514 N.W.2d 912, 916 (Iowa 1994). “The same is true with respect to a claim of fraudulent misrepresentation.” *Id.*

There is no malice when an executor advises a beneficiary that the executor will seek an amount of fees that is lawful under Iowa Code §633.197. The District Court did not err in finding that no reasonable jury could find Defendant’s conduct to be in willful and wanton disregard for the rights of others to establish punitive damages as a separate claim outside the Probate Code.

### **CONCLUSION**

The District Court properly rejected Plaintiff’s attempt to turn his successful challenge of the probate fees sought by SNB, as executor of the Estate of Roger Rand, into a separate common law tort action. The probate code governs the conduct of an executor, provides the procedure for requesting and disputing probate fees, and provides the remedy for any breach of fiduciary duty by an executor. The District Court correctly determined that claims for common law breach of fiduciary duty, negligent misrepresentation, and fraud were precluded by the statutory probate remedies and failed on their merits even if they could be brought in tort. The District

Court properly dismissed the claims for attorney fees, emotional distress damages, and punitive damages. Its well-reasoned decision should be affirmed in its entirety.

**REQUEST FOR ORAL ARGUMENT**

The undersigned counsel for the Appellant requests to be heard in oral argument upon submission of this case.

DATED this 14<sup>th</sup> day of May, 2021.

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**CERTIFICATE OF COST**

It is certified that the actual cost paid by Appellant for submitting this brief was \$0.00 as it was filed electronically via the EDMS filing system.

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**CERTIFICATE OF COMPLIANCE**

Appellant, pursuant to Iowa R. App. P. 6.903(1)(g), hereby certifies that this brief contains 11,345 words of a 14 point proportionally spaced Times New Roman font and it complies with the 14,000 word maximum permitted length of the brief.

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**CERTIFICATE OF FILING**

I, the undersigned, hereby certify this Appellee's Proof Brief was filed with the Iowa Supreme Court via the EDMS filing system on the 14<sup>th</sup> day of May, 2021.

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**CERTIFICATE OF SERVICE**

I, the undersigned, hereby certify that on the 14<sup>th</sup> day of May, 2021, I did serve this Appellant's Proof Brief on counsel for all other parties electronically utilizing the EDMS filing system, which will provide notice to:

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