IN THE SUPREME COURT OF IOWA

Supreme Court No. 24–0030
Polk County Case No. LACL151685

JESSENIA BURTON, NANCY BURTON, AND TRACY BURTON,
Plaintiffs-Appellants,

vs.

WEST BEND MUTUAL INSURANCE COMPANY,
Defendant-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR POLK COUNTY
THE HONORABLE ROBERT HANSON, JUDGE

REPLY BRIEF FOR APPELLANTS

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STATEMENT OF THE ISSUE PRESENTED FOR REVIEW

I. Did the district court err in ordering production of psychological test material to West Bend and its attorneys when the plain language of Iowa Code section 228.9 prohibits it?

REPLY ARGUMENT

I. THE IOWA LEGISLATURE CRAFTED A BALANCE OF INTERESTS IN SECTION 228.9, AND THAT BALANCE ADDRESSES THE COMPLAINTS AIRED BY WEST BEND.

West Bend's argument is contradictory and largely divorced from the law. West Bend claims it has been unfairly surprised by the law regarding psychological test materials in this case (Appellee Brief at 16) and prejudiced by the proceedings (Appellee Brief at 16, 34). Coupled with its emphasis on the liberal nature of Iowa's discovery rules rather than plain language from the legislature describing this precise circumstance, West Bend's position seems to boil down to questions of fairness: that the plain language of the law is *unfair* to West Bend, rather than *unlawful*. But its claims of surprise and prejudice ring hollow at every turn. While the district court contorted Iowa law to rectify that sense for West Bend, this court should not do the same.

The legislature balanced numerous interests when crafting Iowa Code section 228.9 – including those of litigants in West Bend's position. The solution West Bend seeks is found in the plain language of section 228.9.

A. While Discovery is Broad Under Iowa Law, it is Not Without Limits – and Section 228.9 is One Such Limit.

West Bend predicates its argument on the notion that Iowa favors liberal application of discovery rules. Appellee Brief at 20. However, discovery is not unlimited, and those limitations can come through (for example) statutes,

privileges, and court determinations of relevance. *Carolan v. Hill*, 553 N.W.2d 882, 886 (Iowa 1996). This Court should recognize that section 228.9 places one such important limit on discovery, something that was clearly a priority for the legislature in crafting the law. West Bend's reading, however, would render 228.9 toothless and useless, something that must be avoided in statutory interpretation.

West Bend erroneously conflates psychological test material with mental health information when the two are separate and distinct, including having separate specific definitions within Iowa law. *See* Iowa Code § 228.1; Iowa Admin. Code r. 645—243.1. In doing so, West Bend refrains from attacking, or even analyzing, Iowa Code section 228.9 directly and instead ropes two separate, inapplicable statutes together in a way that erases section 228.9 and undermines the field of neuropsychology as a whole.

West Bend's argument is predicated on improperly categorizing the information used in Dr. Tranel's neuropsychological evaluation of Jessenia Burton in the silo of "mental health information" in Iowa Code section 228.6 instead of "psychological test material" in Iowa Code 228.9. *See* Appellee Brief at 25. This, in spite of extensive information provided by industry groups through amicus in this case, as well as the extensive record developed at the trial court level (and ignored by West Bend in making the argument). Only one court supports that erroneous categorization – the district court in this case.

West Bend cannot win under the plain language of section 228.9, so it is instead shifting the field of play to try to place this case under the broader allowances of section 228.6. This cannot prevail. Iowa law repeatedly defines 'psychological test material' as separate and distinct from the broader category of 'mental health information.' *See* Iowa Code § 228.1; Iowa Admin. Code r. 645—243.1.

This makes sense, as section 228.9 was passed *after* the other sections in Chapter 228. Section 228.6 is the broader top of the funnel for mental health information, and section 228.9 is the narrow bottom of the funnel for psychological test material that arose to meet a more specific need later in time. No other reading makes sense.

The issue before this court hinges on statutory language. Words are critical. Improperly conflating distinguishable terms can have far-reaching consequences. So it must be emphasized that psychological test material is different and distinct from mental health information in Iowa Code Chapter 228.

Jessenia Burton has a provable claim of cognitive impairments resulting from the traumatic brain injury she suffered when she was hit by a truck. Cognitive impairments in the form of "mild deficits in overall intellectual functioning and executive functioning, in the context of normal memory, speech and language, visuospatial/visuoperceptual/visuaconstructional functioning, processing speed,

and attention" are neuropsychological impairments. *See* Attachment to D0046, Plaintiffs' Exh. 1, Tranel Report at 12 (8/21/2023). Neuropsychology and clinical neuropsychology are specialized practices in the field of psychology. Nat'l Acad. of Neuropsychologists, *Definition of a Clinical Neuropsychologist*, Official Position Statement (May 5, 2001) https://www.nanonline.org/NAN/files/PAIC/PDFs/NANPositionDefNeuro.pdf. The tests administered by Dr. Tranel to reach his opinions are psychological test materials. *See* Iowa Code § 228.9; Iowa Admin. Code r. 645—243.1. The process for disclosing psychological test materials is set forth plainly and unambiguously in Iowa Code section 228.9.

This court's analysis can stop there without considering the other sections found in Chapter 228. The language of section 228.9, that psychological test material "shall not" be disclosed "in any . . . judicial . . . proceeding" except "to a psychologist licensed pursuant to chapter 154B" has no reasonable alternative interpretation. But if this court chooses to apply canons of statutory construction, it should find that the provision specific to psychological test material (section 228.9) controls over the general disclosure and discovery rules for other kinds of information (sections 228.1–228.8 and the Iowa Rules of Civil Procedure). Iowa Code § 4.7.

The cornerstone of the district court's ruling (D0056, Order (9/14/2023)), which is adopted by West Bend here, is that section 228.6(4) controls over section 228.9 – a position so flawed it crumples even as West Bend attempts to defend it. West Bend argues against itself when it argues that statutes are to be read in their entirety to prevent absurd results (Appellee Brief at 27), but reading section 228.9 to be subject to unrelated qualifiers in Chapter 228, including section 228.6, erases every piece of the operative language of 228.9. Suddenly "shall not" becomes "shall" and 'any judicial proceeding' now adds "where plaintiffs have put their mental health status in controversy" (regardless of their neuropsychological cognitive status) and "except to a licensed psychologist" becomes, ludicrously, "to attorneys, to neurologists, to insurance adjusters, to jurors, just not to the plaintiff patient." West Bend's reading contravenes the mandate the legislature set forth in section 228.9 when it added it to Chapter 228 thirty years ago.

It bears repeating the field of neuropsychology generally finds no functional distinction between test data and test materials. Kyle Brauer Boone, et al., *Official Position of the Am. Acad. of Clinical Neuropsychology on Test Security*, 36 The Clinical Neuropsychologist 523, 532 (2022), https://doi.org/10.1080/13854046.2021.2022214; *See* Brief for Amicus Curiae Iowa Psychological Assoc'n. at 16–19, 32.

And indeed, Iowa psychologists are prohibited from disclosing either. Iowa Admin. Code r. 645—243.4(2)–(3). This is particularly important given two central concerns in the practice of clinical neuropsychology: that tests remain secure and valid, that neuropsychological testing may continue to rely on a patient's ignorance of the contents of exams before they are taken. Brauer Boone at 524.

While West Bend makes overbroad arguments pointing to general discovery rules in claiming that underlying expert data must always be made available to the other side (Appellee Brief at 28), Iowa's discovery rules do not follow the federal pattern, and generally do not dictate to the parties the specific method to make that information available. *See, e.g.*, Iowa R. Evid. 5.705 (stating "[t]he expert may testify . . . without first testifying to the underlying facts or data" and that the expert "*may* . . . be required to disclose the underlying facts or data on cross-examination."). Comparing the evidentiary rule's permissive "may … disclose" with section 228.9's mandatory "shall not disclose" identifies the central flaw in West Bend's argument regarding disclosure: the rules are simply different for psychological test data compared with the general rules for discovery. *Compare* Iowa R. Evid. 5.705 *with* Iowa Code § 228.9. Indeed, in this case, Plaintiffs have offered the underlying data repeatedly, just as West Bend claims is necessary for fundamental fairness – just in the manner dictated by the statute, to a licensed

psychologist of West Bend's choosing. West Bend overstates its position and Iowa law.

West Bend claims anything other than complete disclosure is unfair because this testing was performed as part of a civil suit. But that argument is for the legislature, not this court. The law in effect today in this case is clear, and requires non-disclosure until West Bend to retain a licensed psychologist to receive the information it seeks.

B. West Bend's Attorneys Overstate Their Limitations Under the Plain Language of Section 228.9.

West Bend erroneously claims that under a proper reading of the prohibitions of section 228.9, "neither party may meaningfully conduct a direct or cross examination of either expert witness." Appellee Brief at 28. However, Iowa courts, attorneys and neuropsychologists have worked within the confines of the rules of section 228.9 for 30 years, calling into question the validity of this argument. Neuropsychological testing has been utilized in Iowa courts since 1994, when the Iowa Supreme Court determined that neuropsychologists had the training, expertise, and scientific basis required for admissibility. *Hutchison v. Am. Family Mut. Ins. Co.*, 514 N.W.2d 882, 888 (Iowa 1994). This Court found there was "ample basis" for admission of neuropsychological testimony regarding brain injury. *Id.* Neuropsychologists routinely perform independent medical examinations in worker's compensation and personal injury cases throughout the

state, and indeed such examination is more commonly used by defendants, insurance companies and worker's compensation employers than by claimants or plaintiffs, due to the cost and other factors. Indeed, this was the case in *Hutchison* itself: the neuropsychologist first approved by this court was retained by the defendant to examine a plaintiff. *Id.*

In each case involving neuropsychological testing, the solution for opposing-side attorneys is simple and stated within the statute: retain a licensed psychologist to review the data, who can then relay to counsel how to attack any erroneous or speculative conclusions, or even testify themselves about same. *See* Iowa Code 228.9. Counsel can attack many parts of the testing or conclusions without access to the tests or data, including test conditions; appropriateness of a given test and its use; percentile ranks; severity of injury; effects of the injury; Plaintiffs' valuation of the injury; specific functional or mental limitations of the person; and the science and utility of neuropsychology itself. Attorney groups hold seminars on how to perform these cross examinations. None of this is new, and nothing about this is a surprise to a sophisticated insurer like West Bend.

While West Bend decries this situation as unfair or impossible, section 228.9 has worked for 30 years with essentially no case law generated in Iowa appellate

courts until this case[1] – likely because the statutory language is so clear. This situation is not unprecedented, either. Doctors often give testimony regarding their interpretations of things like MRIs that can only be rebutted by other doctors qualified to make those interpretations. In no situation in any court across the state would an attorney be allowed to give their own opinion on how to read an MRI, but that appears to be the outcome for which West Bend militates when it comes to sensitive neuropsychological testing. Similarly, attorneys often need to retain their own experts to interpret things like complex computer programming code or specialized accounting principles, and nothing about that situation prevents full and complete cross examination.

Indeed, West Bend's own filings *in this case* belie their claims that they cannot effectively cross-examine Dr. Tranel: West Bend presents before this court their belief that Jessenia Burton's testimony indicates she has healed from her head injury. Appellee Brief at 18. This is compelling fodder for cross examination, and not the sign of an insurance company fighting with one hand tied behind its back. The requirement to retain a licensed psychologist to obtain neuropsychological data is how brain injury cases have traditionally been handled in Iowa for 30 years,

[1] The sole appellate reference to Iowa code section 228.9 supports the plain reading of the statute as prohibiting disclosure. *Ragan v. Petersen*, 569 N.W.2d 390, n. 1 (Iowa Ct. App. 1997) ("Some of the medical information in this case, however, may not have been discoverable. *See* Iowa Code § 228.9.").

and this situation is not unique to this case, nor is it unfair or impossible to work within the confines of the statute.

West Bend's true aims are shown when it argues that test data falls outside of the definitions relevant to interpretation of section 228.9. Appellee Brief at 23. This is because compelling production of just the raw test data (in the form of Jessenia Burton's answers to the performed tests) will leave West Bend with one of two scenarios, depending on the test: either a string of random responses (e.g. "1, 5, 6, 2") with no context for the data (therefore providing West Bend and its counsel no more insight into how they might cross-examine Dr. Tranel); or the pen-and-paper answers to a test where Jessenia was instructed to write directly on the test form, which will then be the same as disclosing the test materials (making the entire statute moot and undermining the interests in test security and validity advanced by the legislature in enacting section 228.9). *See* Mark Prohaska & David P. Martin, *Obtaining Neuropsychological Test Data: Why is This So Hard?*, Ala. Law., May 2007, at 221. West Bend either winds up in substantially the same position as it is today, or it entirely undermines the legislature's attempt to address the many and varied reasons why test security is vital in this type of testing – and since the former is a nonsensical position to take, the obvious goal is the latter.

Instead of this Hobson's choice, this court should instead follow the plain meaning of the statute, and allow disclosure only to a licensed psychologist.

C. Plaintiffs' Attempts to Compromise and Protect Jessenia Burton's Interests are Not Waiver or Capitulation.

Before and after the district court heard arguments from the parties regarding West Bend's motion to compel, counsel for Plaintiffs attempted to work with counsel for West Bend in providing reasonable information. *See* Attachment to D0045, Defendant's Exh. B, Correspondence at 2–6 (8/11/2023). These efforts do not now preclude Plaintiffs from arguing that which was always true and of which West Bend was fully aware: that Iowa law makes psychological test material undiscoverable.

West Bend is correct that Plaintiffs' efforts to compromise included disclosure of publicly available test materials at West Bend's request. *See* D0046, Plaintiffs' Resist. M. Compel at 5 (8/21/2023); Attachment to D0045, Exh. B at 2. As West Bend pursued access to Jessenia Burton's test materials and data, counsel for West Bend identified several of the tests used by Dr. Tranel which have been publicly disseminated and can be found online – the foreseeable consequence of not protecting test materials by restricting who may receive and review them. *See id.* Plaintiffs provided those materials, because it was understood by Plaintiffs and Dr. Tranel that they were no longer required to be kept confidential as a result of release into the public domain with links to the test documents provided by West Bend itself. *Id.*

Plaintiffs also followed the direct instructions of the trial court and cooperated with West Bend following the district court's ruling on the motion to compel in order to craft a protective order that would minimize the harm to Jessenia Burton at trial. D0056 at 6; D0066, M. Protective Order (12/22/2023); D0068, Defendant's Response M. Protective Order (1/2/2024); D0069, Protective Order (1/12/2024). This was done to protect Jessenia Burton's interests (as well as the many and varied interests at play with the testing itself), because there was no guarantee that this court would take this appeal on an interlocutory basis. Plaintiffs could either violate a court order (by refusing to turn over the protected information), violate medical ethics and Iowa law (by turning over the protected information), or work toward a protective order and do the best they could under the circumstances. This choice was really no choice at all.

The resulting court order is in line with the district court's ruling, but still runs contrary to Iowa law, granting even the jury access to Jessenia Burton's sensitive neuropsychological test materials and data. *See* D0069. Protective orders are not the solution to this issue as a general rule. *See* Brief for Amicus Curiae Iowa Psychological Assoc'n. at 34–36; Am. Brief for Amicus Curiae Pearson Clinical Assessment at 21–22.

Despite its protestations, West Bend is in no way prejudiced by Plaintiffs' efforts to work with West Bend in crafting a protective order and then appealing to this court to reverse the fundamental flaw that led the parties down this path.

A protective order is not sufficient to protect Jessenia Burton's interests here, nor those of Iowa's neuropsychologists and the testing itself. As a result, this court should reject arguments regarding waiver, which were not properly raised before the trial court and are inapplicable to this issue.

D. West Bend's Other Arguments are Not Properly Before this Court and Should Not Be Considered.

The sole issue before this court is whether the district erred when it interpreted section 228.9 to be subject to other unrelated provisions of Chapter 228 in granting West Bend's motion to compel the production of psychological test materials and data. West Bend raises numerous other issues outside of the ruling appealed here, which was specific to West Bend's motion to compel. These were not ruled on by the district court and do not pertain to the issue of statutory interpretation, except insofar as they bolster West Bend's primary argument relating to fairness.

Specifically, West Bend casts Plaintiffs as noncompliant with the Iowa Rules of Civil Procedure, despite this being incorrect and having no bearing on the application of section 228.9 to the facts of this case in any way. *See* Appellee Brief at 20. In the course of the below proceedings, Plaintiffs' filings and disclosures

were timely – the district court found as such. *See* D0056 at 1. West Bend claims it was entitled to a privilege log, but a privilege log (which Rule 1.503(5)(a) applies to information "*otherwise discoverable*" that is "privileged or subject to protection as trial-preparation material") is most likely inapplicable based on clear mandate of section 228.9 and the type of information West Bend seeks. Iowa R. Civ. Pro. 1.503(5)(a) (emphasis added). More importantly, West Bend had all information that would be found in the privilege log *right within the report of Dr. Tranel*, which included the names of each and every test performed. D0046 at 9; Attachment to D0046, Plaintiffs' Exh. 1 at 9–10. Plaintiffs will not belabor this point, as it does not appear to be a part of the district court's erroneous decision and was fully briefed at that stage, but West Bend had everything required by the rules in hand by at least March of 2023. D0046 at 12–13. Simply put: West Bend's complaints regarding privilege logs are irrelevant, inapplicable, and incorrect on their face, as it had everything required by Rule 1.503(5) in its hands at all pertinent times.

Further, West Bend complains repeatedly that Plaintiffs invoked section 228.9 'only' 53 days before trial. *See* Appellee Brief at 9, 14, 31, 33. However, the court should note that West Bend first requested Jessenia Burton's test data in its third requests for production, filed on the last day of discovery, 60 days before trial. *See* D0039, Plaintiffs' Resist. M. Continue at 3 (7/21/2023); Attachment to

D0046, Exh. 3 at 3 (8/21/2023). Plaintiffs objected immediately, in several forms, and while Plaintiffs had a 30-day window to do so, they made their objections within seven days because of the impending trial date.

And finally, West Bend attempts to shoehorn in a *Daubert* challenge to Dr. Tranel, despite the district court's denial of West Bend's motion to strike. *See* D0056 at 7; *see also* Appellee Brief at 29 (referencing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993)). This runs completely opposite to well-established case law in Iowa that has long supported neuropsychological testing as a reliable and medically proven science. *Hutchison*, 514 N.W.2d at 888.

CONCLUSION

For the foregoing reasons, this court should reverse the district court's order and remand this case so discovery under Iowa Code section 228.9 can proceed.

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)(g) and 6.903(1)(i) because this brief has been prepared in proportionally spaced typeface using Microsoft Word in 14-point Times New Roman font and contains 3,384 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(i)(1).

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CERTIFICATE OF COSTS

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

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CERTIFICATE OF FILING AND SERVICE

I certify that on September 13, 2024, this brief was electronically filed with the Clerk of Court and served on all counsel of record to this appeal using EDMS.

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