

IN THE SUPREME COURT OF IOWA  
NO. 24-1017

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BERT MILLER AND NANCY DUFFNER,     )  
  )  
                          Appellants,     ) JOHNSON COUNTY  
  )  
v.   ) NO. LACV 085049  
  )  
STATE OF IOWA,                                )  
  )  
                          Appellee.            )  
  )

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APPEAL FROM THE IOWA DISTRICT COURT  
IN AND FOR JOHNSON COUNTY  
  
(THE HON. KEVIN MCKEEVER, PRESIDING)

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REPLY BRIEF FOR APPELLANTS, BERT MILLER AND NANCY DUFFNER

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STATEMENT OF THE ISSUES

- I. WHETHER Iowa Code § 714I SHOULD BE APPLIED RETROACTIVELY TO FERTILITY FRAUD CLAIMS WHICH OCCURRED BEFORE THE STATUTE WAS ENACTED

## Argument

The State of Iowa is correct in its conclusion that this case turns on the second prong of the *Hedlund* test, whether the Fraud in Assisted Reproductive Act ("FARA") contains express language stating that it applies retrospectively. Appellee's Br. 17. Where the State of Iowa misses the mark is its contention that FARA's civil cause of action fails to contain express language that it may apply retrospectively. Given that the statute does, the District Court erred in its analysis and its ruling must be reversed and the matter remanded back to the District Court to proceed with discovery and trial.

### **I. FARA Meets the Second Step of the Hedlund Test as it Contains Express Language that it Applies Retrospectively.**

The State of Iowa incorrectly asserts that Plaintiffs-Appellants have not satisfied the second prong of the *Hedlund* test. These arguments fail when FARA is viewed as a whole. The State of Iowa attempts to distinguish both *City of Waterloo v. Bainbridge* and *Shell Oil* in its brief. Appellee's Br. p. 20-21. Yet these efforts miss the mark. While not directly on point to the matter before the Court given that these two cases dealt with non-substantive statutes, these two cases demonstrate that the legislature need not use specific words such as "retrospective" or "retroactive" for a statute to apply retrospectively. See generally *City of Waterloo v. Bainbridge*, 749 N.W.2d 245, 251 (Iowa

2008); Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Shell Oil Co., 606 N.W.2d 370, 375-76 (Iowa 2000).

Consequently, the analysis regarding retrospective application must dig deeper than merely looking for "retrospective" or "retroactive" in the statute's text. In ascertaining the intent of the legislature, courts are obliged to consider a challenged statute in its entirety. State v. Hawk, 616 N.W.2d 527, 529 (Iowa 2000). "Legislative intent is ascertained not only from the language used but also from the statute's subject matter, the object sought to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations." State v. McCullah, 787 N.W.2d 90, 95 (Iowa 2010) (internal quotations omitted).

When FARA is viewed in its entirety, the private civil remedy found in FARA should be applied both retrospectively and prospectively given that: (1) Iowa Code § 714I.4(6) is "not subject to a statute of limitations;" (2.) actions under § 714I.4 "may be commenced at any time;" (3.) § 714I.4 permits the children of deceased victims of fertility fraud to bring claims; and (4.) the logistical and policy reasons behind retrospective application, given that a strictly prospective application of the private cause of action in FARA leaves it essentially toothless. Iowa Code § 714I.4. The combination of these four elements provides the

requisite express language to satisfy the second prong of the *Hedlund* test as outlined in Appellants' opening brief. Appellants' Br. 16-18.

**II. The State's Reliance on the Ex Post Facto Clause is Misplaced.**

In its Reply Brief, the State of Iowa attempts to argue that retrospective application of the private civil right of action in FARA raises Ex Post Facto Clause concerns given the relationship between the private civil right of action at § 714I.4 and acts now defined as sexual abuse in the fourth degree per § 714I.3(2), § 709.4A, and § 802.2E. Appellee's Br. 18-19; see Iowa Code § 714I.3(2) (prohibiting practices and acts of fraud in assisted reproduction); Iowa Code § 709.4A (establishing violations of Iowa Code § 714I.3 as sexual abuse in the fourth degree); Iowa Code § 802.2E ("An information or indictment for sexual abuse in the fourth degree may be commenced at any time after the commission of the offense.") The State of Iowa's reliance on the Ex Post Facto Clause of the Iowa Constitution, to argue against the retrospective application of FARA's private cause of action, fails both procedurally and substantively.

While the State of Iowa raised general due process concerns in its briefing at the trial court level, the Ex Post Facto Clause of the Iowa or Federal Constitution is not cited in either the State of Iowa's Motion to Dismiss or Reply at the trial court



level. D0007, Motion to Dismiss (03/06/24); D006, Brief in Support of Motion to Dismiss (03/06/24); D0018, Reply in Support of Motion to Dismiss (4/22/24). "Issues on appeal not raised at the district court are deemed waived." State v. Meyers, 799 N.W.2d 132, 147 (Iowa 2011); Meier v. Senecaut, 641 N.W. 2d 532, 537 (Iowa 2002); see, e.g., State v. Alexander, 853 N.W.2d 295, 297-98 n. 1 (Iowa Ct. App. 2014) (disregarding appellant's argument not presented in the district court). Given that the State of Iowa's Ex Post Facto argument was not raised at the District Court level, the Court should disregard these arguments on appeal.

Even if the Court deems that the issue was raised in the District Court briefing, reliance on the Ex Post Facto Clause is still not determinative of the issue before the Court. "The ex post facto clauses of the federal and state constitutions forbid enactment of laws that impose punishment for an act that was not punishable when committed or that increases the quantum of punishment provided for the crime when it was committed." State v. Pickens, 558 N.W.2d 396, 397 (Iowa 1997); see also U.S. Const. art. I § 10, cl. 1 ("No State shall...pass any...ex post facto law...."); Iowa Const. art. I, § 21 ("No...ex post facto law...shall ever be passed."). This "ex post facto prohibition extends only to cases criminal in nature...even where the civil consequences are serious in nature." State v. Seering, 701 N.W.2d 655, 667 (Iowa 2005) (quoting Hills v. Iowa Dept. of Transp. &

Motor Vehicle Div., 534 N.W.2d 640, 641 (Iowa 1995) (internal quotations omitted)). As such, “purely civil penalties...are not subject to such restrictions.” Id.; see also State v. Aschenbrenner, 926 N.W.2d 240, 247 (Iowa 2019).

The matter before the Court does not involve Dr. Randall defending against criminal fourth degree sexual abuse charges pursuant to Iowa Code § 709.4A and § 802.2E related to the past conduct outlined in Plaintiffs’-Appellants’ Petition. Nor is Dr. Randall defending against a civil penalty levied by the State of Iowa that is “quasi-criminal” in nature, and thus, potentially subject to Ex Post Facto arguments. See, e.g., Hills, 534 N.W.2d at 642; In re T.H., 913 N.W.2d 578, 596 (Iowa 2018).

Rather, this case involves application of FARA’s private right of action found in Iowa Code § 714I.4, not its criminal component. As such, the Ex Post Facto Clause is not applicable. This private civil remedy for victims of fertility fraud does not fall within the narrow class of civil statutes deemed to have violated Iowa’s Ex Post Facto Clause as it merely creates a private civil remedy and not a state-imposed sanction or penalty, such as driver’s license revocation after a controlled substance conviction or mandatory sex offender registration for juveniles. See Hills, 534 N.W.2d at 642; In re T.H., 913 N.W.2d at 596.

Consequently, the State of Iowa's Ex Post Facto arguments are unrelated to the issue before the Court and should be disregarded.

**CONCLUSION**

For the reasons set forth, the District Court's ruling that grants the State's Motion to Dismiss should be reversed. This matter should be remanded so that parties may conduct discovery and proceed to trial.

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**CERTIFICATE OF FILING AND SERVICE**

The undersigned hereby certifies that on the 4<sup>th</sup> day of October 2024 he or a person acting on his behalf, filed the foregoing Appellants' Brief with the Iowa Supreme Court via EDMS, which will send notification of such filing to all counsel of record.

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