IN THE SUPREME COURT OF IOWA

NO. 17-1825

SHELLI R. FREER, Individually and as Administrator of the ESTATE OF NICOLE J. SANSOM, and MICHAEL SANSOM, Individually,

Plaintiffs/Appellants/Cross-Appellees,

vs.

DAC, INC., d/b/a Prairie House,

Defendant/Appellee/Cross-Appellant

APPEAL FROM THE IOWA DISTRICT COURT
FOR JACKSON COUNTY
THE HONORABLE MARK J. SMITH PRESIDING

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

Patrick L. Woodward AT0008728
Ryan F. Gerdes AT0010925
McDONALD, WOODWARD & CARLSON, P.C.
3432 Jersey Ridge Road
Davenport, IA 52807
Phone No. (563) 355-6478
Fax No. (563) 355-1354
E-mail: pwoodward@mwilawyers.com
rgerdes@mwilawyers.com

ATTORNEYS FOR DEFENDANT/APPELLEE/
CROSS-APPELLANT

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ARGUMENT ON CROSS-APPEAL

I. THE DISTRICT COURT ERRED IN DENYING DEFENDANT'S MOTION TO EXCLUDE EXPERT TESTIMONY

A. Discussion

In their Brief, the Plaintiffs claim Biddlestone's experience as a nurse makes her qualified to render opinions on the propriety of Defendant's care and supervision of Nicole Sansom in its ICF facility. Plaintiffs cite to Biddlestone's degree and work experience in nursing, certification in developmental disabilities nursing, experience in caring for patients with developmental disabilities, and over thirty years of nursing experience. However, just as in the District Court, Plaintiffs have failed to recite any experience of Biddlestone in running an ICF facility, surveying or implementing rules or programs for an ICF facility or even developing an individual program plan for an individual ICF resident. The present case involves complex questions of programs, rules, regulations, and activities of an ICF facility and its residents, and the appropriateness of such programs and application to certain conduct. It is not a case involving nursing; it is a case, as pled by the Plaintiffs, involving the application of rules and the conduct of an ICF facility and whether such conduct constituted negligence. Biddlestone's experience and qualifications are limited to one small aspect,

that being the nursing level, as Biddlestone testified during her deposition that her only expert opinions were that of a nurse:

> "Q. And I am correct that your opinions in this case are solely that as a nurse?
>
> A. As an expert, yes . . . .
>
> Q. And I am talking about your expert opinions is really all I care about.
>
> A. Yes, I am here as a nurse."

(Appendix ("App.") 56). Whether from Ohio or Iowa, nurse Biddlestone is only qualified to testify as to the nursing aspects of this case; she is not qualified to comment on the standard of care for an ICF facility under the circumstances of this case.

The Texas Court of Appeals dealt with a very similar admissibility question in *Pack v. Crossroads, Inc.*, 53 S.W.3d 492, 505 (Tex. App. 2001). In *Pack*, the plaintiff claimed the decedent was subjected to neglect while a resident at the defendant-nursing home. *Id.* at 498. The plaintiff designated a nurse to testify on the deficiencies of the defendant-nursing home facility. *Id.* at 505. The lower court limited the scope of the testimony of the expert nurse on the basis that she was not qualified to give opinions on the standard of care of an entire nursing home facility. *Id.* The appellate court held that although the proffered expert could testify on the standard of care in nursing,

she could not testify as to the standard of care for nursing homes "in general." *Id.* at 507. In so holding, the court cited the very principle set forth by the Defendant in the present case:

> General experience in a specialized field does not qualify a witness as an expert. What is required is that the offering party establish that the expert has knowledge, skill, experience, training, or education regarding the specific issue before the court which would qualify the expert to give an opinion on that particular subject.

Id. at 506 (internal quotations omitted). The issue in *Pack* is synonymous with that in the present case. Biddlestone may be qualified to give opinions on nursing, but, like the proposed expert nurse in *Pack*, she is not qualified to give opinions on intermediate care facilities ***in general*.**

B. Conclusion

While qualified to testify regarding the standard of care in nursing, Biddlestone was not qualified to testify as to ICF-wide standards of care. For the foregoing reasons, the District Court's ruling denying Plaintiffs' Motion to Exclude Expert Testimony should be reversed.

II. THE DISTRICT COURT ERRED IN GRANTING PLAINTIFFS' MOTION IN LIMINE REGARDING THE FINDINGS OF THE IOWA DEPARTMENT OF INSPECTIONS AND APPEALS AND THE SCOPE OF APPLICATION OF SUCH RULING

A. Discussion

Plaintiffs correctly point out that the District Court's ruling prohibiting any evidence of the findings or investigation of the Iowa Department of Inspections and Appeals ("DIA") was based on balancing the evidence's probative value against its unfair prejudice. However, the District Court erred in its balancing and its application of the decision in *State v. Huston*, 825 N.W.2d 531, 539 (Iowa 2013).

The *Huston* case involved a criminal defendant charged with child endangerment. *Id.* at 535. The Iowa Supreme Court found that the district court erred in allowing a Department of Human Services (DHS) caseworker to testify that there was an administrative finding of child abuse against the defendant. *Id.* at 539. The court weighed the potential for unfair prejudice resulting from the evidence and overturned the district court's admission of the testimony "due to the risk the jury would substitute the DHS determination for its own finding of guilt or would give the determination undue weight." *Id.*

There are several important distinctions between *Huston* and the present case which make the holding in *Huston* inapplicable. First and foremost, it is important to note what the court in *Huston* ***did not*** say. The court did not ban any and all mention of the DHS investigation or the role of

DHS in general, as the District Court did in the present case with regard to the DIA. The court even noted:

> We recognize that a DHS caseworker may need to provide some context when she testifies in a child endangerment case as to her personal observations of the victim or home environment and when she recounts the statements made by the defendant during interviews. But, we have also cautioned the line of inadmissibility may be crossed when an investigator's testimony goes beyond the point of merely explaining why certain responsive actions were taken.

Id. at 537 (internal quotations omitted). Thus, the court in *Huston* explicitly recognized that some context is allowed where an administrative investigation follows the subject incident; it is only when such evidence goes beyond explanation when it is inadmissible. In the instant case, the Defendant should have been permitted to introduce general evidence about the DIA and its investigation, so as to provide some context for the Defendant's actions or inactions. The District Court erred in misapplying *Huston* to preclude any mention of the DIA or its role in investigating incidents like the one at issue, and, should this case be remanded, its ruling on the issue should be reversed.

Another important distinction from the present case is that the administrative finding in the *Huston* case was for child abuse and the subject criminal proceeding related to child endangerment; in other words, the administrative finding and the issue to be litigated in the case were identical

or nearly identical. Here, the DIA report simply provided that there were no regulatory violations by DAC; the issue to be litigated at trial, as defined by the Plaintiffs' theories of the case, was whether DAC was negligent. While, theoretically, the two issues may be related, there is no danger that the jury could simply adopt the DIA findings, as was the concern in *Huston*.

Second, as recognized by the court in *Huston,* counsel for the Plaintiffs would have been free to cross-examine DAC's witnesses as to the differing standards of proof in a DIA investigation versus a civil lawsuit, and then argue the same to the jury. *Id.* at 539. This would reduce the concern that the jury would simply adopt the DIA's findings as its own.

Further, if the evidence had been admitted, Plaintiffs could have requested that the District Court give a limiting instruction, instructing that the DIA findings are not conclusive at trial and explaining the differing burdens of proof. The court in *Huston* even cited a few examples of cases where the court found a limiting instruction was sufficient to mitigate the effect of admitting evidence of an administrative finding. *Id.* (citing *United States v. W.R. Grace,* 455 F.Supp.2d 1203, 1207 (D. Mont. 2006) (allowing evidence of EPA environmental risk assessment because the jury is capable of "[d]ifferentiating between the different standards" with the help of a limiting jury instruction); *Commonwealth v. Hernandez,* 420 Pa. Super. 1,

615 A.2d 1337, 1341 (1992) (affirming conviction for sexual abuse of minor when trial court gave cautionary instruction "that only the jury was the factfinder . . . and [that] it 'must not and may not accept any standard adopted by DHS'").

The risk that the jury in the present case would substitute the DIA findings for its own was substantially less than the risk found in *Huston*. The District Court therefore erred in ruling that the potential for unfair prejudice outweighed the probative value of the DIA report.

Plaintiffs go on to argue that admitting evidence of the DIA report would amount to the admission of expert testimony without proper disclosure under Iowa Code section 668.11, which sets forth the disclosure requirements in professional malpractice cases. However, section 668.11 only applies where the party intends to call an expert witness to testify. Where a document contains statements that are independently admissible, the disclosure rule does not apply. Further, even if section 668.11 applied, the DIA report and its findings do not contain opinion testimony that would require disclosure under the rule. The report does not set forth a standard of care, an opinion on causation, or some other topic on which an expert witness may testify. The DIA report merely reflects the fact that there were

no violations of state regulations found following the investigation of the death of Nicole Sansom.

B. Conclusion

For the foregoing reasons, the District Court's ruling on this issue should be reversed.

CONCLUSION

For the reasons stated above, if this case is remanded, DAC asks that the District Court's July 6, 2017 ruling be reversed with respect to the admissibility of evidence of the investigation and report of the Iowa Department of Inspections of Appeals, and the case remanded for trial, and that costs of this action and appeal be assessed against Appellants/Cross-Appellees.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION TYPEFACE REQUIREMENTS AND TYPE STYLE REQUIREMENT

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/s/ Ryan F. Gerdes — April 26, 2018
Ryan F. Gerdes — Date

CERTIFICATE OF SERVICE AND FILING

I certify that on the 26th day of April, 2018, I, the undersigned, did file electronically this Appellee/Cross-Appellant's Reply Brief with the Clerk of the Iowa Supreme Court using the Electronic Document Management System.

I certify that on the 26th day of April, 2018, I, the undersigned, did serve this Appellee/Cross-Appellant's Reply Brief on the attorney for the Appellants via electronic service of the Electronic Document Management System. Upon information and belief, the attorney for the Appellants is a registered filer pursuant to Iowa R. Civ. P. 16.201.

DAC, INC., d/b/a Prairie House,
Defendant/Appellee/Cross-Appellant

By: */s/ Patrick L. Woodward*
Patrick L. Woodward (AT0008728)

/s/ Ryan F. Gerdes
Ryan F. Gerdes (AT0010925)

McDonald, Woodward & Carlson, P.C.
3432 Jersey Ridge Road
Davenport, IA 52807
Telephone: (563) 355-6478
Facsimile: (563) 355-1354
pwoodward@mwilawyers.com
rgerdes@mwilawyers.com

ATTORNEYS FOR DEFENDANT/
APPELLEE/ CROSS-APPELLANT