IN THE SUPREME COURT OF IOWA

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CASE NO. 20-0769

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AMERICAN HOME ASSURANCE,

Petitioner-Appellee,

v.

LIBERTY MUTUAL FIRE INSURANCE COMPANY,

Respondent-Appellant.

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APPEAL FROM THE DISTRICT COURT
OF POLK COUNTY
HON. WILLIAM P. KELLY

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# APPELLANT'S REPLY BRIEF

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## TABLE OF CONTENTS

TABLE OF CONTENTS.....1

TABLE OF AUTHORITIES.....2

ARGUMENT.....3

I. ERROR WAS PROPERLY PRESERVED AT THE DISTRICT COURT ON THE QUESTION OF AMBIGUITY.....3

II. APPELLEE AMERICAN HOME ASSURANCE FAILED TO TIMELY FILE ITS CROSS APPEAL REGARDING THE ISSUE OF AMBIGUITY.....4

III. THE COMMISSION'S INTERPRETATION OF IOWA CODE § 85.21 DOES NOT CONFLICT WITH BINDING PRECEDENT.....5

CONCLUSION.....7

PROOF OF SERVICE.....8

CERTIFICATE OF COMPLIANCE.....9

## TABLE OF AUTHORITIES

CASES Page(s)

*Bergeson v. Second Injury Fund*. 526 N.W.2d 543, 549 (Iowa 1995) ..... 5, 6

*City of Ft. Dodge v. Civ. Serv. Commn. of the City of Ft. Dodge*, 562 N.W.2d 438 (Iowa App. 1997) .....3

*Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983) ..... 5, 6

*Iowa S. Ct. Atty. Disc. Bd. v. Tindal*, 20-0005, 2020 WL 5987504 (Iowa Oct. 9, 2020) ..... 4, 5

*Metz v. Amoco Oil Co.*, 581 N.W.2d 597 (Iowa 1998) .....3

*State v. Lopez*, 907 N.W.2d 112, 117 (Iowa 2018).....4

*Wilson Food Corp. v. Cherry,* 315 N.W.2d 756, 757 (Iowa 1982).....6

*Zomer v. West River Farms, Inc.*, 666 N.W.2d 130 (Iowa 2003).....6

STATUTES & RULES

Iowa Code § 85.21 ..... 5, 6

Iowa R. App. P. 6.101(2)(b) .....5

## ARGUMENT

### I. ERROR WAS PROPERLY PRESERVED AT THE DISTRICT COURT ON THE QUESTION OF AMBIGUITY

Appellee American Home Assurance (hereinafter "AHA") argues Appellant Liberty Mutual (hereinafter "Liberty Mutual") failed to preserve error on the issue of statutory language ambiguity. Error is preserved on a particular issue when it is raised and decided by the district court. *Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998). In determining whether error has been preserved, if a ruling does not specifically address a particular finding, the appellate court is to "assume as fact an unstated finding necessary to support the trial court's judgment. Any ambiguity in the trial court's findings is decided in favor of the judgment." *City of Ft. Dodge v. Civ. Serv. Commn. of the City of Ft. Dodge*, 562 N.W.2d 438, 440 (Iowa App. 1997) (citing *Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983)).

In its appeal ruling, the District Court's analysis included references to (1) the object sought to be obtained by Iowa's workers' compensation statute (District Court Order; App. 137); (2) the legislative history (District Court Order; App. 137); (3) the consequences of a particular construction (District Court Order; App. 138, 140); and (4) the administrative construction of the statute (District Court Order; App. 140). As laid out in

the parties' briefs, pursuant to Iowa law, a prerequisite to relying on and/or considering the aforementioned factors is a finding the language at issue is ambiguous. *See State v. Lopez*, 907 N.W.2d 112, 117 (Iowa 2018) ("If the statute is unambiguous, we do not search for meaning beyond the statute's express terms. However, if the statue is ambiguous, we consider such concepts as the "object sought to be attained"; "circumstances under which the statute was enacted"; "legislative history"; "common law or former statutory provisions, including laws upon the same or similar subjects"; and "consequences of a particular construction."). Therefore, by applying these factors to justify its conclusion, the District Court squarely addressed the question of ambiguity and concluded the statute at issue is in fact ambiguous. *See Hubby v. State*, 331 N.W.2d 690, 695 (Iowa 1983).

## II. APPELLEE AMERICAN HOME ASSURANCE FAILED TO TIMELY FILE ITS CROSS APPEAL REGARDING THE ISSUE OF AMBIGUITY

In its brief, AHA argues the District Court incorrectly determined the applicable statutory language is ambiguous. Under the rules of appellate procedure, "a party must timely file a cross-appeal to obtain appellate review of an adverse finding or decision." *Iowa S. Ct. Atty. Disc. Bd. v. Tindal*, 20-0005, 2020 WL 5987504 (Iowa Oct. 9, 2020). Pursuant to the rules, a party must file a notice of cross-appeal "within the 30-day limit for filing a notice

of appeal, or within 10 days after the filing of a notice of appeal, whichever is later." Iowa R. App. P. 6.101(2)(b). "The failure to file a cross-appeal precludes appellate review of an adverse finding or ruling." *Iowa S. Ct. Atty. Disc. Bd. v. Tindal*, 20-0005, 2020 WL 5987504 (Iowa Oct. 9, 2020).

In this case, Liberty Mutual filed its notice of appeal on May 15, 2020. (Notice of Appeal; App. 144). To date, AHA has yet to file a notice of cross-appeal. Therefore, because AHA did not file a timely cross-appeal, appellate review is precluded on the issue of whether the applicable statutory language is ambiguous.

## III. THE COMMISSION'S INTERPRETATION OF IOWA CODE § 85.21 DOES NOT CONFLICT WITH BINDING PRECEDENT

In its brief, AHA argues the Commission's interpretation of Iowa Code § 85.21 conflicts with binding precedent. In support of this position, AHA cites *Bergeson v. Second Injury Fund*. 526 N.W.2d 543, 549 (Iowa 1995). In relevant part, the court in *Bergeson* stated: "Section 85.21 gives the commissioner authority to order reimbursement where one party makes voluntary payment that ultimately the commissioner determines should have been paid by another party." *Id*. As the Commission correctly notes in its appeal decision, the court in *Bergeson* does not address the issue regarding the timeliness of an 85.21 order at issue in this case. Moreover, the rule limiting contribution or reimbursement from a third party to benefit

payments made after the issuance of an 85.21 order has been referenced and applied on numerous occasions since the *Bergeson* decision. If the rule was improper, the legislature or appellate courts would have addressed the inconsistency at some point over the course of the last 20 years.[1]

In addition, AHA cites *Wilson Food Corp. v. Cherry* where the court found "employers may generally recover payments made by mistake in workers' compensation matters." 315 N.W.2d 756, 757 (Iowa 1982). Of note, this statement was made in the context of an employer/insurance carrier's overpayment of benefits to an employee.[2] *Id*. It was not in the context of seeking reimbursement under Iowa Code § 85.21. Moreover, as noted by the Commission, there are public policy considerations embedded in the aforementioned rule regarding the timing of an 85.21 order. Specifically, the rule gives employers and carriers the full opportunity to investigate the claims and ascertain the possibility of the injury date falling outside its coverage period. That is precisely the case in this scenario. Months before the evidentiary hearing, claimant alleged an injury date

[1] Of note, this same line of reasoning applies to the other cases (e.g. *Wilson Food Corp.* and *Zomer*) cited by AHA in support of its contention the interpretation at issue conflicts with binding precedent.

[2] In addition to *Bergeson* and *Wilson Food Corp.*, AHA cites *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130 (Iowa 2003). Like *Wilson*, *Zomer* deals with a dispute between an insurance carrier and claimant, not between two insurance carriers. *Id*.

outside American Home's coverage period. Despite American Home's contentions, its failure to file a 85.21 order was based on self-inflicted oversight. Thus, even if the law does support a public policy exception to the aforementioned rule in certain circumstances, the facts of this case do not support it.

## CONCLUSION

For the reasons stated in its brief, the undersigned respectfully requests that the Court reverse the District Court's findings and enter judgment in favor of Liberty Mutual Insurance Company.

## CERTIFICATE OF FILING AND SERVICE

I hereby certify that on October 14, 2020, I electronically filed the foregoing Appellee's Proof Brief with the Clerk of the Supreme Court by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Rules 6.106(1) and 6.701, this constitutes service for purposes of the Iowa Court Rules.

*/s/ Benjamin T. Erickson*
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## CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1469 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word 2013 in Times New Roman 14 pt.

Dated: October 14, 2020

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