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IN THE SUPREME COURT OF IOWA

CASE NO. 24-0030

JESSINIA BURTON, NANCY BURTON, AND TRACY BURTON,

Plaintiffs/Appellants,
v.

WEST BEND MUTUAL INSURANCE COMPANY

Defendants/Appellee.

RELATING TO THE IOWA DISTRICT COURT IN AND FOR POLK COUNTY (CASE NO. LACL151685)
HON. ROBERT B. HANSON, DISTRICT COURT JUDGE

APPELLEE'S BRIEF

(Trial Set for May 19, 2025)

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STATEMENT OF THE ISSUE

I. Whether the District Court properly compelled production of the only materials purportedly supporting Plaintiffs' expert's opinion.

ROUTING STATEMENT

West Bend Mutual Insurance Company respectfully submits the Iowa Supreme Court should transfer this appeal to the Iowa Court of Appeals, as it presents the application of existing legal principles and issues that are appropriate for summary disposition. Iowa R. App. P. 6.1101(3).

NATURE OF THE CASE

Plaintiff Jessenia Burton ("Jessenia") claims a motor vehicle accident caused injuries over and above those recoverable from the tortfeasors, and seeks additional compensation from Defendant West Bend Mutual Insurance Company ("West Bend"). *See generally* D0001, Pet. (Oct. 13, 2021). Though there no imaging supported a brain injury, Plaintiffs retained an expert to opine on Jessenia's mental condition. *See generally* D0023, Plf. Designation of Expert Witnesses (Feb. 20, 2023); *see* Attachment B to D0047, Dr. Tranel Report (Aug. 25, 2023) ("Brain MRI on 11/11/19 was negative."). Though Iowa's Rules of Civil Procedure require parties to (1) produce the materials in support of their claims; (2) produce the facts and data upon which their experts rely; and (3) timely object to discovery requests on the basis of privilege, Plaintiffs failed to produce or assert privilege relative to the bases of their expert's opinions until just 53 days before trial. *See generally* D0045, M. Compel (Aug. 11, 2023).

Plaintiffs indicated their retained neuropsychologist would produce the bases of his opinions only to a licensed psychologist—not to counsel, any of the parties, or the court. *See id.* Nevertheless, Plaintiffs did produce some psychological test materials and data. *See* D0056, Order at 5 (Sep. 14, 2023)

(Dr. Tranel "has [already] a) revealed the percentile of Jessenia's performance on various tests administered to her and b) produced certain testing materials.").

West Bend moved to compel production of the withheld materials and, in the alternative, to strike Plaintiffs' expert. *Id.*; *see generally* D0047, M. Strike (Aug. 25, 2023). The District Court granted the Motion to Compel, but denied the Motion to Strike as moot without prejudice. *See* D0056 at 7. Plaintiffs moved for the District Court to reconsider and amend its order. *See generally* D0059, M. Reconsider (Oct. 5, 2023). The District Court denied Plaintiffs' Motion. *See* D0065, Order (Dec. 9, 2023).

Plaintiffs subsequently moved for a protective order, which would allow disclosure of the withheld materials to the parties, their experts, and the district court—but just not "the jury." *See generally* Plaintiffs' Proposed Protective Order (Dec. 22, 2023).[1] Plaintiffs' Motion for Protective Order was granted, though the District Court included "empaneled jurors" as persons

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[1] Plaintiffs filed a Proposed Protective Order contemporaneously with their Motion for Protective Order. *See* D0066. Similarly, West Bend filed a Proposed Protective Order contemporaneously with its Response to Plaintiffs' Motion. *See* D0068. To the extent this Court is unable to access to the Proposed Orders, West Bend is happy to provide them for this Court's review.

qualified to view the materials. *See* D0069, Protective Order (Jan. 12, 2024). Plaintiffs applied for interlocutory review relative to the District Court's ruling on West Bend's Motion to Compel, and their application was granted. The District Court's Protective Order was not appealed.

Plaintiffs have attempted to improperly use their retained expert as both a sword and a shield—soliciting from him the only evidence in support of Jessenia's claims for damages, then refusing to disclose the bases therefor at the eleventh hour, and on the auspice of a statute they misapply. This conduct is antithetical to Iowa's Rules of Civil Procedure and the sound, long-recognized policies upon which they are founded. The District Court's Order granting West Bend's Motion to Compel should be affirmed.

STATEMENT OF THE FACTS

On April 30, 2017, Plaintiff Jessenia Burton ("Jessenia") was involved in a motor vehicle accident. *See* D0001 at ¶ 4. On October 13, 2021, Plaintiffs filed suit in the underlying case, asserting one (1) Underinsured Motorist and Medical Payment Claim against Defendant West Bend Mutual Insurance Company ("West Bend"). *Id.* at ¶¶ 20-22. Jessenia's initial claim was only that she suffered headaches, Post Traumatic Stress Disorder, and anxiety as a result of the accident. *See* Attachment A to D0047, Plf. Answer Interrogatory No. 16 at 3 (Aug. 25, 2023). During her August 22, 2022 deposition, she testified her symptoms had resolved. *See* D0045 at ¶¶ 3-4.

Jessenia presented to her retained expert, Daniel Tranel, PhD, of the University of Iowa College of Medicine's Department of Neurology and Neuropsychology Clinic for a neuropsychological evaluation. *See generally* Attachment B to D0047. On February 20, 2023, Plaintiffs designated Dr. Tranel as a non-treating, retained expert witness. *See generally* D0023. On March 22, 2023, Plaintiffs served Dr. Tranel's first expert report, authored October 23, 2022. *See generally* D0027, Plf. Notice Serving Expert Disclosures (Mar. 22, 2023); *see generally* Attachment B to D0047, Dr. Tranel Report (Aug. 25, 2023). Therein, Dr. Tranel opined Jessenia "has mild deficits" in

certain aspects of her cognitive functioning as a result of the accident. *See id*. at 10. This conclusion was purportedly based on the tests performed during the neuropsychological evaluation. *Id.* Neither Plaintiffs nor Dr. Tranel asserted any statutory privilege for the materials on which Dr. Tranel purported to rely. *See id.*

On March 29, 2023, Plaintiffs produced a *second* expert report authored by Dr. Tranel. *See generally* D0028, Plf. Notice Service of Expert Supp. Report (Mar. 29, 2023); *see* Attachment C to D0047, Dr. Tranel Supp. Report (Aug. 25, 2023). Again, neither Dr. Tranel nor Plaintiffs argued the tests were subject to any claimed statutory privilege, or that they were withholding the facts and data on which Dr. Tranel purported to rely. *See id.* On April 21, 2023, Defendants designated Irving L. Wolfe, DO, a neurologist, as an expert witness. *See* D0030, Def. Designation Expert Witnesses (April 21, 2023).

On July 15, 2023, Plaintiffs produced a *third* expert report authored by Dr. Tranel. *See* Attachment D to D0047, Dr. Tranel Second Supp. Report (Aug. 25, 2023). Therein, Dr. Tranel wrote:

> Dr. Wolfe also stated that my findings regarding [Jessenia's] cognitive functions were "subjective and cannot be objectively verified." This is incorrect: my findings were based on a comprehensive neuropsychological assessment that entailed about 4-5 hours of testing and more than 35 objective, standardized tests.

Id. at 2. As before, neither Plaintiffs nor Dr. Tranel asserted any statutory privilege as to the facts and data on which Dr. Tranel purported to rely. *See id.* On July 20 and 24, 2023, in response to Dr. Tranel's continued reliance on the "35 objective, standardized tests," and in an effort to obtain materials to sufficiently depose Dr. Tranel, West Bend issued correspondence to Plaintiffs requesting they supplement their written discovery (though Plaintiffs had an independent obligation to do so). *See* Exhibit B to D0045, Correspondence at 15-20 (Aug. 11, 2023).

On July 27, 2023—for the first time, just 53 days before trial was set to begin—Plaintiffs objected to producing the facts and data upon which Dr. Tranel purported to rely on the basis they were privileged under Iowa Code section 228.9. *See* Attachment B to D0045, at 8-9. Plaintiffs produced some of the materials. *See id.* at 2-5; *see* D0056 at 5 (Dr. Tranel "has [already] a) revealed the percentile of Jessenia's performance on various tests administered to her and b) produced certain testing materials.").

On August 11, 2023, West Bend filed a Motion to Compel production of Dr. Tranel's file materials. *See generally* D0045. On August 25, 2023, West Bend filed a Motion to Strike Dr. Tranel's testimony. *See generally* D0047. On

September 11, 2023 the Court held a 51-minute hearing on the pending motions.

On September 14, 2023, the Honorable Judge Hanson granted West Bend's Motion to Compel, finding the test materials were discoverable and indicated the Court would consider a joint motion for protective order. *See* D0056 at 6-7. The District Court denied the Motion to Strike without prejudice, indicating the issue would likely be moot upon production of the withheld materials. *See id.* The District Court also invited the parties to move for a protective order relative to the same. *See id.* at 6.

On September 28, 2023, Plaintiffs filed a Motion to Reconsider and Amend. *See generally* D0059. On December 9, 2023, the District Court denied the Motion. *See* D0065. On January 12, 2024, at Plaintiffs' request, the District Court issued a Protective Order relative to the withheld materials. *See* D0069.

ARGUMENT

I. Standard of Review

This Court reviews a district court's ruling on discovery motions for abuse of discretion. *Keefe v. Bernard*, 774 N.W.2d 663, 667 (Iowa 2009) ("Our review of a ruling by the district court on a motion to compel discovery is for abuse of discretion."); *Mengwasser v. Comito*, 970 N.W.2d 875, 881 (Iowa 2022) ("We review whether a district court properly admitted expert testimony for abuse of discretion.").

Here, the District Court did not abuse its discretion when it granted West Bend's Motion to Compel because the Iowa Rules of Civil Procedure require production of expert materials; Iowa's statutory scheme does not stand in the way of disclosure; and Plaintiffs' conduct forecloses their requested relief.

II. The Iowa Rules of Civil Procedure require production of expert materials.

It is axiomatic that parties in civil litigation must exchange the materials in support of their claims and defenses in advance of trial to avoid prejudice and unfair surprise. *Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d 378, 386 (Iowa 2012) ("A trial should be a search for the truth, and our rules of discovery are an avenue to achieving that goal. The discovery process seeks to

make a trial into '"a fair contest with the basic issues and facts disclosed to the fullest practicable extent."'" (internal citations omitted)). "[T]he general rule that the public has a right to every man's evidence." *Wells Dairy, Inc. v. Am. Indus. Refrigeration, Inc.*, 690 N.W.2d at 49 (internal quotation marks and citations omitted). Thus, "'[a]n asserted privilege is narrowly construed because it is an exception to our rules governing discovery.'" *Id.*

To that end, Iowa's Rules of Civil Procedure require disclosure of expert materials. *See* Iowa R. Civ. P. 1.500(1)(b) (initial disclosure obligation); Iowa R. Civ. P. 1.500(2)(b) (expert testimony disclosure obligation); Iowa R. Civ. P. 1.508(1)(b) (obligation to completely respond to expert discovery requests). Plaintiffs were required to produce the compelled materials because (A) Plaintiffs have placed Jessenia's mental/cognitive status at issue; (B) Plaintiffs' expert relies on the compelled materials; and (C) the assertion of privilege is the withholding party's burden.

A. Plaintiffs placed Jessenia's mental condition in issue.

Iowa's Rules of Civil Procedure require a plaintiff claiming personal injury to produce materials in support of that claim, or the means of obtaining the same, "without awaiting a discovery request." *See* Iowa R. Civ. P.

1.500(1)(b). Plaintiffs have an ongoing duty to supplement these disclosures. *See* Iowa R. Civ. P. 1.503(4).

Jessenia now claims she suffers from some "cognitive deficit." *C.f.* Attachment B to D0047 at 10 (opining Jessenia "has mild deficits") *with* D0045 at ¶¶ 3-4 (citing Jessenia's earlier testimony that her symptoms had "resolved"). The only support for this assertion is Dr. Tranel's opinion, which is in turn supported only by the results of the neuropsychological evaluation he performed. Indeed, before her neuropsychological evaluation, Jessenia testified her symptoms had "resolved." *See* D0045 at ¶¶ 3-4. The District Court noted:

> [I]t is Plaintiffs who are personally responsible for the importance of Jessenia's mental health information in this matter. They have made her mental condition an element of their claim(s) in this case. Iowa Code section 228.6(4)(a) expressly provides that mental health information may be disclosed in a civil proceeding in which an individual offers that individual's mental or emotional condition as an element of a claim.

D0056 at 5. When plaintiffs put their mental condition in issue, the rules compel disclosure. *See* Iowa R. Civ. P. 1.500(1)(b). The District Court properly compelled production of the only materials in support of Jessenia's claimed mental condition.

B. Plaintiffs' retained expert relies on the withheld materials.

Retained experts must provide written reports containing their opinions, the bases and reasons therefore, the facts or data considered in reaching their opinions, and any exhibits summarizing or supporting the same. *See* Iowa R. Civ. P. 1.500(2)(b). Those reports must be produced "no later than 90 days" before trial. Iowa R. Civ. P. 1.500(2)(d)(1). Parties have and ongoing duty to supplement their expert disclosures. *See* Iowa R. Civ. P. 1.508(3). In addition, though parties must independently produce and supplement the facts and data supporting their experts' opinions, other parties may obtain "all tangible reports, physical models, compilations of data, and other material prepared by an expert or for an expert in anticipation of the expert's trial and deposition testimony." Iowa R. Civ. P. 1.508(1)(b).

Plaintiffs produced Dr. Tranel's first report on March 29, 2023. *See generally* D0027. West Bend specifically requested the materials in support of Plaintiffs' expert opinions in its written discovery requests to Plaintiffs. *See* Exhibit B to D0045 at 15-20. Though Plaintiffs were aware of the existence of reports, compilations of data, and other material prepared by Dr. Tranel expressly for his favorable opinion in this case as early as October 27, 2022 (the date of Dr. Tranel's first report), Plaintiffs did not supplement their

written discovery responses until West Bend issued correspondence requesting they do so. *See* Exhibit B to D0045 at 15-20. Moreover, Plaintiffs did not assert any privilege relative to the only facts and data in support of Dr. Tranel's opinion until then. *Id.* at 8-9.

C. The assertion of any privilege is the withholding party's burden.

Iowa courts liberally construe discovery rules. *See Mediacom Iowa, L.L.C. v. Inc. City of Spencer*, 682 N.W.2d 62, 66 (Iowa 2004). As such, "a party seeking to defeat discovery must show that the information sought is privileged or irrelevant." *State ex rel. Miller v. Nat'l Dietary Rsch., Inc.*, 454 N.W.2d 820, 823 (Iowa 1990). The party seeking to withhold materials must provide a privilege log describing them "in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection." Iowa R. Civ. P. 1.503(5)(a). Where a party fails to properly assert a privilege, their opponent is entitled to rely on the completeness of their disclosures or discovery responses. *See* Iowa R. Civ. P. 1.503(7).

Here, the District Court properly prevented Plaintiffs from shifting their discovery burdens. It is not, as Plaintiffs appear to argue, West Bend's burden to forecast Plaintiffs' objection, particularly where Plaintiffs did not

assert the privilege until shortly before trial and never provided a privilege log. Plaintiffs had an independent obligation to produce and supplement its expert disclosures. *See* Iowa R. Civ. P. 1.508(3). Indeed, Plaintiffs never provided a privilege log, though they acknowledged their obligation to do so. *See* Attachment B to D0045, at 2 ("We will be filing a limited privilege log later today."). That no privilege log was ever provided makes it unclear exactly what materials have been withheld. This is violative of the plain mandate of the rule. When the Rules of Civil procedure are neglected, a district court does not abuse its discretion in compelling production.

III. No Iowa statute stands in the way of disclosure here.

Relying on a misinterpretation of statutory language and a misapplication of canons of statutory interpretation, Plaintiffs untimely contend the facts and data supporting Dr. Tranel's opinions are privileged pursuant to Iowa Code section 228.9 and Iowa Admin. Code r. 645-243.4(2)-(3). Contrary to Plaintiffs' position, Plaintiffs are not relieved of their discovery obligations on the auspice of Chapter 228. Indeed, the language of Iowa Code Chapter 228 requires production of the withheld materials here because (A) Iowa Code sections 228.6(4)(a) and 228.9 are harmonious; and (B) Iowa Code section 228.6(4)(a) permits disclosure here.

A. Iowa Code sections 228.6(4)(a) and 228.9 are harmonious.

To reach Plaintiffs' statutory construction, they must first demonstrate the irreconcilability of Iowa Code sections 228.6(4)(a) and 228.9. Plaintiffs are unable to do so. Plaintiffs implicitly argue there is a conflict between Iowa Code sections 228.6(4)(a) and 228.9. There is not. Rather, the sections address distinct circumstances. Section 228.9 relates to "psychological test material." *See* Iowa Code § 228.9. The Iowa Administrative Code defines "psychological test materials" as "the test questions, scoring keys, protocols, and manuals that do not include personally identifying information about the subject of the test." Iowa Admin. Code § 645-243.1. When interpreting statutes, Iowa courts "are to be guided by the maxim 'expressio unius est exclusio alterius,'—expression of one thing is the exclusion of another." *See Marcus v. Young*, 538 N.W.2d 285, 289 (Iowa 1995).

Here, the withheld materials do not qualify as any of the foregoing (test questions, scoring keys, protocols, or manuals). Dr. Tranel opined Jessenia suffered mild cognitive deficits as a result of the collision. *See* Attachment B to D0047 at 10. This opinion was purportedly based on the results of the tests performed during her neuropsychological evaluation. *See id.* The District Court ordered production of the facts and data supporting Dr. Tranel's

opinions. *See* D0056. Those are not among the materials to which Iowa Code section 228.9 expressly refers.

Indeed, Plaintiffs and Dr. Tranel appear to concede Jessenia's psychological test results do not fall within the statutory protection. *See id.* at 5. As the District Court noted in its Order granting the Motion to Compel, Dr. Tranel, though opposing production, "has [already] a) revealed the percentile of Jessenia's performance on various tests administered to her and b) produced certain testing materials." *Id.*

Moreover, Plaintiffs acknowledge there is a distinction between "psychological test materials" and *results* of the tests (upon which Dr. Tranel purports to rely), but argue, "[n]o compromise on disclosure of test data will obviate the concerns regarding test security, because the test data necessarily includes test materials." Appellant Am. Br. at 28 (July 26, 2024). If this were true, Iowa's legislature might have included "psychological test data" in the language of Iowa Code section 228.9. It did not.

Iowa courts are not "permitted to supply words in a statute that the legislature chose not to include . . . [because 't]o supply omissions transcends the judicial function.'" *Braaksma v. Bd. of Directors of Sibley-Ocheyedan Cmty. Sch. Dist.*, 981 N.W.2d 134, 140 (Iowa 2022) (citing *Iselin v. United States*, 270

U.S. 245, 251(1926)). The District Court properly declined to judicially rewrite the statute, as Plaintiffs request here. The withheld materials do not fall within the statutory protection.

In contrast, section 228.6(4)(a) addresses the very circumstance in which Plaintiffs have placed themselves here. Section 228.6(4)(a) requires disclosure "in a civil or administrative proceeding in which an individual eighteen years of age or older . . . offers the individual's mental or emotional condition as an element of a claim or a defense." Iowa Code § 228.6(4)(a). The District Court recognized this case falls within the *precise* circumstance outlined in section 228.6(4)(a) and properly applied the specific, controlling language of the section. *See* D0056 at 3.

To the extent there can be said to be a conflict between sections 228.6(4)(a) and 228.9 (there is not), an Iowa statute speaks to that and resolves the same. Iowa Code § 4.7 provides, "the special or local provision prevails as an exception to the general provision." Plaintiffs argue Iowa Code section 228.9 is more specific than section 228.6(4)(a). Appellant Am. Br. at 36-41. Not so. Section 228.9 addresses the limitations on disclosure of "psychological test material," across a wide range of circumstances. Iowa Code § 228.9. Section 228.6(4)(a) mirrors the requirements of Iowa's Rules

of Civil Procedure and applies only in instances, like here, where a party has placed their mental condition in issue. Even if there were some conflict (there is not), section 228.6(4)(a) "prevails as an exception to" section 228.9.

B. Iowa Code section 228.6(4)(a) permits disclosure here.

Iowa Code section 228.6(4)(a) requires disclosure of "mental health information" when a party "offers [their] mental or emotional condition as an element of a claim or a defense." Iowa Code § 228.6(4)(a). Here, Plaintiffs have offered Jessenia's purported cognitive deficit as an element their claims. They are required to produce the subject "mental health information."[2]

Plaintiffs argue an unsuccessful, proposed legislative amendment demonstrates the legislature intended to preclude disclosure of the compelled

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[2] Plaintiffs also argue Iowa Administrative Code rules 645-243.4(2)-(3) prohibit production of the compelled materials in this case. *See generally* Appellant Am. Br. The administrative rules provide that a licensee in the practice of psychology must not disclose either psychological test materials or data. *See* Iowa Admin. Code r. 645-243.4(2)-(3). These administrative rules directly contradict the clear statutory language of Iowa Code section 228.6(4)(a) which allows disclosure of both psychological test data and psychological test materials when the tested party places their own mental status or condition in question during litigation.

"'When a statute directly conflicts with a[n administrative] rule, the statute controls.'" *Calcaterra v. Iowa Bd. of Med.*, 965 N.W.2d 899, 907 (Iowa 2021) (quoting *Exceptional Persons, Inc. v. Iowa Dep't of Hum. Servs.*, 878 N.W.2d 247, 252 (Iowa 2016)). Iowa Code section 228.6(4)(a) controls here, requiring production of the withheld materials.

materials. *See* Appellant Am. Br. at 44-47 ("recent attempted legislative action, which sought to amend section 228.9 to conform precisely with the proposition West Bend promotes today. . . . [has] failed, indicating there is no legislative appetite" for requiring disclosure of the withheld information). Not so.

"[U]nsuccessful attempts at legislation are not the best of guides to legislative intent". *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 381–382, n.11 (1969). Yet, here, Plaintiffs rely on speculation of the meaning of proposed, though unadopted, legislation as their lodestar. Indeed, Plaintiffs provide no evidence to demonstrate the amendment failed due to the legislature's desire to prevent disclosure. Rather, Plaintiffs speculate. Appellant Am. Br. at 47.

However, the legislature just as likely could have declined to adopt the amendment for any number of other reasons, including that legislators found it redundant or unnecessary. *See Burlington Truck Lines v. Iowa Emp. Sec. Comm'n*, 32 N.W.2d 792, 797 (Iowa 1948) ("The fact that the original draft of a bill contains language that is omitted in the final draft does not of necessity mean that the intent of the omitted portion is not still embodied in the bill as passed. The language may have been omitted because deemed unnecessary to

a clear expression of the intent."). Plaintiffs' legislative intent argument is speculative and immaterial in the face of the plain statutory language requiring production. *See* Iowa Code § 228.6(4)(a).

In sum, the plain language of the only applicable statute supports the compelled production of the only facts and data in support of Dr. Tranel's opinions. *See* Iowa Code § 228.6(4)(a). Plaintiffs' efforts to expand the scope of section 228.9 would necessitate inappropriate judicial legislating. To the extent there is a conflict, it is section 228.6(4)(a) which prevails, not legislative inaction. Finally, Plaintiffs' ask to subordinate plain statutory text to an inapt regulation contravenes the great weight of Iowa authority. The district court did not abuse its discretion in applying the plain statutory language and compelling production of the only materials in support of Dr. Tranel's opinions.

Moreover, "[i]n enacting a statute, it is presumed that: . . . The entire statute is intended to be effective[; . . . a] just and reasonable result is intended[; . . . a] result feasible of execution is intended[; . . . and]public interest is favored over any private interest. Iowa Code § 4.4; *see* D0056, at 4 (applying Iowa Code § 4.4). Iowa courts "avoid construing statutory provisions in a manner that will lead to absurd results." *Brewer-Strong v. HNI*

Corp., 913 N.W.2d 235, 251 (Iowa 2018) (internal quotations omitted). As the District Court found, Plaintiffs' proposal would lead to an absurd outcome contrary to the mandate of Iowa Code section 4.4. *See* D0056 at 4.

First, on Plaintiffs' reading of the statute, a party may support a theory of damages with the opinion of an expert witness that is unreviewable even by the party's own counsel. The only individual who might review or challenge the bases for the expert's opinion is an expert of like kind and, even then, that expert may not share the bases of their review or challenge to the party that retained them. Under this scheme, neither party may meaningfully conduct a direct or cross examination of either expert witness. In addition, a jury would be asked to take the experts' opinions on faith alone. That is not how expert discovery works in Iowa (*see Whitley v. C.R. Pharmacy Serv., Inc.*, 816 N.W.2d at 386) or anywhere else (*see e.g.* Fed. R. Evid. 705 ("[T]he expert may be required to disclose those facts or data on cross-examination."*)*.

Second, Iowa courts act as the gatekeeper for the admission of expert testimony. *See Ranes v. Adams Lab'ys, Inc.*, 778 N.W.2d 677, 690–91 (Iowa 2010) (internal citations omitted). Though Iowa courts take a liberal view of the admissibility of expert testimony, they evaluate whether the testimony "'will assist the trier of fact' in understanding 'the evidence or to determine

a fact in issue,'" including whether there exists "a reliable body of 'scientific, technical, or other specialized knowledge.'" *Id.* at 685 (internal citations omitted). In sum, "(1) the expert must be qualified, and (2) the facts upon which the witness is relying must be stated in the record." *State v. Dvorsky*, 322 N.W.2d 62, 64 (Iowa 1982). "In order for the expert's opinion to be competent, sufficient data must be present upon which an expert judgment can be made". *Iowa Power & Light Co. v. Stortenbecker*, 334 N.W.2d 326, 330–31 (Iowa Ct. App. 1983). When the body of scientific knowledge is complex, the court may evaluate its reliability based on the following factors:

> (1) whether the theory or technique is scientific knowledge that can and has been tested, (2) whether the theory or technique has been subjected to peer review or publication, (3) the known or potential rate of error, or (4) whether it is generally accepted within the relevant scientific community.

Id. (quoting *Leaf v. Goodyear Tire & Rubber Co.*, 590 N.W.2d 525, 532 (Iowa 1999) and referencing *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579, 593–94 (1993)).

Plaintiffs tout Dr. Tranel's psychological tests as so complex and nuanced only a neuropsychologist is qualified to review and opine relative to their results. *See* Appellant Am. Br. at 24 ("[A] qualified neuropsychologist is the only person who can provide such evidence of impairment. Specialized

training is required to properly interpret neuropsychological tests and use them to make a diagnosis."). However, on Plaintiffs' reading of the statute, the Court is robbed of its ability to investigate the reliability of the body of scientific knowledge because neither the court nor the parties may review the scientific basis, facts, or data underlying the expert opinions. *But cf. Ranes*, 778 N.W.2d at 686 ("The target of the court′s scrutiny is on the principles and methodologies used to reach the expert′s conclusions, not the conclusions themselves."). Plaintiffs' proposal thus infers, on scant evidence, a legislative intent to sub-silentio usurp the court's role as a gatekeeper of reliable expert testimony, which is violative of Iowa's discovery rules and axioms.

Third, Plaintiffs' reading of the statute improperly shifts the burden of proof to defendants. A *plaintiff* has the burden to establish its claims. Plaintiffs' proposal obligates a defendant to retain a psychologist expert or else forgo its right to challenge—or even review—the facts and data in support of the opinions of the plaintiff's psychologist expert. That is in contravention to Iowa's Rules of Civil Procedure, Iowa Code section 4.4, and militates an absurd result.

IV. Plaintiffs' conduct belies their position and forecloses their requested relief.

Even if Iowa's Rules of Civil Procedure did not require production of expert materials (they do), and Iowa's statutory scheme stood in the way of disclosure (it does not), Plaintiffs' conduct, in (A) failing meet their discovery obligations; (B) voluntarily producing some materials; and (C) benefitting from a protective order which, even adopting only Plaintiffs' terms, would violate the very statute Plaintiffs contend bars disclosure, forecloses their requested relief. Put simply, even if the privilege applied as Plaintiffs argue (it does not), the posture of this case precludes Plaintiffs' ask.

A. Plaintiffs failed to meet their discovery obligations.

Plaintiffs suggest West Bend need merely retain a psychologist as an expert witness for Dr. Tranel to turn over the only materials supporting his opinions. Appellant Am. Br. at 31. This proposal is inapt both on the facts of this case.

Plaintiffs' suggestion fails to address that their first assertion of the statutory privilege came just 53 days before trial—long after the deadline to designate experts. *See* D0045, Mot. to Compel, Attachment B, at 8-9 (Aug. 11, 2023). Plaintiffs' untimely objection deprived West Bend of the ability to consider retaining an expert psychologist.

Plaintiffs' suggestion also fails to address that they presented Dr. Tranel as a *neuro*psychologist, produced materials indicating he is involved in the University of Iowa College of Medicine's Department of *Neurology* and *Neuro*psychology Clinic, and produced three reports opining relative to a *neuro*psychological evaluation. *See* D0023; *see* Attachments B-D to D0047. Accordingly, West Bend timely retained and designated a *neurologist*. *See* D0030. Iowa courts have long held medical practitioners need not be an expert in a particular field to competently serve as an expert witness. *Hutchison v. Am. Fam. Mut. Ins. Co.*, 514 N.W.2d 882, 887–88 (Iowa 1994) ("[W]e refuse to impose barriers to expert testimony other than the basic requirements of Iowa rule of evidence 702 and those described by the Supreme Court in *Daubert.* The criteria for qualifications under rule 702—knowledge, skill, experience, training, or education—are too broad to allow distinctions based on whether or not a proposed expert belongs to a particular profession or has a particular degree.").

Moreover, Even if West Bend retains its own expert licensed in psychology, Plaintiffs' reading Iowa Code section 228.9 would prohibit that expert from disclosing the requested materials to West Bend's counsel.

Plaintiffs have no answer for how any meaningful direct or cross examination of either expert could occur under their interpretation.

B. Plaintiffs' voluntary production of some of the withheld materials contravenes the position they advance here.

Statutory privileges may be waived by untimely objection or disclosure of some materials subject to the privilege. *See State v. Cole*, 295 N.W.2d 29, 35 (Iowa 1980) (finding the defendant waived the statutory patient/physician privilege when she asserted a plea of insanity, then untimely asserted the privilege, holding "[w]e do not believe the privilege may be used in this manner. A rule designed as a shield . . . would in effect become a sword in the hands of a litigant, frustrating a court's search for facts. It cannot be both."); *see Miller v. Cont'l Ins. Co.*, 392 N.W.2d 500, 504–05 (Iowa 1986) ("[W]e have held that voluntary disclosure of the content of a privileged communication constitutes waiver as to all other communications on the same subject.") (citing *State v. Cole*, 295 N.W.2d at 35). That valid policy reasons exist for the statutory privilege does not obviate a clear waiver by conduct. *See id.*

First, the burden to timely object to production on a statutory basis rested with Plaintiffs. *See* Iowa R. Civ. P. 1.503(5)(a). They failed to assert any privilege until just 53 days before trial was scheduled to begin. *See* Exhibit B to D0045 at 8-9. Moreover, they have never provided a privilege log identifying

the withheld materials. This untimely, procedurally improper objection constitutes waiver or estoppel of the claimed privilege.

Second, Plaintiffs and Dr. Tranel waived or are otherwise estopped from asserting any claimed statutory privilege by producing some of the very materials they contend are subject to the statute's protections. *See* D0056 at 5 (Dr. Tranel "has [already] a) revealed the percentile of Jessenia's performance on various tests administered to her and b) produced certain testing materials."). Plaintiffs have not offered any principled distinction between the withheld and produced materials. The District Court properly noted this selective disclosure in granting West Bend's Motion to Compel. *Id.*

C. Plaintiffs' affirmative, successful motion for protective order also contravenes the position they advance here.

"It is a 'well-settled principle' that a 'party who has, with knowledge of the facts, assumed a particular position in judicial proceedings is estopped to assume a position inconsistent therewith to the prejudice of the adverse party.'" *Kinseth v. Weil-McLain*, 913 N.W.2d 55, 74 (Iowa 2018) (quoting *Snouffer & Ford v. City of Tipton*, 150 Iowa 73, 84–85, 129 N.W. 345, 350 (1911)). In litigation, "[c]hoices have consequences." *Chicoine v. Wellmark, Inc.*, 2 N.W.3d 276, 286 (Iowa 2024). Those consequences may include a court declining to permit a litigant to "'switch horses midstream to revive a

previously abandoned (and flatly inconsistent)'" position. *Id.* at 286–87 (internal citation omitted).

Plaintiffs, in this Court, assert Iowa Code section 228.9 wholly precludes production of the materials supporting Dr. Tranel's expert opinions. Appellant Am. Br. at 28 (July 26, 2024) ("No compromise on disclosure of test data will obviate the concerns regarding test security, because the test data necessarily includes test materials.") Yet, in the District Court, Plaintiffs have taken—and obtained the benefit from—a different position. Plaintiffs are estopped from asserting the statutory privilege here, where they have acknowledged the privilege may be waived in the District Court.

Iowa's Rules of Civil Procedure provide district courts a means to prevent unbounded disclosure of discovery materials. *Berg v. Des Moines Gen. Hosp. Co.*, 456 N.W.2d 173, 177 (Iowa 1990) ("By limiting discovery, the interests of both parties may be accommodated: the requesting party is allowed some access to the materials and the burden on the resisting party is minimized."). District courts have broad discretion to fashion protective orders limiting the terms and conditions of discovery and submission of evidence during trial. *See* Iowa R. Civ. P. 1.504(1)(a)(7).

Here, the District Court invited the parties to move for a protective order. *See* D0056 at 6. On December 22, 2023, Plaintiffs so moved. D0066, Mot. for Protective Order (Dec. 22, 2023). Their proposed order contemplated production of the withheld materials to the parties, experts, and the Court:

> 3. Qualified Persons to whom the Confidential Information may be disclosed on these terms shall include:
>
> a. The Court
>
> b. Counsel of record to the Parties and Defendant's adjusters involved with the claim;
>
> c. Licensed psychologists retained by a party as an expert witness in this case.
>
> d. Non-psychologist expert witnesses retained by the Parties in this case.
>
> e. Court reporters hired for depositions in this case.

Plaintiffs' Proposed Protective Order, ¶ 3.[3]

Though the scope of enumerated "qualified individuals" was broad, the list conspicuously excluded jurors.

On January 2, 2024, West Bend filed a response, generally agreeing with the terms of Plaintiffs' proposed order, but arguing a jury should be permitted to review and consider the materials in support of Dr. Tranel's opinions:

[3] *See supra*, n. 1.

3. Qualified Persons to whom the Confidential Information may be disclosed on these terms shall include:

a. The Court;

b. Defendant's representatives;

c. Counsel of record to the Parties;

d. Expert witnesses retained and/or consulted by a Party in this case;

e. Court reporters hired for depositions in this case; and

f. Jurors in this case, subject to the specifications within paragraph 8.

West Bend's Proposed Protective Order, ¶ 3.[4]

West Bend's proposed order limited disclosure of the materials to a jury unless (a) the materials were deemed admissible; and (b) jurors attest they would abide by the terms of the protective order. *See* D0068, Def. Response to Mot. for Protective Order (Jan. 2, 2024). The Court granted Plaintiffs' Motion for Protective Order but incorporated West Bend's limited provision for disclosure of the materials to a jury. *See generally* D0069.

To the extent Plaintiffs now contend there is some danger of "test invalidity" or lack of "security," *see* Appellant Am. Br. at 26, they advanced a protective order to obviate the same. Indeed, they successfully moved for a protective order which, even under only Plaintiffs' proposal, allowed for wide

[4] *Id.*

disclosure and distribution of the very materials they now claim are wholly undiscoverable.

Plaintiffs' concerns, by their own concession, are properly mitigated through the protective order issued in this case. Plaintiffs, who obtained the benefit of that position—an un-appealed protective order issued in response to their own motion—are estopped from arguing otherwise here.

CONCLUSION

For the reasons stated herein, the Court should affirm the District Court's Order.

CERTIFICATE OF FILING AND SERVICE

I hereby certify that on August 23, 2024, I electronically filed the foregoing Brief of Appellee with the Clerk of the Supreme Court of Iowa by using the Iowa Electronic Document Management System (EDMS), which will send notice of electronic filing to the following:

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Per Iowa R. App. P. 6.107(1) and 6.701, this constitutes service for the purpose of the Iowa Court Rules.

August 23, 2024
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CERTIFICATE OF COMPLIANCE

The undersigned certifies that this Brief complies with the typeface, and type-style requirements of Iowa Rule of Appellate Procedure 6.1007. This Appellee's Brief was prepared in Microsoft Word using Equity Text A, size 14-point font.

August 23, 2024
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