IN THE SUPREME COURT OF IOWA

No. 23-1115

JEFFREY PETERZALEK and MOLLY WEBER,

Certiorari Plaintiffs,

vs.

IOWA DISTRICT COURT FOR POLK COUNTY,

Certiorari Defendant.

Appeal from the Iowa District Court
Polk County Case No. LACL152080
Honorable Robert Hanson, District Judge

APPELLANTS' FINAL REPLY BRIEF

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I. ATTORNEYS PETERZALEK AND WEBER BOTH REPRESENTED THE IOWA DEPARTMENT OF PUBLIC SAFETY AND THE DEPARTMENT IS NOT WAIVING PRIVILEGE.

Iowa Department of Justice Attorney Jeffrey Peterzalek and former Iowa Department of Justice Attorney Molly Weber both represented the Iowa Department of Public Safety. Weber represented the Department on a limited basis to respond to Certiorari Defendant Charis Paulson's Iowa Civil Rights Commission complaint—the complaint that served as the administrative prerequisite in what became this matter.

Paulson's attempts to recharacterize the Attorneys as not representing the Department fail. The overly narrow view she takes of opposing counsel would, if adopted, effectively give no protections to attorneys representing a former client—even in an earlier stage of this case—from deposition. *See* Appellee's Br. at 15 ("Paulson is not seeking to depose 'opposing counsel' because neither Peterzalek nor Weber are counsel for the Department of Public Safety in this case."); Appellee's Br. at 17 ("Weber previously represented the Department related to

Paulson's complaint filed with the Iowa Civil Rights Commission"); Appellee's Br. at 27 ("It is difficult to understand how Peterzalek could possess privileged information related to this case or Paulson's allegations without [simultaneously] violating his ethical obligations to Paulson.").

That narrow view applied here would mean that the Department's longtime Attorney and an Attorney who worked, but no longer works, on an earlier stage of the matter in dispute could both be deposed and asked questions relating to their representation. That is despite Paulson's failure to identify topics or guard rails that would prevent the depositions from going into privileged material. Indeed, for Weber the deposition topics suggested likely exclusively cover privileged materials. This Court should ensure protections for attorney-client and work-product privileges, for opposing counsel and counsel that represent the opposing party even though not in the specific case at hand.

a. Peterzalek's Attorney-Client Relationship with the Department Precludes Deposition.

Peterzalek has represented the Department as a member of the Attorney General's Office for almost twenty years. Peterzalek has counseled directors of the agency, rank-and-file members of the law enforcement community, and Paulson herself. In his role counseling the Department, Peterzalek has been involved in sensitive conversations regarding many issues including human resources, contracts, and litigation.

Paulson argues that the Court should allow her to depose Peterzalek because he has not represented the Department here. Paulson also contends that if Peterzalek has privileged information that should not be available for questioning in a deposition that implies an ethical breach. Appellee's Br. at 27. Paulson's analysis of Peterzalek's role and the function of privilege are incorrect. He has information protected by privilege held by the Department—not by Paulson herself—that he cannot disclose and that fact does not conflict with his screening from Paulson on this case.

First, Paulson mistakes advice given to her as agency director as advice given to her in her personal capacity. Peterzalek represented Paulson as a client in her professional capacity—as one of the Department's directors. Peterzalek has never represented Paulson in her personal capacity outside of his representing her in her official role at the Department. So, to the extent Paulson mistakenly believes that she holds privilege rights with Peterzalek that she may waive, she is wrong. Only the Department may choose to waive privilege in the matters that Peterzalek represents Paulson and the Department and the Department has not chosen to do so.

While Paulson is correct that Peterzalek was screened from representing the Department here that fact does not further her arguments. Just because he has not represented the Department here does not mean that he has not represented the opposing party—the Department—in many matters and thus is privy to significant amounts of privileged information. Questions about that information could not be answered in a deposition without invading the privilege. And any advice

Peterzalek gave to other Department employees would be covered as well. The district court's denial of the motion to quash Peterzalek's deposition was error.

b. Weber's Attorney-Client Relationship with the Department Precludes Deposition.

Weber represented the Department in a limited capacity responding to Paulson's complaint in the administrative action before the Iowa Civil Rights Commission. Weber's limited representation of the Department is the only time that she represented the Department. And her work before the Commission on this matter means she is familiar with all the facts and provided advice to the Department on those issues.

Allowing Paulson to depose Weber is among the cleanest examples of deposing an opposing attorney in a matter. While Weber has since left the Iowa Attorney General's office, she represented the Department in the earlier administrative stage of what became this lawsuit. Weber's communications with the Department should be afforded the same standard of protection that would be afforded to the attorneys still defending the Department today. To allow Paulson to depose Weber

regarding her litigation practices, strategies, and mental processes would violate the attorney-client privilege and work-product doctrine that Iowa's courts have so diligently protected.

* * *

The Department has not waived privilege over the Attorneys' representations. The Department holds the privilege and is the only entity able to waive it. Paulson has failed to adequately identify non-privileged topics or protect the Attorneys in her deposition requests. This Court should reverse the district court's denial of the Attorneys' motion to quash.

II. THIS COURT SHOULD ADOPT *SHELTON* AND APPLY IT TO THIS CASE.

This Court has often relied on and cited to *Shelton v. American Motors Corp.*, 805 F.2d 1323, 1327 (8th Cir. 1986), and it should now formally adopt that test. Despite Paulson's protestations to the contrary, this Court has often referred to the *Shelton* standard. *Cf.* Appellee's Br. at 17. Even with this Court's familiarity to date it has not formally adopted the test—yet. *See State v. Leedom*, 938 N.W.2d 177, 195 (Iowa

2020) (favorably citing *Shelton* in affirming a motion to quash opposing counsel's testimony); *Fenceroy v. Gelita USA, Inc.*, 908 N.W.2d 235, 253 (Iowa 2018) (Waterman, J., dissenting) (encouraging the adoption of *Shelton*).

This case presents consideration of this Court's jurisprudence concerning the attorney-client privilege—an issue arising with some frequency over the past few years. And while the Court has yet to adopt *Shelton*, its rulings are directionally consistent with *Shelton*'s application. *See*, *e.g.*, *Leedom*, 938 N.W.2d at 195. Paulson's requested depositions of the Attorneys fail under *Shelton* or any other reasonable test intended to protect important and longstanding privileges that this Court may adopt.

a. Paulson fails *Shelton*.

Shelton precludes deposing an opposing counsel unless (1) the information she is seeking cannot be obtained from another source; (2) the information sought is relevant and non-privileged; and (3) the information she seeks is crucial to the preparation of her case. *See*

Shelton, 805 F.2d at 1327. Paulson has met none of the three prongs for either Attorney here.

i. Paulson's resistance to staying the trial shows why she cannot meet Shelton*'s third prong.*

Shelton's third prong requires that the information to be propounded in deposition is crucial to the preparation of the opposing party's case. *See id.* But Paulson seemed content to continue to trial without the Attorneys' depositions in hand. Indeed, when the Attorneys moved to stay trial during this appeal's pendency, Paulson resisted. *See* App. at 120. That she would willingly go to trial without the information that could be elicited in the depositions is because it was unlikely anything disclosed in those depositions would be relevant or nonprivileged. Paulson's position highlights the lack of crucial nexus to the case that *Shelton* would require. *See Shelton*, 805 F.2d at 1327. For this reason, Paulson has failed to meet her burden for deposing the Attorneys under *Shelton*'s third prong.

ii. Paulson cannot meet Shelton*'s* first prong regarding *Peterzalek.*

Paulson has not adequately shown that the only way for her to get the information that she seeks is through deposing Peterzalek. In her brief, Paulson argues that "[o]ne way" she can support her claims is through deposing Peterzalek. Appellee Br. at 17. Paulson also admits that she propounded discovery seeking similar answers to the Department itself. *Id.* at 16. She contends that because the Department explained that Peterzalek's aid may be necessary to answer one of her Interrogatories, that deposing him is appropriate. *Id.* at 17.

But it is not at all clear that Paulson needs Peterzalek's deposition to show that her claim of discrimination should succeed at trial. She admits that the deposition is only one way to show "the Department has had prior claims of sexual harassment/discrimination or that such claims have created a culture or atmosphere of discrimination towards women." *Id.* Yet her brief acknowledges alternative methods to obtain information relating to the Department's other alleged instances of discrimination. Given the available alternatives, *Shelton* would ask Paulson to use an

alternative method of obtaining information regarding other instances of discrimination. *See Shelton*, 805 F.2d at 1327.

Paulson has failed to support her assertion that Peterzalek is the only individual who can speak to prior claims of gender discrimination. She mainly relies on the Department's discovery responses from December 14, 2022, and January 11, 2023, that "the Department admitted that Peterzalek is likely the only person with information about prior claims." Appellee Br. at 17.

But the Department's responses do not say precisely what Paulson contends—and the difference matters. The Department's December 14, 2022, response says that Peterzalek can give the "most complete information"—not that he is the only person able to answer Paulson's questions. Appellee's Br. at 16. The Department relies even less on Peterzalek in its January 11, 2023 response. Appellee's Br. at 17. That response explained that the Department needed Peterzalek's "assistance" in gathering documents and information. In neither response did the Department contend that Peterzalek was the only

individual with knowledge of prior claims of gender discrimination if such claims exist. Such a contention is not plausible.

Paulson wants to depose Peterzalek as an alternative to engaging in fuller document discovery. But ease of discovery is not a sufficient reason to justify deposing an opposing party's counsel. *See Shelton* 805 F.2d at 1327. By deposing Peterzalek, Paulson hopes to avoid follow-up document requests and identifying alternative witnesses.

That type of "one-stop shopping" approach is what *Shelton* cautions against. Indeed, "[t]aking the deposition of opposing counsel not only disrupts the adversarial system and lowers the standards of the profession, but it also adds to the already burdensome time and costs of litigation." *Id.* And the consequences of delay that *Shelton* predicted include what happened here. *See id.* ("It is not hard to imagine additional pretrial delays to resolve work-product and attorney-client objections, as well as delays to resolve collateral issues raised by the attorney's testimony.").

Even if Paulson could get the information she seeks only from Peterzalek, what she seeks from Peterzalek are his recollections and impressions of other matters he may have handled or been aware of through the course of his representation of the Department. To request his deposition on his recollection of these matters reflects his "mental selective process" which is "protected as work product." *See Shelton*, 805 F.2d at 1329. Deposing an opposing counsel on those sensitive topics risks "detract[ing] from the quality of client representation." *Id.* at 1327. *Shelton* further warns that allowing these depositions may induce a "'chilling effect' that such practice will have on the truthful communications from the client to the attorney." *Id.* For these reasons Paulson has failed adequately to explain why deposing Peterzalek is necessary and overcomes the significant concerns raised by allowing such a deposition.

iii. Paulson cannot meet Shelton*'s second prong regarding Weber.*

Paulson's desire to depose the former opposing counsel from an earlier stage in the case that she is litigating to ask questions about strategic and tactical decisions made in that litigation should be quashed

under any test. Paulson seeks to depose Weber because she had "knowledge that is crucial, relevant and not privileged, and cannot be obtained any other way." Appellee Br. at 17. The questions Paulson continues to raise include questions about earlier decisions the Department made before the Iowa Civil Rights Commission responding to Paulson's complaint. *Id.* at 18.

Shelton sets forth a test that gives robust protections to the attorney-client privilege—in part through requiring that the would-be deposer show that the information could only be acquired from the would-be deponent. Paulson fails to explain why only Weber can give the information that Paulson seeks. *See Shelton*, 805 F.2d at 1327. Indeed, Paulson "attempted to obtain this information from the Commission directly but was unsuccessful." Appellee Br. at 18. Why Weber, the Department's counsel at the time, is the only person who can explain the Department's response to Paulson's complaint before the Commission goes unanswered.

Paulson contends that Weber is the person that she wishes to ask about whether Paulson's treatment differed from the Department's treatment of other plaintiffs in other cases. But whether Paulson has been treated differently than other plaintiffs suing the Department, is not a question that Weber is well-placed to answer. *Cf.* Appellee Br. at 18. Weber represented the Department before the Commission and represented the State in many matters unrelated to the Department. Weber did not generally represent the Department in other matters for which plaintiff comparators could be found. App. at 81; *see* Appellant Br. at 26; *cf.* Appellee Br. at 7 n.1 (defining "the Department" to Paulson as including "DPS, the State of Iowa, and attorneys Peterzalek and Weber.").

And much of what Paulson identified as the subject of her desire to depose Weber is protected by the work-product doctrine. Paulson contends that the information she seeks from Weber is, "fact[ual], not [the] legal advice or mental impressions of Weber." Appellee Br. at 18. But, also according to Paulson, she wants to ask Weber for her reasoning

in "filing an *ex-parte* motion." Appellee Br. at 17. Deposing an attorney on why she filed a Motion is not a "circumst[ance] [which] may arise in which the court should order the taking of opposing counsel's deposition." *Shelton*, 805 F.2d at 1327.

This Court should reverse the district court and order Weber's deposition quashed.

b. *Shelton* remains good law and a positive example for this Court to emulate.

Smith-Bunge v. Wisconsin Central, Ltd., recently held *Shelton* applied when a party sought to depose in-house counsel regarding her conversations with and knowledge of other employees. 946 F.3d 420, 423 (8th Cir. 2019). In *Smith-Bunge,* a company terminated an employee who then sued for unlawful retaliation. *Id.* at 421. The employee sought to depose the company's in-house attorney and the railroad sought a protective order prohibiting the deposition. *Id.* at 421.

The Eighth Circuit applied *Shelton* and held the district court did not abuse its discretion in quashing the deposition. First, the employee had other means to discover the information he was seeking and second,

the information the Plaintiff was seeking was privileged. *Id.* at 423. *Smith-Bunge* explained that "a party cannot depose opposing counsel to explore suspicions about opposing witnesses." *Id.* at 423 (citing to *Shelton,* 805 F.2d 1327–28)). That was despite the in-house counsel's relative non-involvement in the employee's specific dispute. Indeed, the employee failed to "identify any statements from [in-house counsel] outside of the privilege" or "attempt to narrow is inquiry to respect the attorney-client privilege" the deposition should be prohibited. *Id.* at 423.

So too here. The Attorneys are unlikely to have relevant nonprivileged responses germane to Paulson's claims. Despite offers to compromise on discovery or otherwise relay the information that Paulson seeks with either written responses or a protective order, Paulson has continued to request only a full deposition of the Attorneys. This Court should adopt the holding of *Smith-Bunge,* and its reliance on *Shelton* here.

Paulson contends that this Court, despite its earlier opinions' positive citations to *Shelton*, should decline to apply *Shelton* in Iowa.

Appellee Br. at 16 (citing to *Thomas v. Marshall Pub. Schools,* __ F. Supp. 3d __, 2023 WL 5743611 (D. Minn. September 6, 2023)). But the Minnesota district court opinion Paulson relies on is different from both *Shelton* and the case here. In *Thomas v. Marshall Public Schools*, the District Superintendent hired an outside investigator that happened to be an attorney to investigate the eventual plaintiff. 2023 WL 5743611, at *2. The attorney did not contend that what he was doing was in support of litigation, did not mention privilege to any of the interviewees, and the District Superintendent referred to him not as an attorney but as an "outside investigator." *Id.*

The plaintiff sued and sought to depose the outside investigator about the investigation. Both the school district and the investigator's employer, a law firm, opposed the plaintiff's request on attorney-client privilege and work-product grounds. *Id.* The Federal Magistrate Judge overseeing the case applied *Shelton* narrowly and found that it did not apply when "the attorney whose testimony is sought was involved only in a prior, concluded investigation." *Id. a*t *5. In so ruling, the Court relied

on the timing of the litigation or threat of litigation and counsel's failure to designate the investigation as work product. *Id.*

Thomas has little relationship with the case here. Neither of the Attorneys acted as fact finders or investigators. *Cf. id* at *1–2. And unlike in *Thomas*, the Attorneys here, acting as attorneys, have acted in a manner consistent with the work-product doctrine. *See id at *3.*

Thomas may bolster the case for quashing at least Weber's deposition. Paulson is seeking information about Weber's decisions made in representing the Department before the Commission. *Thomas* found that responding to a direct threat of litigation—unlike the investigation in that case—is a factor that supports quashing an attorney deposition. *See id* at *3.

Thomas is distinguishable from this case, and, to the extent it is not, supports the quashing of Weber's deposition notice.

III. ERROR HAS BEEN PRESERVED REGARDING PUBLIC POLICY ARGUMENTS.

The Attorneys' Motion to Quash identifies the problems with failing to quash the subpoenas of an opposing party's attorney and relies on

Shelton for support. App. at 76. Despite that, Paulson contends that the Attorneys did not raise a "public policy issue/argument before the district court." Appellee Br. at 14. She explains that "[b]y neglecting to raise this argument before the district court, the Attorneys failed to preserve it for review." *Id.*

Paulson's issue preservation argument fails for two reasons. First, the Attorneys raised arguments about public policy and the potential chilling effect on attorney-client communications throughout this case and the appellate process. *See*, *e.g.*, App. at 84 ("The requested deposition testimony should not be permitted, not only as a matter of law, but also, a matter of policy concerning the legal profession").

Next, Paulson has conflated "preservation of error" with "additional ammunition for the same argument." *JBS Swift & Co. v. Ochoa*, 888 N.W.2d 887, 893 (Iowa 2016). Once a case has been appealed, the parties typically further define the issues before the Court. *See id.; see also Ames 2304, LLC v. City of Ames, Zoning Bd. of Adjustment,* 924 N.W.2d 863, 868 (Iowa 2019) ("Ames 2304's reliance on the Municipal Code's

definition of 'intensity' on appeal is simply additional ammunition for the same argument it made below- not a new argument advanced on appeal.") (internal quotation omitted). Such further elucidation is entirely appropriate on appeal.

For these reasons, the Attorneys preserved error and this Court should address the concerns they have preserved on appeal.

IV. THIS CERTIORARI PROCEEDING IS PROPER.

a. The Attorneys Preserved Error.

Paulson contends that the Attorneys' contesting their deposition as unlawful does not justify Certiorari review by this Court. She argues that the Attorneys' motion to quash failed to properly preserve error. Appellee Br. at 18. To support her contention, Paulson states that "Peterzalek and Weber never argued the court lacked jurisdiction or that it would be acting illegally if depositions were ordered to proceed. Likewise, the Attorneys neglected to make any arguments that the district court would be abusing its discretion." *Id.* That misunderstands their motion to quash and supporting brief—both of which relied on the inappropriate and unlawful nature of the depositions as justification.

Paulson's overly constrained view of Certiorari review has no basis in Iowa law nor in practice. She conflated "preservation of error" with "additional ammunition for the same argument." *JBS Swift & Co.*, 888 N.W.2d at 893. In the Attorneys' Brief in Support of the Motion to Quash, they explained why the district court should quash the deposition subpoena. Those reasons, with a particular focus on the sanctity of attorney-client privilege, are outlined above. The Attorneys made their arguments to the district court. They did not need to say the magic words that the district court would "abuse its discretion" in ruling against them to preserve their issues on appeal. *See*, *e.g.*, *Ames 2304, LLC*, 924 N.W.2d at 868.

b. This is an appropriate Certiorari Action.

Certiorari is the appropriate vehicle for this Court to review "key discovery disputes." *See*, *e.g.*, *Bousman v. Iowa Dist. Ct. for Clinton Cnty.*, 630 N.W.2d 789, 793 (Iowa 2001) (granting certiorari to review and remand a denied motion to quash). Without certiorari as a vehicle, the Attorneys have "no practical means of judicial review." *River Terminal v.*

Iowa Dist. Ct. For Clayton Cnty., 630 N.W.2d 782, 786 (Iowa 2001) (granting certiorari to review a denied motion to quash).

This Court properly granted certiorari and a collateral attack on the propriety of that grant now, in the merits stage, is unwarranted.

V. THE DISTRICT COURT DID NOT GRANT THE ATTORNEYS THEIR SOUGHT ALTERNATIVE RELIEF.

Among the alternatives the Attorneys proposed in their motion to quash was a substantive protective order that would preclude questions that touched on the likely areas of significant attorney-client privilege. App. at 71. The district court instead granted a protective order that allowed for the depositions to be performed under seal. App. at 123. That is not the relief that the Attorneys sought. And Paulson is incorrect in contending that the Attorneys received the alternative relief that they sought. Appellee Br. at 29. Not all protective orders are the same.

In their Motion to Quash, the Attorneys requested, "[a]lternatively, should the Court decline to quash the subpoenas in this matter, the [Attorneys] move for an appropriately restrictive protective order pursuant to Iowa Rule of Civil Procedure 1.504(1)(a) to govern the

deposition testimony in this case." *See* App. 71 at para. 6. In denying the Motion to Quash, the district court offered to allow the deposition testimony transcripts to be sealed. App. at 123. That does not prohibit Paulson from eliciting testimony on topics that privilege should protect. And it remains unclear what topics she seeks to ask about that are not protected by privilege.

Instead, if the district court wanted to allow the depositions to proceed, despite the unlikely eliciting of relevant non-privileged information, the district court should have entered a protective order requiring appropriate guardrails for the depositions as stated in Iowa Rule of Civil Procedure 1.504(1)(a). The Attorneys did not get the alternative relief they seek and so review of the district court's denial is appropriate. This Court should reverse.

CONCLUSION

This Court should apply, or adopt and apply, a test that is appropriately protective of attorney counsel and privilege and reverse the district court.

Respectfully submitted,

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CERTIFICATE OF COST

No costs were incurred to print or duplicate paper copies of this brief because the brief is only being filed electronically.

/s/ *Eric Wessan*
Solicitor General

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and type-volume limitation of Iowa R. App. P. 6.903(1)(d) and 6.903(1)(g)(1) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Schoolbook font and contains 3,879 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ *Eric Wessan*
Solicitor General

CERTIFICATE OF FILING AND SERVICE

I certify that on December 6, 2023, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ *Eric Wessan*
Solicitor General