IN THE SUPREME COURT OF IOWA
No. 22–1419

KATHERINE AVENARIUS and PAUL AVENARIUS,

Plaintiffs–Appellees,

vs.

STATE OF IOWA,

Defendant–Appellant.

Appeal from the Iowa District Court for Polk County
Samantha J. Gronewald, District Judge

APPELLEES' RESISTANCE TO APPELLANT'S APPLICATION FOR FURTHER REVIEW OF FEBRUARY 7, 2024 DECISION OF COURT OF APPEALS

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AVENARIUS' STATEMENT RESISTING FURTHER REVIEW

The Court of Appeals was correct in affirming the District Court's denial of the State's Partial Motion for Summary Judgement. Further review is not appropriate in this matter since both the District Court and Court of Appeals' decisions are clearly supported and consistent with applicable Iowa case law.

QUESTION PRESENTED FOR FURTHER REVIEW

"Then you should say what you mean," said the March Hare to Alice.

"I do," Alice hastily replied; "at least-at least I mean what I say-that's the same thing, you know."

"Not the same thing a bit!" said the Hatter. Carroll, L. , *Alice's Adventures in Wonderland.*

In this case, the District Court and the Court of Appeals have correctly ruled that in order for the State to escape liability for its own negligent acts, then *the State must say what it means*; something which the State has failed to do.

In order to escape liability, is the State required to clearly express in unambiguous terms in its form that the person signing the form is waiving any negligence claims based on the State's or its instructors' negligent conduct?

STATEMENT OF THE CASE

Nature of the Case

Avenarius agrees with the State's recitation of the Nature of the Case.

Statement of Facts

Kate Avenarius, "Avenarius herein," was a veteran police officer who earned a distinguished and decorated position of trust at the Dubuque Police Department. Her career goal was to attain a position of high-level command; a path that required her to obtain a firearms instructor certification. Completing the Iowa Law Enforcement Academy's firearms instructor certification program was the next required step for Avenarius to accomplish her career goal.

The State required Avenarius to sign its form entitled "Waiver Release From Liability And Assumption of Risk Agreement." This piece of paper, which the State forced Avenarius to sign if she wanted to become a certified firearms instructor in Iowa, contains no language referencing the State's or the State's instructors' negligence or negligent conduct. Avenarius was not aware of any other options but to sign the State's pre-printed form prepared by the State. Avenarius

had no power to negotiate any of the terms and was forced to sign the paper lest she forego the certification class. Avenarius had no idea that the State would attempt to hide behind this piece of paper and escape accountability *after* the State's instructor negligently directed her to "try something new" on a live firing range. The State's dangerous instructions ultimately caused the shooting that has caused Avenarius's permanent and traumatic injuries.

ARGUMENT

I. The State's Form Fails To Include Clear And Unambiguous Language That Releases The State From Its Own, Or Its Instructors' Negligence.

Words matter. The Court of Appeals confirmed that words matter. Seven words: In this case it would only take seven words, "negligence by the ILEA or its instructors" to clearly and unambiguously inform Avenarius she was waiving any claims of negligence against the ILEA or its instructors. The State's attempt to trivialize the Court of Appeals decision as establishing a "magic words" test is an attempt to shift the focus away from the State's failure to be transparent in its attempt to hide from liability by not

saying what it means.

"You have the right to remain silent" are seven powerful words that clearly inform someone of the rights they are at risk of waiving. The State's attempt to belittle the power of words by re-characterizing them as "magical words" is without merit. Ironically, the State has failed to show any burden, let alone any degree of difficulty, it would have taken to include seven words in its escape from liability piece of paper. If specific words don't matter, as the State claims, then why not include the words "*claims of negligence by ILEA or its instructors"* in its escape from liability piece of paper? Is it because the State does not want to clearly and unambiguously inform the people it is forcing to sign its paper, that they are signing away potential rights of recovery caused by the negligent acts of the State or its instructors? The bottom line is that the Court of Appeals and District Court's thorough analysis is accurate and soundly based on Iowa law. The analysis set forth in the Court of Appeals' decision and supplemented by summary below, directs that the State's request for further review should be denied.

The terms in the State's escape from liability piece of paper are deficient and unenforceable. The Iowa Supreme Court has made it

clear that it demands a party to clearly express its intention to exclude liability for its negligent acts and omissions before a defendant escapes liability for its fault. In *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 879–80 (Iowa 2009) the Supreme Court considered what other jurisdictions required for liability waivers to apply. The *Sweeney* court recognized that other courts have not required magic words but have imposed a demanding requirement that the intention to exclude liability for acts and omissions of a party must be expressed in clear terms. *Id.* at 879 *citing Gross v. Sweet,* 49 N.Y.2d 102, 424 N.Y.S.2d 365, 400 N.E.2d 306, 309–10 (N.Y.1979) (noting that while the word "negligence" need not specifically be used, words conveying a similar import must appear). The *Sweeney* court concluded that, "…the approach of these cases is consistent with the approach in Iowa exculpatory clause cases generally. *See Baker,* 433 N.W.2d at 708 -709 (requiring a clear and unequivocal expression). We see no reason to relax from the approach in *Baker*." *Id.* at 880.

After its in-depth analysis, the *Sweeney* court determined that a party must express in clear terms an intention to exclude liability for its *acts and omissions*. Applying *Sweeney* to the facts of this case lead the Court of Appeals to conclude the State's form it forced Avenarius

to sign is unenforceable. The State's piece of paper in this case did not include *any* terms like *acts of negligence, fault, omission, covenant not to sue, caused by the acts or conduct of the released party/releasees*. In addition, the State's piece of paper makes no reference to its actions or that of its employee's actions as the type of conduct that informs Avenarius she is releasing. This is the type of language the *Sweeney* court and the cases it reviewed and relied upon, required to be included in a form before a party could be relieved of its responsibility.

Despite the fatal flaws in the State's form, the State references Iowa Court of Appeals decisions that seem to say the omission of the term like omission is "good enough." The Iowa Supreme Court, as recent as *Lukken v. Fleischer,* 962 N.W.2d 71, (Iowa 2021) confirms that if a party wants to escape liability for any of its acts, omissions or negligence, then it must expressly state those terms in the form.

The District Court correctly ruled the State failed to expressly state the necessary terms to escape liability. The District Court accurately analyzed the relevant caselaw, including *Sears, Roebuck & Co. v. Poling,* 81 N.W.2d 462 (Iowa 1957) and its progeny, and succinctly concluded, "...the waiver did not contain clear and

unequivocal language that Katherine [Avenarius] was waiving liability as to the negligent acts or omissions of Defendant.

Further, the Court of Appeals succinctly concluded that the State's form contained, "*....no clear expression of Avenarius's intent to release the State from liability for claims related to the negligent acts of ILEA or its instructors, either in the express language of the rlease or the context provided.*" The Court of Appeals and District Court's decisions are well-reasoned, accurately analyzed and should not be overturned.

CONCLUSION

For the reasons set forth above and the reasoning set forth in greater detail in the Court of Appeals' decision, the State's request for further review must be denied.

Respectfully submitted,

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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 proportionally spaced typeface using Microsoft Word in 14-point Georgia font and contains 1,664 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

/s/ Todd Klapatauskas
Todd Klapatauskas

CERTIFICATE OF FILING AND SERVICE

I certify that on March 14th, 2024 this Resistance was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

/s/ Todd Klapatauskas
Todd Klapatauskas