IN THE SUPREME COURT OF IOWA

Supreme Court No. 20-0076

IN RE THE MARRIAGE OF SUSAN GAYLE HUTCHINSON AND ROBERT GREGORY HUTCHINSON

Upon the Petition of
SUSAN GAYLE HUTCHINSON,
Petitioner/Appellee,

And Concerning
ROBERT GREGORY HUTCHINSON,
Respondent/Appellant

APPEAL FROM THE IOWA DISTRICT COURT FOR LINN COUNTY
No. CDDM037207
Honorable Mitchell E. Turner, Judge

FINAL BRIEF OF PETITIONER/APPELLEE SUSAN GAYLE HUTCHINSON

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This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because it contains 12,796 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

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/s/ Richard F. Mitvalsky September 4, 2020
Richard F. Mitvalsky Date

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ROUTING STATEMENT

Counsel for the appellee agrees this appeal does not meet the standards required for the Iowa Supreme Court to retain this case under Iowa R. App. P. 6.1101. Therefore, it should be transferred to the Iowa Court of Appeals pursuant to Iowa R. App. P. 6.1101(3).

STATEMENT OF THE CASE

A. Course of Proceedings.

Respondent/Appellant Robert Gregory Hutchinson (Greg) challenges the district court's December 13, 2019, ruling granting Petitioner/Appellee Susan Hutchinson's (Susan) Petition to Correct, Vacate or Modify Decree of Dissolution of Marriage (App. p. 9). The parties' divorced on November 2, 2010, by Decree incorporating their Stipulation of Settlement. (App. p. 241)

Susan filed her Petition on April 20, 2016, requesting that the court correct, vacate or modify the parties' 2010 Decree based upon extrinsic fraud. In the first count of her Petition, Susan sought a share of Greg's defined benefit pension. In her second count, Susan alternatively sought modification of alimony.

On June 30, 2016, Susan served her first discovery requests on Greg. (App. p. 17) On August 4, 2016, Greg moved for summary judgment contending Susan's Petition was untimely filed under Iowa R. Civ. P. 1.1013. (App. p. 18)

Susan filed her first Motion to Compel Discovery Responses on August 9, 2016, owing to Greg's failure to respond to her discovery. Greg filed no resistance. On September 1, 2016, the district court ordered discovery produced. (App. p. 20)

On October 17, 2016, Susan filed her Resistance to Motion for Summary Judgment and, following briefing by both parties, the district court entered its summary judgment ruling on January 6, 2017. (App. pp. 23-36) The district court granted summary judgment to Greg dismissing Susan's request to modify alimony, but denied summary judgment as to Susan's request to correct, vacate or modify the Decree, finding the concealment Susan alleged prevented the fair submission of the controversy altogether, and thus constituted extrinsic, and not intrinsic, fraud. (App. p. 33)

On March 22, 2018, Petitioner served her second discovery requests upon Greg seeking documents concerning his GE pension. (App. p. 37) Greg never responded, and Susan filed her Second Motion to Compel Discovery Responses on July 24, 2019. (App. pp. 38-40) Greg filed no resistance. The district court granted Susan's motion August 8, 2019, ordering Greg to produce discovery by August 18, 2019. (App. pp. 41-42) He did not, and on August 21, 2019, Susan filed her Motion for Discovery Sanctions. (App. pp. 43-44) On September 4, 2019 the district court granted Susan's sanctions motion, requiring Greg to pay Susan's attorney fees for the preparation and filing of her motion. (App. pp. 45-46)

On September 17, 2019, Susan filed her Renewed Motion for Discovery Sanctions alleging the content of Greg's "last second" discovery responses served September 3, 2019, were not responsive. (App. pp. 50-54) At the October 9, 2019, pretrial conference, the district court granted Susan's Renewed Motion and ordered Greg to produce specific GE pension records within seven days, to pay Susan's attorney fees for having to pursue discovery, and ordered the possibility of additional sanctions if Greg failed to comply. (App. pp. 55-58)

On November 4, 2019, Susan filed a Motion to Exclude Evidence requesting further discovery sanctions for Greg's ongoing failure to produce GE pension documents. (App. pp. 108-109) Trial was held on November 5 and 6, 2019, during which the court prohibited Greg from contesting Susan's calculations of the value of his pension. (Tr. p. 275, ln. 21 – 24)

The district court issued its Ruling granting Susan's Petition on December 13, 2019. The district court ordered the property division within the parties' 2010 Decree modified to grant Susan a 50% share of the marital portion of each of Greg's ongoing GE monthly pension payments in the amount of $668.63. (App. pp. 150, 249) The district court also awarded Susan $40,117.80 representing the total value of her marital share of each of Greg's pension payments ($668.63 x 60 months) paid to him through the month of trial. (App. p. 250) The district court directed Greg to pay this amount from his Integrated Sales 40lk, and ordered him to pay $7,056 as

additional sanctions for his failure to provide discovery through trial. (App. p. 249-250)

Greg timely filed his Notice of Appeal on January 13, 2020. Enforcement of the district court's Ruling was stayed by posting of bond on March 2, 2020.

B. Statement of Facts.

Susan Hutchinson and Greg Hutchinson were married June 29, 1990. (Tr. p. 25, ln. 18) Greg became employed at General Electric (GE) on September 28, 2000. (App. p. 242) Susan petitioned for dissolution of their marriage on April 22, 2010, (App. p. 242) and they divorced on November 2, 2010. (Tr. p. 25, ln. 21). Their decree incorporated a stipulation of settlement signed by each of them. (App. pp. 124-136)

While employed at GE, Greg participated in two retirement plans – a 40lk defined contribution plan and a defined benefit pension (GE pension). (Tr. p. 12, ln. 24 – p. 13, ln. 2; p. 13, ln. 13; App. p. 242) However, Greg never told Susan during their marriage he had more than one retirement plan benefit at GE, and never told Susan he participated in a defined benefit pension at GE. (Tr. p. 77, ln. 15, 22) As a result, during their marriage Susan never knew Greg participated in a pension through GE. (Tr. p. 118, ln. 2 – 5) Susan only knew Greg participated in a GE 40lk plan. (Tr. p. 76, 6 – 7) Susan had no suspicion or knowledge during their marriage

Greg participated in any retirement benefit through GE other than the 40lk plan. (Tr. p. 76, ln. 12)

When Susan filed her divorce petition, the district court issued a mandatory discovery order, called the Case Requirements Order, on April 22, 2010. (App. pp. 138-143) Greg accepted service of Susan's Petition and the mandatory discovery order on May 4, 2010. (Tr. p. 21, ln. 14; App. p. 242; App. p. 137) Greg recalled receiving both documents. (Tr. p. 22, ln. 10; p. 23, ln. 4) Susan was initially represented by attorney Crystal Usher, then Amy Reasner. (App. p. 242) Greg elected to proceed pro se. (App. p. 242)

Section II, (5) of the CRO specifically required the parties:

> Not more than sixty (60) dates from the date the case was filed, you shall give your lawyer, if you have one, and to the other person or his/her lawyer, the following information:… (5) Copies of IRA accounts, retirement plans, 40lk's, deferred compensation, savings plans and any other similar plan documents; and (9) Documentation on the value of any other assets…not specifically requested above, whether individually or jointly owned.…

(App. p. 139)

When Susan filed her divorce petition, Greg knew he had participated in the GE pension for approximately 9 ½ years (Tr. p 12, ln. 17; p. 21, ln. 7) He also knew he became vested in his GE pension three years earlier in 2007. (App. p. 242; Tr. p. 19, ln. 4 – 14; p. 20, ln. 10 – 20; p. 21, ln. 3; App. p. 163) Greg also knew that his

vested interest in the GE pension had some value, (Tr. p. 67, ln. 10 – 18; p. 69, ln. 5 – 9; App. p. 163), and that it was a marital asset. (App. p. 243)

Greg knew the mandatory discovery order placed him under a legal duty to disclose his retirement assets and produce documents relating to them. (Tr. p. 25, ln. 6; p. 69, ln. 13-16) Greg knew that both his GE 40lk and GE pension were retirement assets. (Tr. p. 24, ln. 24 – p. 25, ln. 2) Susan believed the discovery order placed the parties under the same legal duty. (Tr. p. 77, ln. 1 – 3) Susan produced financial documents for her assets and accounts. (Tr. p. 76, ln. 25) However, Greg never disclosed his participation in the GE pension to Susan or her attorney during their divorce case. (Tr. 78, ln. 5 – 14)

Written settlement negotiations between Susan and Greg began with attorney Reasner's July 12, 2010, letter to Greg enclosing the first stipulation draft. (App. pp. 176-191) Greg responded to Reasner on July 26, 2010, asserting that the 2002 Harley Davidson motorcycle awarded to him was overvalued in stipulation Exhibit A, that the savings account awarded to Susan was undervalued, and that he would not pay the monetary property settlement proposed. (App. pp. 193-194; Tr. p. 33, ln. 17 – 25; p. 34, ln. 1 – 25; p. 35, ln. 1- 25) Greg made no disclosure of his GE pension here. (Tr. p. 36, ln. 3 – 5)

Reasner responded to Greg on August 4, 2010, with value adjustments, (Tr. p. 36, ln. 19 – 22, p. 37, ln. 10 – 13), and supplied a new stipulation Exhibit A to

Greg. (Tr. p. 37, ln. 1 – 4) Reasner provided yet another updated Exhibit A to Greg on August 9, 2010. (App. pp. 203-204) Greg responded by adding value to assets being awarded to Susan in stipulation Exhibit A, decreasing the value of his motorcycle and savings in Exhibit A, and reducing his property settlement payment to Susan. (App. pp. 205-206; Tr. p. 39, ln. 9 – 25, p. 40, ln. 1 – 25, p. 41, ln. 1 -13) Still, Greg made no mention of his GE pension interest.

On October 12, 2010, Reasner wrote to Greg providing a new stipulation and Exhibit A. (Tr. p. 42, ln. 10 – 13; App. pp. 207-209) Greg carefully read these materials to assure himself that any equalization payment required from him was correctly calculated. (Tr. p. 42, ln. 18 -21) Greg responded on October 20, 2010, with direct comments to the division of retirement assets, yet even here made no disclosure of his GE pension. (App. p. 210)

Greg read every stipulation draft. (Tr. p. 55, ln. 4 – 7) Every draft contained a specific paragraph entitled "Securities/Retirement Plans" and a representation that each party fully disclosed all of their assets. (Tr. 31, ln. 18-21, 23; App. pp. 176-211) Greg paid attention to Reasner's drafts and asset value calculations because they were producing a property settlement payment owed from Greg to Susan. (Tr. p. 32, ln. 25 – p. 33, ln. 4) Throughout the negotiations, Greg insisted upon specific asset value adjustments in stipulation Exhibit A in his favor because he did not want to overpay Susan in a property settlement. (Tr. p. 33, ln. 5 – 9) Greg admitted he

could have notified Reasner of his vested interest in the GE pension as a part of his review of any version of the draft documents. (Tr. p. 46, ln. 9 – 17) Greg never produced any document stating he had an interest in the GE pension. (Tr. 78, ln. 5 – 14) Greg never notified Reasner during the divorce process of his participation in the GE pension plan. (Tr. p. 46, ln. 22 – 25) Reasner confirmed that Greg never reported in any way he was a participant in a defined benefit pension. (Tr. p. 150, ln. 6 – 8; p. 151, ln. 7 – 11; p. 152, ln. 19 – 22, p. 163, ln. 15 – 16) Susan had no knowledge, suspicion or reason to believe there was such a pension. (Tr. p. 78 ln. 12 – 22; Tr. p. 80, ln. 18 – 22)

The district court found:

> …Greg knew of both its existence and the fact it was a marital asset, and that he intentionally did not disclose its existence or its value to Susan or her counsel. *The evidence also overwhelmingly established that Greg knew of his obligation/duty to fully disclose his assets (including the GE pension), and that he intentionally violated that duty.*

(App. p. 243)(*emphasis* added).

The only retirement asset Greg disclosed to Susan and her attorney during the divorce case was his "GE retirement fund" worth $126,000 stated in stipulation Exhibit A. (App. p. 242) Susan knew that the $126,000 "GE retirement fund" was Greg's GE 40lk account. (App. p. 145; Tr. p. 79, ln. 20 – 24) Greg knew the "GE retirement fund" referred to his 401k and did not refer to his GE pension. (Tr. 28, ln.

4-16) As a result, the only retirement asset mentioned in the stipulation was Greg's 401k.

Greg signed the final Stipulation of Settlement on Friday, October 29, 2010. (App. p. 135) Susan signed the final Stipulation of Settlement on Monday, November 1, 2010. (App. p. 134) They made their signatures under oath, swearing that they read the stipulation and that the statements within it were true. (App. pp. 134-135) Those written statements included that they both participated in the preparation of the stipulation, that the stipulation satisfactorily disposes of all marital assets, and

> "… that they have fully disclosed all of their assets, income and liabilities to the other…".

(App. p. 128)

Greg also approved submission of a proposed Decree to the court which contained the false representation he had fully disclosed all of his assets to Susan. (App. pp. 125-126) The court entered that Decree on November 2, 2010. As a result of Greg's total concealment, the stipulation made no mention or award of any interests in the GE pension.

When Greg signed the divorce stipulation on October 29, 2010, he also hand-delivered a GE Consent Form (App. p. 170) and a Fidelity 403b beneficiary designation form (App. pp. 171-172) to Reasner's office. The Fidelity form related to a separate premarital 403b retirement plan Greg accrued before marrying Susan,

prior to being terminated as a teacher for improper relations with a student. (Tr. 200, ln. 12 – 15; p. 201, ln. 18 – 20; p. 202, ln. 16 – 19; p. 201, ln. 24 – p. 202, ln. 6; p. 316, ln. 2 – p. 317, ln. 6) Reasner first received the consent form on October 29, 2010. (Tr. p. 197, ln. 3 – 5; p. 165, ln. 22 – p. 166, ln. 4; p. 196, ln. 5 – 8) Greg informed Reasner that the purpose of the consent form was for Susan to release her right to GE retirement death benefits, allowing Greg to redirect them to his children. (App. p. 168)

The consent form was generic, consisted of one page and contained two unmarked boxes – one referring to the "GE Pension Plan" and the other referring to the "GE Savings and Security Program." (App. pp. 121, 170, 243) Greg had checked neither box. (App. pp. 121, 170; Tr. p. 81, ln. 23 – p. 82, ln. 3)

When Susan met with Reasner's paralegal, Michelle Barnes, on November 1, 2010, to review and sign settlement documents, Greg had already signed the stipulation swearing under oath he had fully disclosed all assets, and that he only owned the $126,000 GE retirement fund. (Tr. 82, ln. 22 – 25; p. 83, ln. 1 – 6; p. 170, ln. 10 – 14; App. pp. 135-136) Barnes confirmed that the GE consent form contained no markings. (Tr. p. 171, ln. 3 – 14) Agreeing to release Greg's 40lk death benefits, Susan signed both the divorce stipulation and the GE consent form. (Tr. 82, ln. 14 – 17; p. 83, ln. 7 – 14, 20 -21; p. 139, ln. 9 – 10; p. 139, ln. 23 – 25) Susan did not check either box on the consent form because she could not determine which

box correctly described the "GE retirement fund" as named in their stipulation Exhibit A. (Tr. p. 83, ln. 22 – 23; p. 84, ln. 1 – 7; p. 140, ln. 8 – 12; App. p. 114) Barnes confirmed Susan did not check either box because she did not know the formal name of the GE retirement fund set forth in stipulation Exhibit A. (Tr. p. 172, ln. 11 – 19) Susan knew Greg participated in only one GE retirement plan, but wasn't clear which box contained the correct technical name. (Tr. p. 84, ln. 15 – 22) Had Greg checked both boxes, Susan would have considered this "a red flag" indicating her to the existence of more than one retirement asset at GE. (Tr. p. 86, ln. 1 – 6) Nothing in the unmarked consent form indicated Greg participated in more than one retirement plan at GE. (Tr. p. 84, ln. 23 – p. 85, ln. 1; p. 173, ln. 17 – 20)

Barnes mailed Susan's signed, unchecked, GE consent form to Greg on November 12, 2010. (Tr. p. 86, ln 10; App. pp. 120-123, 169-172) her letter to Greg, Barnes asked him to "return a copy of the form (or scan and email) when section 2 is complete." (Tr. p. 86, ln. 24 - p. 87, ln. 2; App. pp. 120, 169) In relation to the GE consent form, Barnes asked Greg to "confirm in section 2 *which* plan you are participating in (GE Pension Plan or GE Savings and Security Program) and check the *appropriate box.*" (App. pp. 120, 169)(*emphasis* added). Of note, Barnes' letter used the singular nouns "plan" and "box", consistent with Susan's and Reasner's knowledge Greg had an interest in only one GE retirement asset. (Tr. p. 86, ln. 11 – 18)

Reasner approved Barnes' letter before mailing, and knew Susan did not check either box because the name of the "GE retirement fund" was not obvious within the consent form. (Tr. p. 203, ln. 12 – 14, 23 – p. 204, ln. 1) Barnes' November 12, 2010, letter asked Greg to correctly identify the GE retirement fund by its technical name (Tr. p. 207, ln. 4 – 10), and had nothing to do with a question of whether Greg participated in more than one GE plan. (Tr. p. 207, ln. 4 – 8) Barnes' letter asked Greg to identify the relevant *plan,* (Tr. p. 241, ln. 4), and to check the box for the $126,000 GE retirement fund stated at stipulation Exhibit A. (Tr. p. 241, ln. 8 – 11)

Greg never produced the GE consent form until September 2015, after telling Susan there was nothing she could do about his nondisclosure of the second GE retirement asset. (Tr. p. 208, ln. 25 – p. 209, ln. 6) Between November 12, 2010 and September 2015, Greg never communicated with Susan, Reasner or Barnes concerning his pension, and transmitted no documents to them relating to his pension. (Tr. p. 209, ln. 7 – 14) Barnes reviewed her historical emails, phone logs and time sheets and confirmed Greg never contacted her. (Tr. p. 177, ln 5 – 10, 20 – 25; p. 189, ln. 21 – 25) Likewise, Reasner testified Greg never contacted anyone in her law office by mail, delivery, phone call or in any other manner until September 30, 2015. (Tr. p. 212, ln. 12 – 17) The district court specifically found any testimony

from Greg that he returned any completed forms to Reasner to be not credible. (App. p. 244)

Once Greg received Susan's signed GE consent form, Greg promptly checked the box denoting his participation in a GE Pension Plan (App. p. 119) and also completed a separate GE beneficiary designation form checking two boxes indicating his participation in two GE retirement plans - the "GE Pension Plan" *and* "GE Savings and Security [S&SP] Program". (App. p. 118; Tr. p. 306, ln. 16 – 18, ln. 19 – 21; Tr. p. 306, ln 25 – Tr. p. 307 ln. 1) Additionally, Greg was having an affair with Michelle Tegeler during his marriage to Susan, (Tr. p. 11, ln. 9 – 19), and instead of designating his children as beneficiaries, Greg designated Tegeler. (App. pp. 118, 168) Within a day of receiving Barnes' letter, Greg sent both documents to GE for implementation. (Tr. p. 300, ln. 13 – 18; p. 300, ln. 21 – 23; p. 338, ln. 17 – 20; p. 339, ln. 2) Greg never provided either document to Reasner, Barnes or Susan before September 30, 2015. (Tr. p. 192, ln. 20 – 24; p. 247, ln 3 – 9) In the event of Greg's death, Tegeler will receive ongoing payments in an amount equal to 50% of his current monthly benefit. (Tr. p. 13, ln. 23 – p. 14, ln. 2, 5 – 11; App. pp. 118, 147) Greg admitted he submitted the GE beneficiary designation form because it was important to him to have *both* plans free and clear of Susan's rights. (Tr. p. 308, ln. 2 – 6, 8 – 9)

On September 3, 2015, Susan met Greg at University of Iowa Community Credit Union at Greg's request, (Tr. p. 57, ln. 22; p. 88, ln. 7 – 8), where Greg asked her to sign an alimony satisfaction of judgment (Tr. p. 57, ln 22; p. 58, ln. 6; p. 88, ln. 2 – 3) At this meeting, Greg told Susan he had retired from GE and was getting a "nice pension." (Tr. p. 88, ln. 11 – 15; Ruling, p. 4) This was the first time Susan ever found out anything about Greg's GE pension. (Tr. p. 87, ln. 23 – p. 88, ln. 8) Susan replied, "you never disclosed that going through our divorce." (Tr. p. 88, ln. 11 – 15) Greg replied that there was nothing Susan could do about it now because she had already signed off. (Tr. p. 88, ln. 11 – 15)

Had Greg disclosed his additional participation in a defined benefit pension, Reasner would have put "a hold on the divorce because there were two plans, not one." (Tr. p. 248, ln. 4 – 7) Susan would not have signed the divorce stipulation and would have pursued an equal marital share of Greg's interest. (Tr. p. 98, ln. 6 – 16; p. 103, ln. 8 – 12) Like Greg, Susan confirmed the overall intention of their agreement was to achieve an equal division of marital property. (Tr. p. 98, ln. 17 – 20) Further, had Susan received any disclosure Greg participated in the GE Pension Plan *and* GE Savings and Security Program within one year of their decree, she would have contacted Reasner and would have initiated an action to vacate or modify decree then. (Tr. p. 103, ln. 18 – 25)

Greg left GE on November 1, 2014, and started receiving monthly payments from the GE pension in January 2015. (Tr. p. 12, ln. 20; p. 13, ln. 5, 16; App. pp. 147, 149, 242) Greg receives a gross monthly pension payment of $1,867.95. (App. p. 148; Tr. p. 16, ln. 19) He will receive this benefit for the remainder of his life and he is not expecting this monthly benefit to change in the future. (Tr. p. 13, ln. 19; p. 16, ln. 23) Greg's monthly pension benefit was calculated based upon the length of time he was in service as an employee at GE. (Tr. p. 16, ln. 24 – p. 18, ln. 25) The total length of Greg's employment at GE was 169 months. (Tr. p. 25, ln. 12 – 15) Of that amount of time, Greg and Susan were married for 121 months. (Tr. p. 26, ln. 8 – 17; p. 93, ln. 10 – 18) Greg was married to Susan for 71.59% of the total number of months he participated in the GE pension. (App. p. 150)

71.59% of Greg's monthly pension benefit is $1,337.26 per month. (App. p. 150) Greg admitted that he knew the objective of the divorce settlement agreement was to achieve an equal sharing of their marital property. (Tr. 41, ln. 18) A 50% equal share of that portion of Greg's monthly benefit accrued during the marriage is $668.63. (App. pp. 150, 243)

Since entering pay status, Greg has received each and every monthly pension payment and Susan has received no share. (Tr. p. 96, ln. 15 – 17; p. 57, ln. 3) Over the 60 month period between Greg's commencement of pension benefits and the district court's Ruling, Susan would have received $40,117.80 had she been paid a

50% share of the marital portion of the pension ($668.63 x 60 months). (App. pp. 150, 243)

Shortly after her meeting with Greg at UICCU, Susan contacted attorney Reasner. (Tr. p. 88, ln. 23 – 25) Reasner contacted Greg on or around September 30, 2015, raising his pension nondisclosure. (Tr. p. 59, ln. 1 – 16; App. p. 173) Greg responded to Reasner on September 30, 2015 by attaching the signed GE consent form.

Additional facts are presented below where relevant.

PRESERVATION OF ERROR

Susan agrees that Greg preserved error on this issue by either requesting affirmative relief at trial or within post-trial motions pursuant to Iowa R.Civ. P. 1.904(2).

SCOPE AND STANDARD OF REVIEW

Actions under Iowa R. Civ. P. 1.1012(2) are generally law actions, and not equity actions. *In re Marriage of Cutler,* 588 N.W.2d 425, 429 (Iowa 1999). Review would ordinarily be for correction of errors of law, and the district court's findings of fact would binding on appeal if supported by substantial evidence. Iowa R. App. P. 6.904(3)(a)

However, Susan's action to vacate or modify seeks equitable relief because it was filed outside of the one-year time limit in Iowa R. Civ. P. 1.1013(1). Therefore, even though the district court enjoys wide discretion in deciding whether to vacate an order under Rule 1.1012(2), Susan agrees that this court's review, except as to the district court's attorney fee ruling, is de novo. *In re Adoption of B.J.H.,* 564 N.W.2d 387, 391 (Iowa 1997). Even so, the district court's fact findings are entitled to weight on appeal, especially when considering the credibility of witnesses. Iowa R. App. P. 6.904(3)(g)

Review of the district court's attorney fee award is for abuse of discretion, and reversal is warranted only if the district court's ruling rests on grounds that are clearly unreasonable or untenable. *Great America Leasing Corp v. Cool Comfort Air Conditioning and Refrigeration Inc.* 691 N.W.2d 730, 732 (Iowa 2005)(citing *City of Des Moines v. Housby-Mack, Inc.* 687 N.W.2d 551, 554 (Iowa 2004) and *Gablemann v. NFO INC.,* 606 N.W. 2d 339, 342 (Iowa 2000)). As a general rule, trial courts possess broad discretion with respect to imposing discovery sanctions. *R.E. Morris Investments, Inc. v. Lind,* 304 N.W2d 189, 191 (1981). A district court's order imposing discovery sanctions will not be disturbed unless the court abused its discretion. *In re Marriage of Williams*, 595 N.W.2d 126, 129 (Iowa 1999).

ARGUMENT

I. THE DISTRICT COURT CORRECTLY RULED SUSAN'S PETITION WAS NOT REQUIRED TO BE FILED WITHIN ONE YEAR OF ENTRY OF DECREE.

A. Susan's Petition is Not Barred by the One-Year Time Limit in Iowa R.Civ. P. 1.1013(1).

1. General Rule

Iowa R. Civ, P. 1.1012 grants jurisdiction to the district court to entertain a *direct attack* on a final divorce decree on certain enumerated grounds, including fraud. *City of Chariton v. J.C. Blunk Cont. Co.*, 112 N.W.2d 829, 838 (Iowa 1962); *In re Davidson*, 14-0204 WL 6977276 *4 (2014). Susan's petition alleged extrinsic fraud as the basis for correcting, vacating or modifying the court's 2010 decree. However, Rule 1.1013(1) requires that a petition attacking a final decree "must be filed and served within one year after the entry of the judgment or order involved." Iowa R. Civ. P. 1.1013(1). Susan filed her Petition more than five-years after entry of the parties' Decree.

2. Susan Could Not Have Discovered the Extrinsic Fraud with Reasonable Diligence Within One Year of Decree.

However, Iowa courts recognize certain equitable exceptions to the one-year time limitation imposed by Rule 1.1013(1). The Iowa Court of Appeals has held:

> A party may institute a suit in equity seeking to vacate a judgment and obtain a new trial *where, with reasonable diligence, he or she was not able to discover the fraud or*

> *other grounds for vacating the judgment within one year after the judgment.*

Johnson v. Mitchell, 489 N.W.2d 411, 415 (Iowa App. 1992)(*emphasis* added).

In the exercise of "reasonable diligence" in discovering evidence, "a party… may not be accused of a lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable. *Westergard v. Des Moines Ry. Co.,* 52 N.W.2d 39, 44 (1952). A party "is not called upon to prove he sought evidence where he had no reason to apprehend any existed." *Id.*

The district court determined September 3, 2015, "was the first time that Susan would have been alerted to the existence of any pension." (App. p. 244) It found "Greg's fraud could not have been discovered earlier in the exercise of due diligence." (App. p. 244)

The district court correctly concluded, "Greg provided categorically no information to Susan or her attorney regarding the existence of any pension" during the divorce case, (App. p. 242), and Greg presented no evidence he did so. Furthermore, Greg has not appealed the district court's finding that he failed to disclose the existence of this GE pension when he had a legal obligation to do so. (App. p. 244)

Additionally, the GE consent form Greg provided did not reveal his participation in more than one GE retirement plan. (Tr. p. 84, ln. 23 – p. 85, ln. 1) It was blank and contained no markings. (Tr. p. 81, ln. 19 – 22; p. 197, ln. 17 – 22).

It was a one-page generic form, (Tr. p. 85, ln. 11 – 16), containing two empty boxes – one referring to the "GE Pension Plan" and the other referring to the "GE Savings and Security Program." (App. p. 121, 170, 243) On a separate GE Beneficiary Designation Form he planned to submit to GE, *but did not give to Susan or her attorney*, Greg checked two boxes denoting his participation in two GE retirement plans – the GE Pension Plan and the GE Savings and Security Program. (App. p. 118) Greg admitted checking two boxes in the GE beneficiary designation form made it clear he participated in two GE retirement benefits. (Tr. p. 307, ln. 13 – 16) Greg admitted he did not provide this beneficiary designation form to Susan or her attorney. (Tr. 314, ln. 23-25) He only provided the unmarked consent form to them, and on that consent form he withheld checking any box at all. (App. p. 121, 170; Tr. p. 81, ln. 23 – p. 82, ln. 3)

By the time Susan received the consent form for review, Greg had already signed the divorce Stipulation of Settlement swearing under oath he had only one retirement asset - the GE retirement fund worth $126,000. (Tr. p. 83, ln. 1 – 6; App. pp. 135-136) Greg fully knew the GE retirement fund referred to his 401k and not refer to his pension. (Tr. 28, ln. 4-16) Susan only knew Greg contributed to the GE 401k retirement plan. (Tr. 76, ln. 6-7; p. 118, ln. 2-5) To Susan, Greg's purpose for the GE consent form was to merely ask her to sign off on the 40lk death benefits. (Tr. p. 82, ln. 14 – 17; p. 139, ln. 23 – 25; p. 83, ln. 7 – 14)

Moreover, Greg acknowledged the GE pension is not described anywhere in the parties' settlement documents, (Tr. 14, ln. 19; p. 26, ln. 22; p. 28, ln. 23), dismissively remarking that the pension "didn't make the list". (Tr. 28, ln. 20) Greg admitted he could have notified Susan's attorney of his participation in the GE pension during his settlement negotiations with her, but never did so. (Tr. 46, ln. 17, 25) Greg also admitted he made no reference to a defined benefit pension in any of his correspondences with Reasner or anyone else. (Tr. 47, ln. 13-16) Although Greg was subject to the district court's April 22, 2010, discovery order requiring him to produce documents showing all of his assets, the district court accurately concluded that Greg "provided categorically no information regarding the existence of any pension" during the parties' divorce proceeding. (App. p. 242) As a result, the parties' 2010 Decree does not refer to or award any interests in GE defined benefit pension to either party. (Tr. 28, ln. 23 – p. 29, ln. 2)

In judging Greg's contention that Susan could have discovered his interest in the GE pension within one year of decree, this Court should heavily weigh the implication of Greg's decision to challenge only the fraud element of "justifiable reliance" on appeal. In other words, Greg concedes clear and convincing evidence established he knowingly and intentionally made false, material misrepresentations for the deliberate purpose of deceiving Susan into believing he only had one retirement asset. Against his deliberate efforts to conceal his vested pension interest,

Greg's assertion that Susan should have somehow divined knowledge from a blank, generic GE consent form (App. p. 170), accompanied by his dishonest explanation discussed below, is a sleight of hand argument as lacking in credibility as was the description often given to Greg's testimony by the district court.

The district court also gave attention to Greg's deception when he presented the form to attorney Reasner for the first time, one day before signing the divorce Stipulation. It wrote:

> At the time that Greg signed the Stipulation on October 29, 2010, he dropped off a form for Susan to sign referable to the 'GE retirement fund.' In his email to attorney Reasner on October 28, 2010, he explained that it 'waives her right to GE death benefits and allows me to redirect them to my children'. (See Exhibit A, page 2).

(App. p. 243)

The district court noted that Greg's email made no reference to a pension. The court further pointed out the falsity of Greg's explanation to attorney Reasner – that the purpose of the form was to permit him to name his children as beneficiaries – when it was revealed at trial that Greg instead named his girlfriend, Michelle Tegeler, with whom he was having an affair during his marriage to Susan. (Tr. 309, ln. 21-23, Tr. 310, ln. 14-18; App. p. 244)

Furthermore, Susan's paralegal asked Greg in her written November 11, 2010, letter to return an executed copy of the completed GE Consent Form, but he did not. (App. pp. 116, 169; Tr. p. 208, ln. 25 – p. 209, ln. 6) Between November 12, 2010,

and September 2015, Greg never communicated with Reasner, Barnes or Susan in any way concerning his GE pension nor provided any documents relating to his defined benefit pension, continuing its concealment. (Tr. p. 209, ln. 7 – 14) The district court specifically found any testimony from Greg asserting he returned documents to attorney Reasner to be lacking credibility and completely unsupported in evidence. (App. p. 244)

Greg's statements to Susan on September 3, 2015 in the parking lot of the University of Iowa Credit Union betrayed his personal state of mind, more than five years later, that he had concealed the pension from Susan in a way preventing her from discovering its existence any sooner. (App. p. 244) At UICCU, Greg informed Susan for the first time that he was getting a "nice pension" from GE. (Tr. p. 88, ln. 11 – 15; App. p. 244) When Susan replied that, "you never disclosed that going through our divorce," (Tr. p. 88, ln. 11 – 15), Greg chided Susan that there was nothing she could do about it now because she had already signed off. (Tr. p. 88, ln. 11 – 15)

About Susan's testimony concerning the events of September 3, 2015, the district court found Susan's testimony:

> to be both credible and relevant to Greg's state of mind, and his understanding that he had intentionally deceived Susan during the dissolution process and at the time of signing the Stipulation of Settlement. It is also consistent with sending over a blank 'Consent' form for Susan to

> sign, and later intentionally checking the pension box, and never returning a copy of it to Attorney Reasner.

(App. p. 244) The district court determined that this was the first time Susan would have been alerted to the existence of any pension, and that Greg's fraud could not have been discovered earlier in the exercise of due diligence. (App. p. 244) The record shows ample support for the district court's conclusion that Greg acted to ensure that Susan could not have discovered Greg's fraud within one year of the decree. Greg's argument offers no evidence, only conjecture.

3. *Simon v. Simon* is Inapposite Authority. Greg's assertion that *Simon v. Simon* is indistinguishable from the instant case reflects a misunderstanding of that decision. *Simon v. Simon*, 15-0814, WL 1703521 (2016). In *Simon,* the petitioning party did not present his complaint as a petition to vacate the parties' decree, nor did he assert he was unable to discover the grounds for his complaint within the one-year time limitation imposed by Rule 1.1013. *Id., *1* Because the *Simon* court was never asked to decide whether any equitable exceptions to the one-year rule applied, it did not analyze the "equitable exception" question at all. Consequently, *Simon* provides no support for Greg's assertion that Susan's Petition is an improper collateral attack upon their 2010 divorce decree, and its holding is inapposite here.

4. Conclusion.

For these reasons, this Court should affirm the district court's decision that Susan could not with reasonable diligence have discovered Greg's fraud within one year after the judgment.

B. Commission of Extrinsic Fraud Warranted Modification of Decree.

1. Applicable Legal Principles.

Although Susan's petition is not time barred under Rule 1.1013(1), the district court correctly concluded that not every case of fraud will justify relief from Rule 1.1012. *Scheel v. Superior Mfg. Co.*, 249 N.W.2d 377, 382 (Iowa 1958). When fraud is the alleged basis for relief, the fraud must be "extrinsic and collateral to the proceedings and issues in the original case." *Johnson*, 489 N.W.2d at 415; see also *Schettler v. Iowa Dist. Court for Carroll Cty.,* 509 N.W.2d 459, 467 (Iowa 1993)(citing *Stearns v. Stearns,* 187 N.W.2d 733, 735 (Iowa 1971))(the only fraud that is not subject to these time constraints is extrinsic fraud, which is "some act or conduct of the prevailing party which has prevented a fair submission of the controversy.") Therefore, extrinsic fraud is "the only type of fraud which is recognized as a basis for declaring a judgment to be void." *Committee of Professional Ethics and Conduct of the Iowa State Bar Ass'n v. McCullough*, 468 N.W.2d 458, 461 (Iowa 1991).

Intrinsic fraud is not a basis for relief. *Graves v. Graves*, 109 N.W. 707, 708 (Iowa 1906) (quoting *Greene v. Greene*, 68 Mass 361, 366 (1854)). It includes false testimony and fraudulent exhibits, and pertains to matters that have been either actually tried or could have been tried. *In re Adoption of B.J.H.*, 564 N.W.2d at 391; *Giglos v. Stavropoulos*, 204 N.W.2d 619, 621 (Iowa 1973). The principle that intrinsic fraud does not justify vacating a judgment is grounded in the precept that "a party cannot obtain relief from a judgment based on fraud which is based on matters or issues which actually were or could have been presented or adjudicated at trial." *Gigilos,* 204 N.W.2d at 621.

However, fraud is extrinsic:

> …where its effect is to prevent a party from having a trial or from presenting all of his case to the court, or where it operates upon matters pertaining, not to the judgment itself, but to the manner in which it is procured, so that there is not a fair submission of the controversy. Fraud which induces an adversary to withdraw his defense, or prevents him from presenting an available defense or cause of action in the action in which the judgment is obtained, has been regarded as a proper ground for equitable relief against the judgment.

T.C. Williams, Anotation, *Concealment or Misrepresentation of Financial Conditino by Husband or Wife as Ground of Relief From Decree of Divorce*, 152 A.L.R. 190 (1944).

Extrinsic fraud consists of "extrinsic or collateral acts not involving the merits of the case" preventing the fair submission of the controversy. *Graves* 109 N.W. at 709. More recently, the Iowa Court of Appeals described extrinsic fraud this way:

> Extrinsic fraud is some act or conduct of the prevailing party which has prevented a fair submission of the controversy. *Miller v. AMF Harley–Davidson Motor Co., Inc.,* 328 N.W.2d 348, 353 (Iowa App.1982). It includes the lulling of a party into a false sense of security or preventing him from making a defense. *In re Marriage of Heneman,* 396 N.W.2d 797, 800 (Iowa App.1986).

Johnson v. Mitchell, 489 N.W.2d at 415; see also *B.J.H.,* 564 N.W.2d at 392 (finding extrinsic fraud where the act or conduct has prevented a fair submission of the controversy); *Costello v. McFadden*, 553 N.W.2d 607, 612 (Iowa 1996)(extrinsic fraud includes a party lulling another into a false sense of security or preventing the party from making a defense). Put another way, extrinsic fraud keeps a party from presenting her case or prevents an adjudication on the merits. *Mauer v. Rohde*, 257 N.W.2d 489, 496 (Iowa 1977).

2. The District Court Correctly Held Greg's Total Concealment Constituted Extrinsic Fraud

In Iowa, the concealment and nondisclosure of a material asset is extrinsic fraud. Most recently, the Iowa Court of Appeals decided the claim of the former spouse (Deborah) of an attorney (Scott) alleging that he failed to disclose the existence of two contingency fee cases in discovery or prior to their marriage

dissolution trial in September 2003. *In re: Marriage of Rhinehart,* 09-0193 WL 446560 *1 (2010) In *Rhinehart*, the parties' divorce decree was filed March 18, 2004. *Id.* On December 14, 2005, more than one year later, Deborah filed a petition under Iowa R. Civ, P. 1.1012 asserting Scott committed extrinsic fraud by completely concealing of the existence of the contingency cases in discovery and at trial. *Id.*

The Court of Appeals affirmed the district court on de novo review, concluding that by concealing the existence of the contingency cases, "Scott's actions prevented a fair submission of the dissolution property/debt/spousal support issues," and constituted the commission of extrinsic fraud *Id.,* *3 (citing *Johnson*, 489 N.W.2d at 415). Giving weight to the district court's findings that Scott's testimony lacked credibility, the court found decisive the facts that Scott did not disclose the contingency fee cases during his discovery deposition, in his trial testimony or at any other point in the case. *Id., *4.*

Greg's conduct strongly resembled the facts in *Rhinehart*. Here, the district court made specific findings that Greg's testimony on key points was "disingenuous at best and utterly not credible", (App. p. 242), "was not borne out by any credible testimony", (App. p. 243), "is not credible", (App. p. 244), that "is ludicrous." (App. p. 244) Also, like *Rhinehart*, Greg violated an April 22, 2010, discovery order by "categorically not producing" any documents or information relating to the GE

pension. (App. pp. 139, 242) Greg did not disclose his vested pension interest at any other point in time in the case, either, despite knowing of his duty to do so. At one point Greg provided a misleading explanation of the GE consent form's purpose to attorney Reasner. In approving the Decree as to substance ahead of submission for approval, Greg defrauded the court by leading it to believe full disclosure took place when he knew it hadn't.

Iowa law is well-settled that pension plan benefits are material in actions for dissolution of marriage. Pensions are divisible marital property. *In re Marriage of Sullins,* 715 N.W.2d 242, 247–48 (Iowa 2006)(citing *In re Marriage of Branstetter,* 508 N.W.2d 638, 640 (Iowa 1993) ("Pensions in general are held to be marital assets, subject to division in dissolution cases, just as any other property." (Citations omitted.))

In each of these respects, Greg's complete concealment and nondisclosure of his vested pension interest throughout the case entirely prevented Susan from making a claim or addressing the issue of his defined benefit pension in any way whatsoever. Consequently, Greg's concealment absolutely prevented a fair submission of the controversy. *Miller,* 328 N.W.2d at 353; *B.J.H*, 564 N.W.2d at 392. The district court was plain about this when it wrote:

> In the case at bar, the fraud which Greg perpetrated at the time of the signing of the Stipulation of Settlement was extrinsic because it prevented Susan from even having the

> issue of the distribution of any such GE Pension addressed. Susan was not given the opportunity to fairly present evidence referable to the GE pension because Greg affirmatively concealed its existence. This is not a situation where there was perjured testimony or false evidence presented upon which the judgment was based. Rather, Greg's extrinsic fraud was collateral to the proceedings and pertained exclusively to the manner in which the judgment/decree was procured. The concealment of the GE Pension was collateral to the matter already adjudicated in the Stipulation and Decree.

(App. p. 244) Like *Rhinehart,* Greg's commission of extrinsic fraud prevented any determination of rights as to the GE pension. Greg's fraud prevented the submission of the issue entirely, left the decree and all of its prior negotiated versions without mention of the issue, and induced Susan to sign an agreement making no award at all of Greg's GE pension. Greg's fraud had the effect of lulling Susan into a false compromise and a false sense of security that she and Greg were being awarded equal shares of marital assets available for their support in future retirement years. Greg's fraud also prevented Susan from making a defense against an outcome *that would effectively award Greg the entirety of Susan's marital share of the GE pension*. In each of these respects, Greg's fraud prevented Susan, and the court, from addressing the merits of the case on the issue of Greg's pension and prevented any submission at all of the controversy.

More than 100 years earlier, the Iowa Supreme Court reached the same conclusion in *Graves v. Graves,* 109 N.W. 707 (Iowa 1906). *Graves* remains the

leading Iowa decision on the issue of extrinsic fraud. In *Graves,* the court declared that while false swearing or perjury alone is not grounds for setting aside or vacating a judgment, when accompanied by "fraud extrinsic or collateral to the matter involved in the original case sufficient to justify the conclusion that but for such fraud the result would have been different" a decree may be vacated and a new trial granted." *Graves,* 109 N.W. at 709.

Graves involved a wife's discovery, more than one year after entry of their original divorce decree, that her husband gave false trial testimony *and* that he concealed property from her. *Id.,* at 707. The court held that the husband's concealment of property in the original action was fraud extrinsic to the matter involved in the original case which justified granting a new trial. *Id.,* at 709.

Finding extrinsic fraud as a basis for vacating a judgment may require a clear and convincing showing of egregious misconduct, and at the very least a showing of fault, willfulness, or bad faith. *In re Marriage of Heneman,* 396 N.W.2d 797, 800 (Iowa App.1986); *Miller,* 328 N.W.2d at 353. Under *Rhinehart* and *Graves,* concealment constitutes such conduct. But Greg's trial testimony betrayed a particular conceit when he admitted he intended in 2010 not to disclose his pension interest during the divorce case because he felt, "I've got---still got a lot of life to live and this—all this stuff is just stuff. And if they miss something on there, that is on them." (Tr. 55, ln. 8-13) Proof of his state of mind was told when Greg wrote to

his plan administrator in 2019 that "[i]n 2016, my ex-wife discovered I was getting the GE pension," (Tr. 327, ln. 12-16; App. p. 166), and again when he defiantly testified at trial that "Susan doesn't deserve any of the pension". (Tr. 323, ln. 7)

Within these statements the district court could find more than the requisite degree of fault, willfulness, and bad faith justifying vacation or modification of the 2010 decree due to extrinsic fraud.

3. Greg's Authorities are Distinguishable and Non-Controlling.

In support of his position that his fraud was intrinsic, but not extrinsic, Greg cites *In re Marriage of Bacon*, 11-0368, WL 4579601 (2011) as an identical comparative example. It is not.

In *Bacon,* the former husband's complaint was not that his wife had failed to disclose the existence of assets. *Id.* Instead, *Bacon* involved an assertion of fraud based upon his disagreement with certain property values his former wife applied to assets she *did* disclose in her financial affidavit and which *were known to him*, including his own business. *Bacon*, at *1.

Without deciding that the wife committed fraud, *Bacon* reiterated that a fraudulent act of giving false values on a financial affidavit is intrinsic fraud, because such fraud could be met and challenged at trial. *Id.,* *4 (citing *Graves,* 109 N.W. at 709, quoting *Pico v. Cohn,* 25 P. 970, 071-71 (Cal. 1891)).

In contrast, nondisclosure of an asset altogether conceals all proof of its existence and presents no information from which to proceed. It leaves no trail of conflicting evidence by which to compare and challenge the fraud. It deprives the opposing party from meeting and exposing the fraud with conflicting evidence at trial. In this important way, Greg's fraud is decidedly different from the valuation discrepancies alleged in *Bacon*.

Greg also cites *In re Marriage of Gance,* 36 P.3d 114 (Col. App. 2001), in support of his argument that the concealment he perpetrated during the divorce proceedings was intrinsic. First, to the extent *Gance* stands for the proposition that nondisclosure and concealment is considered intrinsic fraud in Colorado, it is in direct conflict with *Graves,* which stands as the law of this state today. Furthermore, the Iowa Court of Appeals issued its decision in *Rhinehart* nine years after the *Gance* decision. Accordingly, Iowa decisions both before and after *Gance* make clear that Iowa courts characterize complete nondisclosure and concealment as extrinsic fraud, and *Gance* is not authoritative here.

Furthermore, at the time *Gance* was published, Colorado law did not place an affirmative duty upon litigants to disclose assets fully. Enactment of changes to the rules of civil procedure in 2005 subsequently established that affirmative duty. *In re Marriage of Schelp*, 228 P.3d 151, 155–56 (Colo. 2010). Iowa law, however, has

imposed a statutory duty to fully disclose assets, as well as a duty to supplement incomplete discovery responses. *Rhinehart*, 210 WL 44650 at *4.

4. Conclusion.

For these reasons, this Court should affirm the district court's conclusion that Greg's concealment constituted extrinsic fraud, collateral to the proceedings and pertaining to the manner by which the decree was procured, because his fraud actively and completely prevented Susan from presenting any evidence at all concerning Greg's GE pension and from having the issue of its distribution addressed in any way.

II. THE DISTRICT COURT CORRECTLY FOUND SUSAN PROVED THE JUSTIFABLE RELIANCE ELEMENT OF FRAUD BY CLEAR AND CONVINCING EVIDENCE.

A. Susan Proved the Fraud Element of Justifiable Reliance.

Fraud is proven under Iowa law by establishing the following elements clearly and convincingly: (1) misrepresentation or failure to disclose when under a legal duty to do so, (2) materiality, (3) scienter, (4) intent to deceive, (5) justifiable reliance, and (6) resulting injury or damage. *In re Marriage of Cutler*, 588 N.W.2d 425, 430 (Iowa 1999). "Fraud may be an affirmative misstatement or the concealment of or failure to disclose a material fact." *Clark v. McDaniel*, 546 N.W.2d 590, 592 (Iowa 1996).

On appeal, Greg concedes Susan clearly and convincingly proved five of the six fraud elements. Greg argues only that the district court erred in finding Susan proved the element of "justifiable reliance".

Justifiable reliance is an essential element of a claim for fraud. *In re Cutler,* 588 N.W.2d at 430. A party must not only act in reliance on the misrepresentation, but the reliance must be justified. *Spreitzer v. Hawkeye State Bank*, 779 N.W.2d 726, 736 (Iowa 2009)(citing *Gibson v. ITT Hartford Ins. Co,,* 621 N.W.2d 388, 400 (Iowa 2001)). The justified standard means the reliance does not necessarily need to conform to the standard of a reasonably prudent person, but "depends on the qualities and characteristics of the particular plaintiff and the specific surrounding circumstances." *Spreitzer*, 779 N.W.2d at 736 (citing *Lockard v. Carson,* 287 N.W.2d 871, 878 (Iowa 1980)).

Furthermore, an individual to whom the fraudulent misrepresentation is made is "'required to use his senses, and cannot recover if he blindly relies on a misrepresentation the falsity of which would be patent to him if he had utilized his opportunity to make a cursory examination or investigation.' " *Dier v. Peters*, 815 N.W.2d 1, 9 (Iowa 2012)(citing *Lockard,* 287 N.W.2d at 878 (quoting Restatement (Second) of Torts § 541 cmt. *a,* at 89)). However, as Greg notes in his appellate brief, "[i]t is not necessary that the representation be the only reason for the

plaintiff's action. It is enough if the representation was a substantial factor in bringing about the action." Iowa Uniform Jury Instruction No. 810.8.

By these standards, this court should affirm the district court's finding that Susan's reliance was justified.

B. The Evidence of Justifiable Reliance.

1. Greg's Representation. The trial testimony from both Susan and Greg clearly proved that Greg represented he owned no interest in a defined benefit pension or any retirement account other than the $126,000 GE pension. (App. pp. 244-245)

As the district court observed, ¶6 of the parties' divorce stipulation specifically contained an explicit representation that each party fully disclosed all of his or her assets. (App. p. 128) On October 29, 2010, Greg signed the Stipulation on oath attesting to Susan that his representation was true. (App. p. 135) Greg also pre-signed the decree approving its content and, in doing so, misled the decretal court to rely upon, and to order, proposed language ratifying a full disclosure Greg knew had not occurred. (App. p. 126)

Greg made the same representation, that the "GE retirement fund" was his only retirement asset, by omission when he produced no record of his GE pension in response to the court's April 22, 2010 mandatory discovery order, while knowing

the order imposed upon him a legal duty to disclose its existence. (Tr. 24, ln. 19-24; p. 25, ln. 2, 6)

2. Susan Relied Upon Greg's Representation.

At trial, Susan testified unequivocally that she relied upon Greg's representation he possessed no interest in a defined benefit pension, answering:

> Q. Did you rely upon Mr. Hutchinson's signature under oath in the representations in the stipulation that he made full disclosure of all of his financial accounts and retirement?
>
> A. Yes.

(Tr. 83, ln. 15-19)

> Q. Did you rely upon Mr. Hutchinson's signature to the affidavit -- to the Stipulation of Settlement that he had indeed fully disclosed all of his retirement assets and account and plans?
>
> A. Yes.
>
> Q. Did Mr. Hutchinson's signature affirming under oath that he had actually disclosed all of his retirement property -- did that cause you to agree to the settlement?
>
> A. Yes.

(Tr. 100, ln. 24 – p. 101, ln. 10)

Attorney Reasner substantiated Susan's testimony, testifying that Susan relied upon Greg's signature to the stipulation, representing he had disclosed all of his financial assets, for the fact that Greg owned no interest in any other retirement

account than the $126,000 "GE retirement fund". (Tr. p. 161, ln. 15 – 17) Reasner also testified that Susan was relying upon Greg's representation in authorizing her and Barnes to mail the signed, unmarked GE consent form to Greg on November 12, 2010. (App. pp. 169-170; Tr. p. 191, p. 23 – p. 192, ln. 1)

Greg raised no serious question and presented no evidence contesting the fact Susan relied upon Greg's representation he owned no interest in any retirement accounts, including defined benefit pensions, other than the $126,000 "GE retirement fund". Accordingly, the district court correctly, and easily, concluded that Susan relied upon Greg's representation.

3. Susan's Reliance Was Justifiable.

For equally plain reasons, district court correctly concluded that Susan's reliance upon Greg's representation was completely justified.

To this question, Greg's own trial testimony eviscerates his argument. Greg admitted that he read and reviewed every draft Stipulation, every attached Exhibit A and every settlement communication transmitted to him by attorney Reasner (Tr. p. 55, ln. 4 – 7; App. pp. 176-191, 195-204, 207-211), and that *he himself relied upon Susan to have fairly and accurately disclosed her assets within these documents*, to make sure that he didn't overpay Susan in a property settlement. (Tr. p. 33, ln. 5 – 9) Greg also admitted he utilized Susan's disclosures to negotiate for changes, and

to produce a more favorable net settlement for himself. (Tr. 34, ln. 2-8, 15-20; p. 35, ln. 1-8, 16-21; p. 39, ln. 20-25; p. 40, ln. 1-4, 14-25; p. 41, ln. 4-13)

Here, Greg's argument reaches the height of hypocrisy, by asking this Court to ignore that *he* felt justified in relying upon Susan's representation she fulfilled her duty and fully disclosed her assets, but that Susan was unjustified in relying upon the reciprocal representation from Greg. This Court should reject Greg's argument out of hand.

Moreover, in his trial testimony Greg flatly contradicted the argument he now presents on appeal, by explicitly admitting that Susan *was* justified in relying upon his representation. Greg conceded that he knew the act of swearing to tell the truth under oath gives the recipient the highest assurance that the oath giver is telling the whole truth. (Tr. p. 48, ln. 17 – 20) Greg also admitted that any time he is sworn under oath, statements he gives under that oath can be relied upon as truthful by the recipient. (Tr. p. 48, ln. 10 – 13) Greg admitted that the giving of an oath placed upon him a legal duty to tell the truth. (Tr. p. 48, ln. 1 – 5) Lastly, on the specific question of justification, Greg admitted that a recipient *is justified in relying upon statements he makes under oath,* orally or in writing, if he is swearing that the statements are true. (Tr. p. 48, ln. 21 – 25; Tr. p. 49, ln. 1-2) Greg admitted that the recipient *would have been entitled to rely* on the truthfulness of his answer. (Tr. p. 49, ln. 3 – 7) Greg acknowledged that these principles were true in 2010 as they

were at the time of trial. (Tr. p. 49, ln. 3 – 7) Inescapably, Greg's own testimony established Susan was justified in relying upon his sworn representation he had fully disclosed all of this retirement assets.

Susan directly testified she felt justified in relying upon Greg's representation he had no interest in a defined benefit pension because Greg swore on oath he had fully disclosed all of his retirement assets. (Tr. 101, ln. 1-10) Attorney Reasner agreed Susan was justified. (Tr. 161, ln. 7-21; p. 204, ln. 7-17)

Attempting to muster some appearance of supportive evidence in the record, Greg resorts to misrepresenting Susan's trial testimony to suggest Susan knew that Greg might have more than one GE retirement account. This is false. Susan testified repeatedly and consistently at trial she did not. In pointing to specific testimony from Susan, Greg mischaracterizes her statements by omitting precedent questions and answers, in which Susan testified she knew only of one plan and that there were no markings on the GE consent form that suggested to her that Greg might be participating in more than one plan. (Tr. p. 84, ln. 21 – 25; p. 85, ln. 1) Susan's testimony that "there might be one account, maybe two, or maybe none" was her description of the form's generic text. (Tr. p. 85, ln. 11 – 16) No witness at trial – not even Greg – testified that the generic, blank GE consent form tended to indicated he participated in more than one GE retirement plan.

Greg's remark in his brief that Susan "did not care at the time whether Greg Hutchinson had a GE pension plan or a GE Savings and Security Program account, or both" is nothing more than flagrantly false rhetoric in direct conflict with every piece of credible evidence presented. This Court should likewise disregard Greg's self-serving, unsupported testimony that Susan had actual knowledge of the GE pension, because Greg offered no proof Susan had any knowledge at all. In fact, on cross-examination Greg backtracked on this particular assertion by admitting he did not actually know what retirement plans he was referring to when he gave his answer. (Tr. p. 67, ln. 25 – p. 69, ln. 4)

In vivid contrast, the district court found Susan's testimony credible that she first learned of the existence of any pension on September 3, 2015. (App. p. 244) To the final point Greg asserts on appeal, that Susan and attorney Reasner had a duty to investigate further, the district court stated:

> The court disagrees. Greg had multiple opportunities and was under multiple obligations to affirmatively fully disclose all of his assets, particularly his retirement assets. He did not do so. Ms. Reasner had no obligation to investigate something that Greg had failed to advise her even existed.

(App. p. 244)

As Susan (Tr. p. 76, ln. 6 – 7, 12; p. 78, ln. 15 – 19; p. 80, ln. 18 - 22), attorney Reasner (Tr. p. 207, ln. 4 – 8) and Michelle Barnes (Tr. p. 173, ln. 17 – 20) all

testified, there was no question whether Greg participated in more than one GE retirement plan – the $126,000 GE retirement fund.

Based upon these circumstances, the Court should affirm the district court's ruling that Susan proved the fraud element of "justifiable reliance" by clear and convincing evidence presented at trial.

III. THE DISTRICT COURT CORRECTLY AWARDED SUSAN ATTORNEY FEES AS DISCOVERY SANCTIONS.

A. The District Court's Refusal to Award Attorney Fees to Greg Should be Affirmed.

For the proposition that he should be awarded attorney fees resulting from dismissal of the second count of Susan's Petition, Greg relies upon Iowa Code §598.36 which states:

> In a proceeding for the modification of an order or decree under this chapter, the court may award attorney fees to the prevailing party in an amount deemed reasonable by the court.

Iowa Code §598.36 (2019). Although Count II was a "modification proceeding" under Iowa Code Chapter 598, the district court has considerable discretion in determining whether such fees should be awarded under this statute. *In re Marriage of Maher*, 596 N.W.2d, 561, 568 (Iowa 1999). The district court was well within its discretion to deny Greg's request.

First, the district court understood that Susan's request to modify alimony was alternate and subsidiary to her primary claim to correct, vacate or modify the parties' 2010 decree. Both counts sought to remedy exactly the same extrinsic fraud and arose from the same set of operative facts. On those common facts and circumstances, the district court found Greg intentionally and materially committed extrinsic fraud. The relief ordered by the district court was, in effect, the same relief Susan requested by way of alimony modification– an award of a future stream of funds equivalent to what should have been the value of her marital share of Greg's GE pension. (App. p. 15) Viewed this way, the district court was fundamentally correct when it ruled upon Greg's Rule 1.904(2) motion by stating that Susan completely prevailed in this proceeding. (App. p. 255)

Second, if asked to grant attorney fees under Iowa Code §598.36, the court is to evaluate each party's ability to pay their own fees. *In re Marriage of Kimmerle*, 447 N.W.2d 143, 145 (Iowa App. 1989) On the question of his own ability to pay attorney fees, or Susan's for that matter, Greg gave no testimony and developed no record at all.

Had he done so, the district court had before it the parties' affidavits of financial status filed October 16, 2019, declaring their respective incomes and monthly expenses as of the time of trial. Greg's financial affidavit alone proves his superior ability to pay whatever attorney fees he was requesting, reporting his gross

monthly income at $10,348 and showing positive net monthly cash flow. (App. p. 71) Susan's gross monthly income was $4,138.33 – inferior to Greg's. (App. p. 63) Furthermore, Greg owns far greater assets than Susan, including ready access to $30,000 in cash from which to meet his attorney fees, in comparison to Susan.

Third, Greg's proof of any attorney fees incurred was deficient. At trial, Greg gave no testimony and presented no exhibits describing any amount of attorney fees he claimed. By the time the evidentiary record closed on November 6, 2019, (Tr. p. 356, ln. 11 – 12), Greg had submitted no attorney fee statement, no testimony, and no attorney fee affidavit upon he could be examined to test accuracy or reasonableness.

The only documents Greg submitted for the record relating to attorney fees were an attorney fee invoice from the Wassmer Law Office filed on November 11, 2019, an unsupported attorney fee affidavit from Leslie Stokke with no time record, attached to his Post Trial Brief filed November 11, 2019, along with an affidavit from attorney Wassmer. None were trial exhibits. Both affidavits concede they are based on *estimations* of how fees may have been indistinguishably allocated between Counts I and II of Susan's Petition. Both also make clear that at least some portion of the fees Greg requests are in fact attributable to legal services rendered to defend Count I of Susan's Petition, upon which the court denied Greg's request for summary judgment and which Greg lost at trial.

For all of these reasons, the district court properly denied Greg's request for an award of attorney fees.

B. The District Court Acted Within its Discretion in Awarding $7,056 in Attorney Fees to Susan Hutchinson as a Discovery Sanction.

Greg presents four arguments challenging the district court's award of $7,056 in attorney fees as a discovery sanction. First, Greg contends the district court did not sufficiently explain its award. Next, Greg argues that because the district court imposed greater sanctions than Susan requested, it erred. Third, Greg asserts that Susan did not carry a burden to prove the necessity of services or that the charges were reasonable. Lastly, Greg appears to argue that Susan waived or forfeited some part of the sanctions imposed. For the following reasons, this Court should reject each argument and affirm the district court's decision.

At the beginning of trial, the district court received Susan's attorney fee statement into evidence, from which all descriptions of work were redacted, without objection. (App. pp. 212-216; Tr. 7, ln. 19-24) Additionally, Greg agreed at the beginning of trial that Susan's unredacted attorney fee exhibit, with task descriptions stated, would *only* be submitted to the court for *in camera* review in determining fees. (Tr. 7 ln. 24 – p. 8, ln. 3) Greg never requested an unredacted copy of Exhibit 21 for his own inspection. Because he consented at trial to the very procedure that produced the result to which he assigns error, Greg waived any argument that the district court wasn't specific enough in explaining its order.

The district court nevertheless sufficiently explained how it decided the amount of attorney fees to award as a discovery sanction. Within its broad discretion, *R.E. Morris Investments, Inc.,* 304 N.W.2d at 191, the district court explained:

> Pursuant to the court's order of October 9, 2019, however, the Respondent was ordered to pay, as a sanction for his failure to provide discovery, the cost of Susan's attorney fees incurred for having to pursue the discovery in this case (which was actually never provided). An award of attorney fees is an appropriate sanction in such an instance and is specifically contemplated by Rule 1.517(1)(d)(1) of the Iowa Rules of Civil Procedure. *The court has reviewed Petitioner's Exhibit 21 and finds that $7,056 of Petitioner's attorney fees are directly referable to Petitioner's unsuccessful attempts to get Greg to provide necessary, relevant, and potentially dispositive information referable to his GE pension plan, his contact with the Plan Administrator, and details referable to the plan itself. The court therefore finds that judgment should be entered in favor of the Petitioner and against the Respondent in the amount of $7,056 as a sanction for Greg's blatant and willful failure to provide requested discovery.*

(App. p. 246)(*emphasis* added)

Susan's trial Exhibit 21 itemized all of her attorney fees incurred through October 25, 2019, and contained an attorney fee affidavit. With the district court's permission, Susan filed a redacted Supplemental Attorney Fee Affidavit on November 12, 2019, stating her attorney fees incurred from October 28, 2019 through November 6, 2019. (App. pp. 237-240) Susan also submitted her unredacted

Exhibit 21 and unredacted supplemental attorney fee statement, with work tasks showing, by hand-delivery to the district court on November 12, 2019, for *in camera* inspection. (App. p. 238)

As a result, the district court had complete, unredacted and itemized records stating all legal work performed for Susan and its cost when it made its attorney fee ruling. Additionally, the district court had before it Susan's Renewed Motion for Sanctions filed September 17, 2019, and the district court's October 9, 2019, order granting Susan's Renewed Motion for Sanctions which ruled:

> Respondent is ordered to pay the cost of Petitioner's attorney fees incurred for having to pursue the discovery ordered herein, which costs shall *include but not necessarily be limited to* attorney fees for all time expended in relation to the preparation of Petitioner's Renewed Motion for Sanctions, defending Respondent's Resistance, making her Reply, and hearing.
>
> * * *
>
> *…the judgment and payment terms shall also be established by the trial judge*; and
>
> * * *
>
> …at this time, the Court declines to order additional sanctions requested by Petitioner in her Renewed Motion, *but without prejudice to making future requests in the event Respondent fails to fully and completely comply with this Order in any way*.

(App. pp. 55-56)(*emphasis* added)

The district court's October 9, 2019, Order gave notice to Greg that he may be subject to further sanctions if he failed to comply with the court's pretrial orders. When deciding the attorney fee issue, the district court also had the benefit of the complete trial record upon which it determined Greg did not provide the discovery documents ordered on October 9, 2019. (App. p. 246) The district court described Greg's conduct as "blatant and willful failure to provide requested discovery." (App. p. 246) In its ruling on Greg's Rule 1.904(2) Motion, the court elaborated by explaining:

> As a result, significant relevant information was never provided to the Petitioner. Potentially this information would have shown, conclusively, that the Respondent knew of the pension at the time of the original Decree of Dissolution and that he intentionally and in bad faith failed to divulge that information. It would have substantially shortened the trial. The award of attorney fees was issued as a sanction, not as a matter of right.

(App. p. 256) Thus, although the district court declined to state its mathematical calculations, it amply explained its reasoning, described the severity and prejudicial effect of Greg's discovery violation, and fashioned a permissible discovery sanction within its discretion.

On appeal, Greg cites no legal authority limiting the district court's discretion in imposing discovery sanctions specifically to what one party or another has requested. In its ruling on Greg's 1.904(2) motion the district court astutely pointed out that Susan's attorney fee affidavit in the amount of $2,568, filed October 14,

2019, contemplated that Greg would, in fact, provide the requested documentation and did not account for time relating to noncompliance through trial. (App. p. 256) The district court found he did not.

Susan's trial evidence, on the other hand, spoke to the reasonableness and nature her fees. The attorney fee affidavit within Exhibit 21 incorporated the proper professional considerations under Iowa Rule of Professional Conduct 32:1.5(a) for establishing the reasonable value of legal services. (App. p. 212) Exhibit 21 stated that all services reflected were "solely for representation in this case and are true and correct accountings." (App. p. 212) Susan testified that she reviewed Exhibit 21 against her unredacted billing statements to confirm that it accurately reflected her attorney fees incurred. (Tr. p. 106, ln. 9 – 22) Greg's counsel chose not to examine Susan on the content of Exhibit 21.

Lastly, Greg's assertion that the district court did not rule on Susan's attorney fee request relating to its September 4, 2019, Order may be partially correct in that Susan's fee award was not specifically reduced to judgment in any pretrial order. However, the district court's Order granting Susan's first Motion for Sanctions ordered payment of fees in the amount Susan was allowed to state by subsequent affidavit, which she filed. The record reflects no waiver or forfeiture by Susan, and the district court's approach of deciding them how it did was not an abuse of discretion.

IV. THIS COURT SHOULD AFFIRM THE DISTRICT COURT'S AWARD OF RETROACTIVE BENEFITS.

At the outset, Susan's Petition requested pursuant to Iowa R. Civ. P. 1.1012 that the court "correct, *vacate* or modify the parties' Decree" to award her a share of Greg's pension asset. (App. p. 14)

Iowa Rule of Civil Procedure 1.1012 vests authority in the district court to either vacate or modify a final judgment – whichever is most appropriate under the circumstances. During trial, the district court informed the parties that if it found in Susan's favor, it would not vacate that part of the parties' decree that actually divorces the parties, but only the property settlement portions. (Tr. p. 193, ln. 23 – Tr. p. 194, ln. 4)

Importantly, had the district court elected to vacate the parties' 2010 decree, the parties might have been returned to married status and Greg's Integrated Sales 40lk may have become divisible marital property. After reflecting upon the parties' requests for relief and the evidence presented, the district court opted to modify the property division provisions of the 2010 decree to "address the GE pension issue." (App. p. 245) Susan therefore concedes that Greg's Integrated Sales 40lk retirement plan is an asset he acquired following the parties' divorce. Susan knows of no legal authority granting jurisdiction to the district court to divide post-divorce assets

However, the question of whether the district court had the power to direct payment specifically from Greg's Integrated Sales 40lk, however, is different from whether Greg is liable to Susan for $40,117.80. The first is merely a question of "how to collect," whereas the second relates to establishment of the liability itself. Greg admitted that he knew the objective of the divorce settlement agreement was to achieve an equal sharing of their marital property. (Tr. 41, ln. 18) The district court concluded was "exceptionally clear" from the trial testimony and the stipulation's distributive scheme that an equal division of their assets and debts was intended. (App. p. 245) Susan's Exhibit 12 correctly calculated what she would have received as her equal marital share of Greg's monthly pension benefits under *In re Marriage of Benson*, 545 N.W.2d 252, 255 (Iowa 1996). Recognizing that the district court could vacate their divorce altogether, and suggesting a like-kind payment in tax terms, Susan proposed payment from Greg's Integrated Sales 40lk. (Tr. p 147, ln. 6 – 9)

Yet, Susan also testified she would accept payment from other sources, including cash. (Tr. p. 147, ln. 10 – 11) When questioned by Greg's attorney on why she was not requesting cash, Susan replied that Greg "can pick the asset as long as it's an equitable asset." (Tr. p. 124, ln. 9 – 25; p. 125, ln. 9 – 10) Greg himself testified that he would prefer to pay a money judgment instead of from his Integrated Sales 40lk. (Tr. p. 279, ln. 8 – 11) Accordingly, even if this Court finds that the

district court overreached in directing payment from Greg's Integrated Sales 40lk, this Court should affirm the district court's ruling ordering Greg to pay to Susan the sum of $40,117.80 representing pension benefits she should have received since January 1, 2015. The court should then modify the means of payment, to enter judgment against Greg in the same amount with interest running from the date of this Court's ruling. The Court should also order Greg to pay Susan the full judgment amount with interest no later than 30 days of issuance of Procedendo.

V. SUSAN SHOULD BE AWARDED APPELLATE ATTORNEY FEES.

When the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reason," a court may award attorney fees. *Baldwin v. City of Estherville, 929 N.W.2d 691*, 700 (Iowa 2019)(citing *Remer v. Bd. of Med. Exam'rs*, 576 N.W.2d 598, 603 (Iowa 1998)(en banc)(quoting *Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines, Inc.*, 510 N.W.2d 153, 158 (Iowa 1993)); *accord Alyeska Pipeline Serv. Co. v. Wilderness Soc'y*, 421 U.S. 240, 258–59, 95 S. Ct. 1612, 1622, 44 L.Ed.2d 141 (1975)).

Considering the culpability of Greg's conduct, that Susan has been required to defend the district court's ruling on appeal, and the merits of each parties' arguments, Susan requests an award of appellate attorney fees in the amount of $5,000.

CONCLUSION

For the foregoing reasons and upon the authorities presented, Petitioner/Appellee requests that this Court affirm in full the district court's Findings of Fact, Conclusions of Law and Ruling.

REQUEST FOR ORAL ARGUMENT

Pursuant to Iowa R. App. P. 6.908(1), Susan requests oral argument upon submission of this appeal.

COST CERTIFICATE

Pursuant to Iowa R. App. P. 6.903(2)(j) the undersigned certifies the actual cost of printing and duplicating the foregoing Appellee's Proof Brief was the sum of $0.

SUSAN GAYLE HUTCHINSON,
Petitioner/Appellee

By */s/ Richard F. Mitvalsky*

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