IN THE IOWA SUPREME COURT OF IOWA

No. 22-0684

LORRI HAGEN,
Petitioner-Appellee/Claimant

vs

SERTA/NATIONAL BEDDING CO., LLC and
SAFETY NATIONAL CASUALTY CO.,

Respondent-Appellant/Defendants

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WORTH COUNTY, IOWA
THE HONORABLE CHRIS FOY, DISTRICT JUDGE
NO. CVCV012778

APPELLEE'S RESISTANCE TO APPELLANTS' APPLICATION FOR FURTHER REVIEW COURT OF APPEALS RULING DATED MARCH 29, 2023

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STATEMENT RESISTING FURTHER REVIEW

The District Court and the Court of Appeals did not err when they both concluded that the exclusion of Hagen's expert reports (and corresponding bills) from evidence was an abuse of discretion by the Worker's Compensation Commissioner.

The crux of the appeal and the Application for Further Review focused on Appellants' failure to meet their burden and show *unfair* prejudice in order to exclude untimely reports filed as part of the arbitration proceeding in this matter as controlled by Administrative Rule 876-41.19(3)(e). That rule is as follows:

> If evidence is offered at hearing that was not disclosed in the time and manner required by these rules, as altered by order of the workers' compensation commissioner or a deputy workers' compensation commissioner or by a written agreement by the parties, the evidence will be excluded ***if the objecting party shows that receipt of the evidence would be unfairly prejudicial***.

Id. (Emphasis added).

This case does not satisfy any of the grounds of I.R.App.P. 6.1103(1)(b). This case is not in conflict with *Square D Co. v. Plagmann*, as cited by the Appellant. Further it is not "important" in nature warranting Supreme Court review, insomuch as it addresses the application of an

administrative sub-section for purposes of evidentiary admissibility of two reports in a worker's compensation case. That level of review is the role of the Court of Appeals and that role has been fulfilled. (Not to say this case is not important to the litigants, only that it is not of the type warranting serious review and consideration by the Supreme Court).

Further, the Appellant misstates that the Court of Appeals decision in arguing that they applied a different standard, referencing a footnote on page 11. It is not necessary for the Supreme Court analyze a footnote of the Court of Appeals to determine if an important question of changing legal principles exists. No changing legal principle exists. The Court of Appeals applied the correct and consistent standard as is required to be applied.

Interestingly, Appellants' Routing Statement in their appellate brief notes that "[t]his case involves existing legal principles and should be transferred to the Court of Appeals." Appellant's Final Brief, p.5. Despite now being in the same position as they were following the District Court ruling, Appellants now argue that the Court of Appeals decision is in conflict with existing case law and there is an important question of changing legal principles.

This Resistance addresses the Application for Further Review only and the Appellee would respectfully direct the Court to the Appellee's Final Brief for further argument as it relates to the underlying appeal.

ARGUMENT

I. APPELLANTS' RELIANCE ON *PLAGMANN* IS MISPLACED AND THE ANALYSIS IS INACCURATE.

The finding in *Plagmann* is not controlling. Additionally, the holding of *Plagmann* does not address the problem with Appellants' failure to present evidence to meet their burden. The holding in this case is not in conflict with the Administrative Rule or *Plagmann*.

First, *Plagmann* is an unpublished opinion that is not controlling on an issue. "Unpublished opinions or decisions shall not constitute controlling legal authority." I.R.App.P. 6.904(2)(c). "The State urges this court to apply the reasoning and holding of an unpublished decision by the Iowa Court of Appeals with facts that resemble those in this case. However, we will not consider this decision. Iowa R. App. P. 6.904(2)(c)..." Franklin v. State, 905 N.W.2d 170, 172 (Iowa 2017). "Unpublished opinions of this court are not precedential, see Iowa R. App. P. 6.904(2)(c), which is why our court generally does not cite them." State v. Shackford, 952 N.W.2d 141, 145 (Iowa 2020). *Plagmann* does not satisfy the grounds under

6.1103(1)(b)(1) because the holding in this case is not in conflict with any precedential holding of the Court of Appeals.

Next, Appellants' reliance on *Plagmann* focuses on the holding:

> "Although the deputy did not make a specific finding of fact concerning the possibility of unfair prejudice to Plagmann, we infer that such a finding was implicit in the deputy's decision to sustain Plagmann's objection to exclude the exhibit."

Square D Company v. Plagmann, 11-0655 (Iowa Ct. App 2011).

If Appellants had their way, they would completely ignore the last line of Administrative Rule 87641.19(3)(e). Appellants argue in their Application that the *Plagmann* holding completely excuses them from providing "specific instances of unfair prejudice." App. For Further Review, P. 15-16. That argument is beyond the logic of the actual holding in *Plagmann* and is completely contrary to the rule.

The holding in *Plagmann* reasons the deputy did not need to make a specific finding to exclude evidence and that it was implicit based on the facts presented to the deputy. Presumably, actual supporting evidence was presented to the deputy in *Plagmann* that supported the ruling. Evidentiary facts of one case greatly differ from that of another.

That holding does not solve the problem faced by the Appellant, that being that the Appellant failed to meet their burden of the Administrative rule and provide actual evidence in support of unfair prejudice. *Plagmann* does not relieve the Appellant of that responsibility if they seek exclusion of evidence. *Plagmann*, at best, is an out for the deputy or commissioner, not the Appellant. Accordingly, the holding by the Court of Appeals in this case is not in conflict with *Plagmann* and is inapplicable here.

Both the District Court and the Court of Appeals concluded that the record was devoid of any supporting evidence to support such a finding of prejudice. "Not only did Commissioner Cortese fail to find Respondents would suffer unfair prejudice if the two reports were admitted, ***there is no evidence in the record to support such a finding***." District Court Ruling on Petition for Judicial Review, App. at 85 (emphasis added). "…***Serta failed to show*** that the receipt of the evidence would be unfairly prejudicial as required by rule 876-4.19(3)(e)…" Court of Appeals Decision, p 12. (emphasis added). The burden to establish exclusion is on the Appellant. They failed to do so and the rule in that circumstance prohibits exclusion.

Through every level of appeal, the Appellants again and again restate and solely rely on the argument that the reports were late and therefore unfair prejudice existed. Again and again, the District Court and then the

Court of Appeals concluded that lateness is not, on its own, evidence of unfair prejudice. To assume simply that late reports create unfair prejudice is contrary to language within the rule. "We agree with the district court that is where the commissioner went wrong- excluding the reports simply because of the prejudice inherent in their late disclosure, rather than holding Serta to it burden to show *unfair* prejudice from the receipt of the evidence." Court of Appeals Decision, p 11. "Such an interpretation (one automatically equating late disclosure with prejudice) is at odds with the language of the rule and swallows the admissibility avenue it provides for untimely reports." *Id*.

Appellants further argue in their Application that the "Court of Appeals' decision would limit the discretion and authority of the agency to determine the appropriate sanctions to administer for failure to timely certify and produce expert reports…" Application for Further Review, p 16. This Court of Appeals decision would do no such thing. The Administrative Rule 879-4.19(3)(e) rule itself already significantly limits the "discretion and authority of the agency" by placing a burden on the Appellants to show unfair prejudice. This Court of Appeals decision does not change the Administrative rule, the agency's authority, or the burden that is on the party moving to exclude evidence. If Appellants do not like the rule, they should

seek to change the rule itself, not seek to judicially strength its authority despite the clear language of the rule.

II. NO ALTERNATIVE STANDARD OF REVIEW WAS APPLIED BY THE COURT OF APPEALS AND NO CHANGING LEGAL PRINCIPLE EXISTS.

The Court of Appeals address the Standard of Review they applied in this case in Section II on page seven of its opinion, which states that an abuse of discretion standard is the applicable standard in an administrative review.

Appellants refer to a footnote on page 4 to suggest that the Court of Appeals was adopting or suggesting we adopt an alternative standard of review for administrative reviews. This is not accurate. The Court of Appeals noted that a typical review of the application of law to facts would be reviewed for corrections of error at law. The Court of Appeals then recognizes "this is not the standard used by our supreme court…or this court in reliance on those cases. (Opinion, p. 11, n.4). The Court of Appeals understood their role to apply the abuse of discretion standard that has been consistently applied by the Court and did so. They did not rule or even suggest that the legal principle regarding the appropriate standard to apply is

changing as required by the grounds listed under I.R.App.P. 6.1103(1)(b)(3).

Of significant note, both the Appellant and the Appellee, agreed in their appellate briefs the appropriate Standard of Review was abuse of discretion. (See Appellant and Appellee's Final Brief). The Court of Appeals agreed. Opinion p. 7.

Appellants state that the Court of Appeals failed to address the deference given to Agency decision which is not accurate. At page 10 of the Court of Appeals decision, it is noted "We recognize our historical reluctance to interfere with the commissioner's imposition of sanctions for disclosure violations." The Court then goes into an analysis of that deference previously given, but then concludes that the limits of that deference were exceeded in the present case when the Commissioner exceeded the limitation of Administrative rule 876-4.19(3)(e). Appellants' assertion that the Court of Appeals did not consider the deference to be given to the lower court is inaccurate. To imply that the deference is insurmountable is illogical.

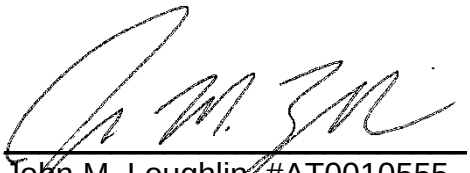
CONCLUSION

This evidentiary review of the applicability of an Administrative rule was appropriately addressed and reviewed by the Court of Appeals. This

case does not rise to the level of one that is an important case in conflict with a decision of the Court of Appeals. Additionally, the Court of Appeals opinion does not suggest nor apply an alternative standard of review. No basis exists for this case to receive further review from the Supreme Court. Appellants failed to provide evidence to support the burden required by Administrative Rule 876-4.19(3)(e) when seeking to exclude untimely exhibits. Both the District Court and the Court of Appeals exhaustively reviewed the evidence presented in support of the parties' position and both came to the conclusion that the Commissioner exceeded his authority under the rule by excluding the evidence. The failure to apply the law correctly in reaching a decision is an abuse of discretion.

Appellee respectfully requests the Supreme Court deny Appellants' Application for Further Review.

Respectively submitted.



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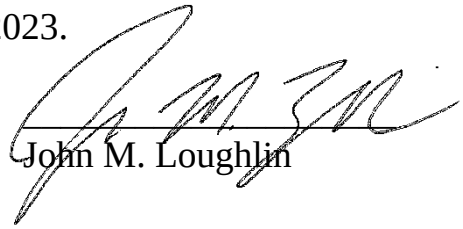
CERTIFICATE OF FILING

I, John M. Loughlin, certify that I will file this Resistance to Application for Further Review by filing with the Clerk of the Supreme Court by EDMS on the 27th day of April, 2023.



John M. Loughlin

CERTIFICATE OF SERVICE

I, John M. Loughlin, certify that that I served this Resistance to Application for Further Review on the 27th day of April 2023 by EDMS by sending a copy to:

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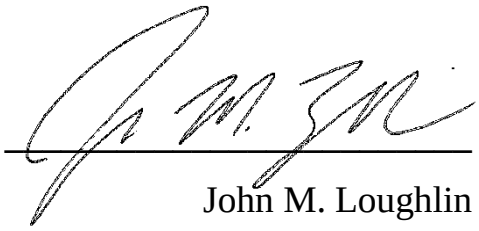

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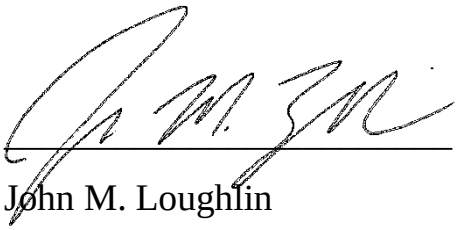

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4/27/23

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