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

FROM THE DECISION OF THE IOWA COURT OF APPEALS
FILED JULY 21, 2021

APPLICATION FOR FURTHER REVIEW OF PETITIONER/APPELLEE SUSAN GAYLE HUTCHINSON

RICHARD F. MITVALSKY
THOMAS F. OCHS
of
GRAY, STEFANI, & MITVALSKY, P.L.C.
425 Second Street S.E., Ste 700
P.O. Box 456
Cedar Rapids, IA 52406-0456
Tel. 319 364-1535
FAX 319 364-1562
rmitvalsky@gsmlawyers.com

CERTIFICATES OF SERVICE AND FILING

I certify that on August 10, 2021 I filed this document in compliance with Iowa R. App. P. 6.901 (3) and (8) and Iowa Rule 16.1221(1) by electronically filing one copy with the Clerk of the Iowa Supreme Court using the Iowa EDMS, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.315(1)(b), this constitutes service of the document pursuant to rule.

Webb L. Wassmer
wassmerlaw@yahoo.com

/s/ Richard F. Mitvalsky
Richard F. Mitvalsky [AT0005537]
of
GRAY, STEFANI & MITVALSKY, P.L.C.
425 2nd Street S.E., Ste. 700
P.O. Box 456
Cedar Rapids IA 52406-0456
Tel. 319 364-1535
Fax 319 364-1562
e-mail: rmitvalsky@gsmlawyers.com

QUESTIONS PRESENTED FOR REVIEW

Whether the Iowa Court of Appeals, in a Split Decision, Misapplied Iowa Law Interpreting the Equitable Exception to the One-Year Time Limit for Vacating a Divorce Decree Procured by Extrinsic Fraud Under Iowa R.Civ.P. 1.1012 and 1.1013.

STATEMENT SUPPORTING FURTHER REVIEW

In 1988, the Iowa Court of Appeals proclaimed:

> The courts of this state have an obligation to require accountability. Failure to disclose, secretion of assets, or transfer of assets during the dissolution process must be dealt with harshly. Otherwise the process becomes an uncivilized procedure and the issues become not ones of fairness and justice but which party can outmaneuver the other.

In re Marriage of Williams, 421 N.W.2d 160, 164 (Iowa App. 1988).

This case involves the admitted concealment of the existence of a defined benefit pension account throughout and following settlement negotiations in a dissolution of marriage action. In defending himself against his ex-wife, Susan's, suit to vacate the decree based upon his extrinsic fraud, Robert Hutchinson asserted Susan was at fault for not discovering his repeated, intentional deception sooner by following up on a letter sent to Robert by her lawyer 10 days after the entry of decree.

In a split-decision, the Iowa Court of Appeals has reversed the trial court's ruling granting Susan relief and in so doing has said:

> We agree . . . that courts must discourage 'financial trickery in dissolution of marriage proceedings.' We do so here by requiring divorcing parties to police one another, so to speak, by exercising reasonable diligence to promptly discover asset-fraud.

In re the Marriage of Hutchinson, No. 20-0076, 2021 WL 3076299 at *7, n.4 (2021).

This Court now is presented with the opportunity to clarify for the bar and litigants what is expected in the exercise of "reasonable diligence" in the case of a

complete and intentional concealment of significant assets, committed in bad faith, in violation of court discovery orders, and reinforced by sworn statements assuring full asset disclosure, and to reiterate that such conduct will lead to a divorce decree being vacated.

TABLE OF CONTENTS

BRIEF

Introduction and Grounds for Further Review.

Robert Hutchinson (referred to as "Greg" in the district court and as "Robert" by the Court of Appeals[1]) intentionally misled his then-spouse, Susan Hutchinson ("Susan"), and her lawyer by concealing the existence of a vested pension account throughout the process of negotiating a settlement of the parties' dissolution of marriage proceeding. Critically, following entry of their November 2, 2010 decree, Robert continued his concealment by refusing to respond to a written letter from Susan's attorney requesting a return copy of an executed pension beneficiary form for their file.

Five years after the entry of the decree, Robert admitted his fraud to Susan and taunted her by saying, "there's nothing you can do about it." (Tr. p. 88, ln. 11-15)

The district court found that Robert "knew the pension vested three years prior to the parties' dissolution of marriage." (App. p. 242). At trial, Robert admitted he knew he was under a legal duty to disclose his vested interest in his GE pension (Tr. p. 25, ln. 6; p. 69, ln. 13-16), that did not do so (Tr. 46, ln. 17, 25), and that he believed Susan "didn't deserve any of the pension". (Tr. 323, ln. 7)

[1] This application adopts the court of appeals' use of "Robert" for consistency with that opinion.

By the time of trial on Susan's petition to vacate, Susan had been cheated out of receiving at least $40,117.80 in monthly marital pension payments, and future monthly payments in the amount of $668.63. (App. pp. 249-250)

In its ruling granting Susan's request to vacate the property settlement portion of the decree, the district court found:

> [Robert] 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 [Robert] 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).

Both the district court and the court of appeals' dissenting opinion concluded Susan could not have discovered Robert's extrinsic fraud during the parties' divorce proceeding or within one year of entry of decree. However, the majority reversed the district court's order on the sole ground Susan or her attorney should have discovered Robert's extrinsic fraud despite his active concealment by following up on a letter Susan's attorney's office sent to Robert after the entry of the decree.

The court of appeals' reversal of the trial court's ruling presents this Court with the opportunity to address an issue of broad importance to the family law bar and to the public alike. It allowed to stand, the majority's opinion risks undermining confidence in the rule of law because it will invite litigants to engage in strategic

subterfuge, even to the extent of violating court orders and refusing to respond to actual requests for the very information that *could* timely lead to the discovery of fraud, all as Robert did here, in order to gain unjust outcomes in divorce. The court of appeals ruling effectively, but unrealistically and unjustly, leaves "policing" responsibility to the party victimized by the total concealment, even when the victim has been actively denied knowledge of the concealment by the actions of her former spouse. Further, the majority opinion makes no attempt to distinguish the outcome here from *In re Marriage of Rhinehart*, 09-0193, 2010 WL 44560 (2010), a case where the court of appeals affirmed a ruling that intentional concealment of assets could not have been discovered.

I. THE COURT OF APPEALS ERRED BY HOLDING SUSAN FAILED TO EXERCISE "REASONABLE DILIGENCE" THAT WOULD HAVE REVEALED EXTRINSIC FRAUD WITHIN ONE YEAR OF ENTRY OF THEIR DECREE.

A. Statement of Facts

The district court entered a decree dissolving the Hutchinson's 20-year marriage on November 2, 2010, incorporating by reference the parties' Stipulation of Settlement. (App. pp. 124-136) The decree divided the parties' marital assets and liabilities equally and awarded Susan monthly spousal support payments for four years. (App. pp. 124-136) As part of the property settlement, Robert retained

undivided ownership of a 401(k) account he established through GE, his former employer. (App. pp. 124-136)

Roughly ten months after termination of the alimony payments in 2015, Robert asked Susan to meet him at the University of Iowa Credit Union in order to sign a satisfaction of judgment. (App. p. 244), In the course of their conversation, Robert told Susan he was receiving a nice pension. (App. p. 244) Susan expressed surprise because Robert had never made mention of a pension account during their marriage and had not disclosed one during the process of their dissolution proceedings and settlement negotiations. (App. p. 244) Robert's response was, "It's too late. You can't do anything about it now." (App. p. 244)

Susan filed a Petition to Vacate, Modify or Amend Decree eight months later. (App. p. 9-16) The basis of her petition was the allegation Robert had committed extrinsic fraud by concealing the existence of the pension.

The crux of Robert's defense centered on a generic "Spouse's Consent to Waive Right to Benefits" form which he represented to Susan's attorney as necessary for waiving Susan's rights to any death benefits from his GE 401(k) account. Robert presented that form in blank for Susan's signature at the same time he signed the final draft of the stipulation on October 29, 2010. (App. p. 243) The GE consent form featured two check-boxes, one for a GE Savings & Security

Program and one for a GE Pension Plan. (App. p. 243) Neither box was checked. (App. p. 243)

At the beginning of their divorce case, a mandatory discovery order was issued requiring Robert to provide "[c]opies of IRA accounts, retirement plans, 401k's, deferred compensation, savings plans and any other similar documents" to Susan or her attorney. (App. p. 138) Robert also signed the final draft of the stipulation on October 29, 2010, by swearing, under oath, that he had "fully disclosed all of [his] assets, income and liabilities to [Susan]…" (App. p. 128) The record established Robert never provided any indication he participated in a defined benefit pension. (App. p. 242)

Having knowledge of Robert's GE 401(k) plan only, Susan signed the consent in blank at the time she added her signature to the stipulation on November 1, 2010. (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 contained the correct technical name for the 401(k) "GE retirement fund" as named in their stipulation Exhibit A. (Tr. p. 83, ln. 22 – 23; p. 84, ln. 1 – 7; 15-22; p. 140, ln. 8 – 12; App. p. 114) Susan's attorney and her legal assistant both confirmed this. (Tr. p. 172, ln. 11 – 19; p. 203, ln. 12-14, 23-p. 204, ln. 1)

Ten days after the entry of the decree, Susan's attorney instructed her legal assistant to return the GE consent form bearing Susan's signature to Robert via letter.

(Tr. p. 86, ln 10; App. pp. 120-123, 169-172) The letter asked Robert to send back a copy of the form after checking "the appropriate box" denoting the "plan you are participating in." (App. pp. 120, 169) This letter used the singular nouns "plan" and "box", consistent with Susan's and her attorney's knowledge Robert had an interest in only one GE retirement asset. (Tr. p. 86, ln. 11 – 18)

Because Robert's 401(k) account was solely awarded to him, no further court orders or documents were necessary to monitor, divide, or otherwise treat Robert's GE retirement property.

Once he received the GE consent form with Susan's signature, Robert checked *both* boxes, denoting his interests in his 401(k) *and a defined benefit pension plan,* and sent the form to GE. (App. p. 118; Tr. p. 306, ln. 16 – 18, ln. 19 – 21; Tr. p. 306, ln 25 – Tr. p. 307 ln. 1) Robert never cooperated with counsel's written request for a return copy of the completed form within one year of entry of decree. (App. p. 244)

B. District Court Ruling.

Following a two-day trial, the district court ruled in Susan's favor. The court made the following factual findings:

> It was not until September 3, 2015, when Susan met [Robert], at his request, at the University of Iowa Credit Union to sign a form satisfying his alimony obligation to Susan under the terms of the Decree, that [Robert] informed her that he was getting a "nice pension" from GE. That was the first time that Susan would have been alerted to the existence of any pension. Susan immediately questioned him about

> how he got a pension, and he informed her that it was too late for her to do anything about it. The Court found Susan's testimony in that regard to be both credible and relevant to [Robert's] state of mind, and his understanding that he had intentionally deceived Susan during the dissolution process and at the time of the signing of the Stipulation of Settlement. It is also consistent with his 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. This September 3, 2015, date is obviously more than a year after the date of the decree, but the Court finds [Robert's] fraud could not have been discovered earlier in the exercise of due diligence.

(App. p. 244). In addressing Robert's assertion that Susan should have discovered his failure to disclose the pension within one year of the entry of the decree, the district court found Robert intentionally concealed the pension and provided "categorically no information regarding the existence of any pension" (App. p. 243). The trial court ruled:

> [Robert] argues that Attorney Reasner could have and should have been more diligent in investigating prior to proving up the divorce on November 2, 2010. The Court disagrees. [Robert] 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 [Robert] had failed to advise her even existed.

(App. p. 244).

The court accordingly modified the property division of the decree, rather than simply setting it aside, and ordered Robert to pay Susan a total of $40,117.80 – the amount of accumulated payments Susan would have received had the pension been divided in the original decree in the same manner as the parties' other marital

property. The court also awarded Susan future payments from the pension in the amount of $668.63 per month. Robert was then ordered to pay $7056 of Susan's attorney's fees as a sanction for violation of discovery orders leading up to the trial. Robert filed a timely Notice of Appeal and the case was transferred to the Iowa Court of Appeals.

C. Majority Holding – Iowa Court of Appeals

The court of appeals, in a split decision, reversed the trial court's findings in Susan's favor, deciding that if had Susan exercised "reasonable diligence" she could have discovered Robert's fraud within one year of decree. The court of appeals vacated the district court's modification of the decree and remanded the case to the district court with instructions concerning the award of sanctions against Robert. The recitation of facts in the court of appeals' majority opinion is not contested, as far as it goes. Nor does Susan argue with the majority's holding (arrived at after a rather lengthy analysis of case authority inferring support for a contrary conclusion) that Robert's conduct in concealing the existence of his pension is indistinguishable from the type of extrinsic fraud within the meaning of *Graves v. Graves,* 109 N.W.707, 709 (Iowa 1906).

Rather, Susan's focus is on the majority's conclusion she failed to exercise "reasonable diligence" to timely discover Robert's fraud, a standard articulated in

Johnson v. Mitchell, 489 N.W.2d 411, 415 (Iowa App. 1992). More specifically, the court of appeals' analysis on this point was as follows:

> So we move on to the next step of the analysis. Here we consider whether Susan has proved a negative, so to speak, by establishing that reasonable diligence would not have permitted her to 'discover the fraud . . . within one year after the judgment.' [citations]
>
> We conclude Susan has not met this burden. Here again we focus on Susan's response to the GE consent form. As explained, Robert provided this form to Susan on October 29, days before the entry of the decree. The form included two check-boxes: one for the *GE Pension Plan* and one for a GE Savings and Security Program. On November 1, Susan signed this form without checking either box—and without finding out why the form referred to two different plans. Then, on November 12, Susan's attorney's office sent the signed form to Robert. Neither box was checked. Instead, the cover letter asked Robert to check the correct box. The letter also advised Robert that Susan 'would appreciate' receiving a copy of the form after Robert completed it.
>
> But no one followed up. Neither Susan nor her attorney's office followed up with Robert to obtain the completed form. As a result, Susan did not receive a copy of the completed form. If she had, she would have seen that Robert checked *both* boxes, a clear sign that he had *two* retirement funds with GE, not just one.
>
> By failing to follow up and obtain a completed copy of the GE consent form, Susan failed to exercise reasonable diligence, which would have permitted her to learn of Robert's purported fraud within one year after the judgment.[2] See *Johnson,* 489 N.W.2d at 415.

Hutchinson, 2021 WL 3076299, at*6-7 (*emphasis in original*). Footnote 2 within this passage is important to this application, as will be explained below. For the reasons discussed below, the majority's analysis and conclusion are erroneous.

D. Dissenting Opinion – Iowa Court of Appeals

Judge Schumacher concurred in part, specially concurred in part, and dissented in part. Her dissent focused upon the majority opinion's conclusion Susan failed to act with reasonable diligence. *Hutchinson,* 2021 WL 3076299, at *12-13 (Schumacher, J. dissenting, in part). Judge Schumacher also would have awarded $5,000 in appellate attorney's fees. *Id*. The analysis of the issue of extrinsic fraud in the dissent begins: "I write separately to address the issue of extrinsic fraud that has vexed the family law practice." *Id.,* at *14. Judge Schumacher's opinion cited to and discussed *In re: Marriage of Rhinehart*, also a case of asset concealment in divorce, in support of her affirmance of the district court's determination Robert's complete concealment of the pension involved undiscoverable extrinsic fraud. *Id.,* at *13.

On the specific question of whether Susan had shown she exercised reasonable diligence in discovering Robert's concealment, Judge Schumacher stated:

> While the majority highlights that Susan should have followed through with requesting a copy of the form, this underscores both the timing of Robert presenting the form and that Robert had simultaneously signed a stipulation declaring that the only retirement fund he owned was the GE 401(k) plan. Robert essentially argues that although he failed to disclose the pension, failed to provide a copy of the executed form, and indicated full disclosure simultaneously with the delivery of the generic consent form, he is shielded because Susan should have done more to discover his deception. Given the generic nature of the form and

> language that accompanied the boxes, along with Robert's statement to Susan's counsel that the purpose of the form was to change the death benefits to his children, even the return of the executed form to Susan may not have triggered 'an aha moment' and alerted her to the undisclosed pension.
>
> It is critical to consider the practical ramifications inherent in holding contrary to the district court's determination. Such a finding invites litigants to sophisticate their efforts to conceal property. This is an invitation our courts should not extend.

Id., at *12-13.

E. Argument

1. The Court of Appeals Applied a Standard Inconsistent With Similar Prior Iowa Cases.

The court of appeals' decision resolved the question of whether Robert's conduct constituted extrinsic fraud by adhering to the precedent established in *Graves*. The *Graves* case does not contain an in depth analysis of the reasonable diligence issue. Importantly, however, the Court in *Graves* deferred to the trial court's conclusion by saying, "There is a dispute in the testimony about this matter, and we are inclined to agree with the trial court that plaintiff was guilty of no negligence in prosecuting her action." 132 Iowa 199, ___, 109 N.W. 707, 709 (1906). Ultimately, the court's decision in *Graves* was that the defendant, who was found to have committed concealment, "has no cause for complaint of the action of the trial court." *Id*.

As mentioned, the court of appeals made no attempt to distinguish the rationale underlying the outcome in this case from the outcome in *Rhinehart*.[2] The case was cited in both the majority and dissenting opinions here, yet the majority's apparent failure to distinguish it sheds no light on this "vexing" issue.

In *Rhinehart*, the dissolution trial took place in September 2003. *Rhinehart,* 2010 WL 44560, at *2. The husband, an attorney, failed to disclose that he had been retained the previous January in two contingency cases. That disclosure would have impacted the experts' respective valuations of his law practice. *Id.,* at *3. At trial on the ex-wife's petition to vacate the dissolution decree on the basis of newly discovered evidence, the record revealed the ex-husband had been involved in correspondence with the defense attorneys in those cases dating back to July, 2002. *Id*., at *3. One month before the dissolution trial, the husband filed the lawsuits in the clerk of court's public offices, and he faxed copies of the petitions from those cases to newspapers in Sioux City and Des Moines, but not to his ex- wife's attorney. *Id.*

The court of appeals upheld the trial court's decision to vacate the decree in *Rhinehart* on the grounds his concealment was extrinsic fraud *that could not have been discovered earlier than it was.* The court did not find that the ex-wife could

[2] Susan acknowledges the *Rhinehart* opinion does not constitute controlling authority. Iowa R.App.P. 6.904(2)(c).

have and should have discovered the existence of these cases by, for example, reviewing local newspapers or monitoring pubic records of case filings to ascertain the existence of these cases within one year of the entry of the decree. *Id.*, at *2 Notably, in *Rhinehart* the court of appeals found no error in the trial court's conclusion that the husband's extrinsic fraud was undiscoverable within one year of decree despite evidence of the specific assets in public records prior to the divorce trial. *Rhinehart,* at *2. Nevertheless, the majority opinion did not analyze *Rhinehart* or make any attempt to explain why the evidence concerning reasonable diligence here is distinguishable from *Rhinehart.* Susan asserts that the diligence owed in *Rhinehart* is materially indistinguishable from the appropriate expectation of reasonable diligence here, particularly when considered against the extent of Robert's intentional acts to conceal his pension from her.

2. The Record Supports the District Court's Conclusion that Susan Could Not Have Discovered Robert's Fraud Before One Year Following Entry of their Divorce Decree.

In this case, the court of appeals apparently gave no weight to the district court's determination of the reasonable diligence issue when it should have done so. The district court was best situated determine the parties' credibility and to recognize the reach, intentionality, and effect of Robert's concealment in the circumstances at the time and as they actually were. Here, the court of appeals does not refer to the applicable scope and standard of review. It is obvious, however, the court

determined to find the facts anew under a *de novo* standard. Yet, the majority reached its conclusion through reasoning colored by hindsight rather than discerning, as it did in *Rhinehart*, that the district court's conclusion had substantial support in the record.

> [A] de novo review 'does not mean [the appellate courts] decide the case in a vacuum, or approach it as though the trial court had never been involved.' *Davis–Eisenhart Mktg. Co. v. Baysden,* 539 N.W.2d 140, 142 (Iowa 1995). Rather, even in a de novo appellate review, 'great weight' is accorded the findings of the trial court where the testimony is conflicting. *See id.* (citation omitted). This is because the trial court is in a far better position to weigh the credibility of witnesses than the appellate court. *See id.; Birusingh v. Knox,* 418 N.W.2d 80, 82 (Iowa Ct.App.1987).

Albert v. Conger, 886 N.W.2d 877, 880 (Iowa App. 2016).

The trial court was unequivocal in determining Susan had met her burden of showing reasonable diligence. In considering Susan's burden, the trial court applied Iowa law correctly and stated:

> While it is true the Petitioner must have exercised reasonable diligence in discovering evidence '[a] party to a suit may not be accused of lack of diligence when he possesses no means of knowing that the evidence subsequently discovered was previously obtainable.' *Westergard v. Des Moines Railway Company*, 243 Iowa 495, 503, 52 N.W.2d 39, 44 (1952). One 'is not called upon to prove he sought evidence where he had no reason to apprehend any existed.' *Id*.

(App. p. 247).

In reversing the trial court's finding, the court of appeals does not expressly say the trial court erred, or that there was not substantial evidence to support its conclusion

Susan had met her burden. Nor does the court of appeals cite to any evidence in the record supporting its notion that Robert, who had already refused to respond to one written post-decree request for a completed copy of the consent form, would have suddenly handed over the very form implicating himself in fraud. Instead, the court of appeals merely supposed, without evidentiary support, what *could have happened if* there had been follow up to the letter asking Robert to return a completed copy of the consent form, but without recognizing the obvious improbability of its supposition.

3. Susan Exercised the Diligence Called for by the Situational Circumstances.

In deciding Susan did not meet the burden of "proving a negative, so to speak", the majority opinion also failed to acknowledge the significance of situational context and its influence upon correctly measuring the diligence Susan owed in the actual circumstances *as they then existed*.

In her dissenting opinion, Judge Schumacher correctly recognized that assessing the reasonableness of Susan's actions must take into account Robert's efforts to shape and limit Susan's perceptions in the critical time period. First, Robert supplied Susan's attorney the GE consent form after negotiating specific asset assignments and valuations, in his favor, through four drafts of the proposed stipulation, each one of which contained "Exhibit A" listing all of the parties assets and their respective values to justify the property settlement and a full-disclosure

affirmation. When Robert signed the final stipulation, he made the same representation of full disclosure under oath. In other words, at the same time Susan's attorney received the blank consent form from Robert, she and Susan also had in hand a fully-negotiated and sworn assurance that Robert's GE 401(k) was the only retirement asset he owned.

Susan and her attorney also knew there was a mandatory discovery order in place requiring Robert to disclose his interests in any and all retirement plans. Thus, shaped by Robert's assurance of a sworn oath and the command of a court order, Susan and her attorney knew Robert participated in only one retirement plan. (Tr. p. 84, ln. 15-22; p. 86, ln. 11-18). Susan believed she could reasonably rely upon a court order and a sworn statement, and Robert admitted Susan was justified in relying upon his sworn assurance. (Tr. p. 48, ln. 1-5, 10-13, 17-25; p. 49, ln. 1-2) In addition, Robert falsely represented to Susan's attorney that the consent form was needed so he could name his children as beneficiaries of his 401(k), in Susan's place. (App. p. 168)

Moreover, the consent form itself was a generic fill-in-the-box form which could apply to more than one GE retirement plan offering, but also by its express terms stated it applied to the "GE Pension Plan, *if any*" and the GE Savings and Security Program account balance, *if any*". (App. p. 170)(*emphasis* added) Robert had identified his interest a GE 401(k) retirement plan. In this light, the consent

form was not inconsistent with the information known to Susan and her attorney at the time. It revealed nothing of Robert's concealment of an interest in a second, undisclosed retirement plan. To the contrary, Robert's disclosure of his GE 401(k) gave cover within the form to his concealed defined benefit pension. In this situational context, the court of appeals was unjustified in concluding Susan should have suspected fraud either before or after entry of the divorce decree.

This Court should also reconsider, within the context of the parties' actual marital property settlement, the undue weight and meaning ascribed by the court of appeals to the absence of "follow up" by Susan or her attorney to the November 12, 2020 letter. Their settlement called for Robert to receive and retain *undivided* ownership of his GE 401(k) retirement account. No share of this account was to be awarded to Susan as an alternate payee under a separate Qualified Domestic Relations Order (QDRO). Consequently, "following up" post-decree to enforce deadlines for exchanging documents and implementing QDROs did not apply. Here, this Court should find the height of Robert's hypocrisy and the profound conflict within the majority's decision. *But for Robert's pension concealment,* enforceable court orders *would have existed and applied* mandating the timely exchange of documents necessary to complete a QDRO dividing his pension.

The majority's observation in footnote 2, referenced above, is relevant to this point. It reads: "It might be objected that, even if Susan had persisted in asking for

the form, Robert would have refused to provide it. In that case, though, Susan could have sought relief in court within the first year after her dissolution." *Hutchinson,* 2021 WL 3076299, at *7 n.2. The court of appeals posits that Susan could have sought relief in court, but does not explain *how* she could have done so. Robert was no longer under any legal requirement to furnish any information at all to Susan concerning his retirement assets. The decree did not require Robert to return the consent form, meaning an enforcement or contempt action was unavailable. In this respect, the court of appeals overlooked the fact Robert's fraud induced Susan into a marital property settlement containing no post-decree enforcement provisions addressing retirement property, because none was required.

Against these facts, the court of appeals' observation at footnote 2 is critically flawed. Susan had no available judicial remedy to compel Robert to return the completed consent form. By that time, and as a result of the fraud Robert crafted, any document exchanges between the parties concerning Robert's retirement property were purely voluntary. Any remaining question whether Robert would have voluntarily complied with a "follow up" was convincingly answered by Robert himself, from his statement that Susan "didn't deserve any of the pension" and from

his refusal to comply with discovery requests in this case, which resulted in severe discovery sanctions against him.[3]

Finally, the majority's invocation of a party's right to subpoena employment records misapplies an integral point emphasized within the majority's citation, itself. Citing to Beverly Bird's publication, the court of appeals wrote "[i]f your spouse stalls or is uncooperative, you can issue a subpoena duces tecum to his employer, past employers, or even to a plan administrator if you can identify it, asking for information about retirement benefits." *Hutchinson,* 2021 WL 3076299, at *5 Yet, the point Bird makes contemplates having knowledge or suspicion of stalling or lack of cooperation *about something* in the first place. With no indication given by Robert of the existence of a marital pension, Susan and her attorney had no way to suspect stalling or lack of cooperation as to an asset actively concealed from them as of which they had no knowledge. In the situation, the majority's suggestion of the right to subpoena historical records now is a proposition toward a level of due diligence not indicated by the circumstances at the time.

[3] As a sanction for not producing documents relating to his GE Pension, the district court prohibited Robert from providing any testimony contesting Susan's calculation of the value of the marital portion of Robert's pension. (Tr. p. 275, ln. 21-25) Additionally, the district court ordered financial sanctions against Robert for not producing documents relating to his GE Pension on September 4, 2019 (App. p. 45-46) and in its Ruling (App. p. 250)

The majority's opinion can be read to stand for the notion that reliance upon an opposing party's court-ordered disclosures and sworn statements assuring full disclosure is unreasonable. The opinion improvidently signals that parties should expect that their soon-to-be-ex-spouse cannot be trusted even with these safeguards, and that discovery *for assets that haven't been mentioned, of which there is no knowledge, and may not exist* should be compelled by subpoenas to institutions. Yet, under the majority's rationale, even a subpoena directed to a self-employed person would do nothing to alleviate suspicions of stalling, lack of cooperation, or concealment.

CONCLUSION

Above all, there is something sinister about Robert pointing to the GE consent form he intentionally left blank and misrepresented to Susan's attorney, in obfuscation of his fraud under way, as proof from which Susan should have gleaned his fraud.

If left to stand without further review, Robert Hutchinson will have succeeded in preventing a fair submission of the controversy by intentionally and fraudulently concealing his pension, which would have caused the decree not to have been rendered. His victim, Susan, will have been purposefully defrauded of substantial marital retirement pension benefits where the record clearly shows she had no knowledge the pension existed.

For the foregoing reasons and upon the authorities presented, Susan asks this Court on to grant further review, and to affirm the trial court's decision to modify the property division of the decree and award her the amount she would have received from her share of Robert's GE pension through the date of trial, plus ongoing monthly payments thereafter. Susan accepts the court of appeals' decision to require Robert to pay her from funds other than his non-marital 401(k), and does not contest the direction remanding the case for reconsideration of the sanctions award against Robert and his request for attorney's fees. Finally, Susan asks the Court to accept Judge Schumacher's opinion that she is entitled to $5,000 in appellate attorney's fee from Robert.

SUSAN GAYLE HUTCHINSON,
Petitioner/Appellee

By */s/ Richard F. Mitvalsky*

Richard F. Mitvalsky [AT0005537]
of
Gray, Stefani & Mitvalsky, P.L.C.
425 Second Street SE, Suite 700
PO Box 456
Cedar Rapids IA 52406-0456
Tel.: 319-364-1535
Fax: 319-364-1562
Email: rmitvalsky@gsmlawyers.com

PETITIONER/APPELLEE

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

This application complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) and 6.1103(4) because it contains 5579 words, excluding the parts exempted by those rules.

This application 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 it has been prepared in a proportionately-spaced typeface using Microsoft Office Word 2010 in Times New Roman 14-point type.

/s/ Richard F. Mitvalsky August 10, 2021
Richard F. Mitvalsky Date