IN THE IOWA SUPREME COURT
No. 16-1364

KELLY BREWER-STRONG,

Petitioner-Appellant,

v.

HNI CORPORATION,

Respondent-Appellee.

Appeal from the Iowa District Court for Muscatine County
The Honorable John Telleen

Brief of Amici Curiae of the Iowa Association of Business and Industry, the Iowa Insurance Institute, the Iowa Defense Counsel Association, and the Iowa Self-Insurers Association

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Identity and Interest of Amici Curiae

The Iowa Association of Business and Industry is the largest business network in the State of Iowa, representing over 1,400 business members that employ over 300,000 Iowans.

The Iowa Insurance Institute is an association of Iowa's property and casualty companies who, collectively, insure 2 million Iowans and employ 8,000 more. It is committed to promoting a cost-effective legislative and regulatory environment conducive to the ability of property casualty insurers to write reasonably priced coverage.

The Iowa Defense Counsel Association is a group of more than 330 lawyers and insurance-claims professionals who are actively engaged in the practice of law or in work relating to the handling of claims and the defense of legal actions.

The Iowa Self-Insurers Association is a group of self-insured employers concerned about workers' compensation law in Iowa

Together, these four associations (we'll call ourselves the Employer Amici) represent the stakeholders on the bottom side of the "v" in workers' compensation cases: employers, insurers, and

defense attorneys. And together they submit this amicus brief in response to the Iowa Association for Justice's request that this Court overrule its unanimous decision in *Bell Brothers Heating & Air Conditioning v. Gwinn*, 779 N.W.2d 193 (Iowa 2010).

In *Bell Brothers*, this Court held that to receive reimbursement for unauthorized medical care, a claimant must prove that this self-selected care was "reasonable and beneficial," meaning that it provided "a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." *Id.* at 206. That test isn't just some procedural rule that this Court created to fill in the gaps of a vague statute; it is dictated by the terms of Iowa Code section 85.27(4), which states that the employer "has the right to choose the care" of an employee who is injured on the job.

That right to choose—and thus the Court's *Bell Brothers* test—is a fundamental part of Iowa's workers' compensation scheme. It effects rehabilitation; it effects costs; and it is relied upon by insurance companies when setting the premiums for Iowa

workers' compensation insurance. The Employer Amici urge the Court to reaffirm this important precedent.

Argument:

Bell Brother's "more favorable medical outcome" test is consistent with (indeed, dictated by) the statutory text and should be reaffirmed under basic principles of stare decisis

The workers' compensation laws establishes a no-fault system that is "designed to provide compensation benefits and medical services promptly, without protracted and expensive litigation." *Baker v. Bridgestone/Firestone*, 872 N.W.2d 672, 677 (Iowa 2015). Essentially, it is a series of bargains in which (like all bargains) each side gives and gets.

As this Court has recognized, section 85.27(4) is one of the "bread-and-butter" parts of that bargain. *Ramirez-Trujillo v. Quality Egg, L.L.C.*, 878 N.W.2d 759, 769 (Iowa 2016). It requires employers to "furnish reasonable services and supplies to treat an injured employee"—regardless of whether the employer is at fault—and, in exchange, it gives the employer "the right to choose the care." Iowa Code § 85.27(4). In *Bell Brothers*, this Court implemented that bargain by holding that employees can only be reimbursed for self-selected (i.e., non-authorized) medical care, if

they prove the care was "reasonable and beneficial," such that if it "provides a more favorable medical outcome than would likely have been achieved by the care authorized by the employer." 779 N.W.2d at 206.

IAJ doesn't like the last part of that test. Its members think that employees should be given a greater choice in selecting their care, so they are asking the Court to delete the "more favorable medical outcome" element. An employer should be forced to pay for unauthorized care, IAJ argues, if the employee can prove that the care was reasonable and that it improved the employee's condition in some way. IAJ Br. at 16.

The Court should reject IAJ's invitation to alter the test for reimbursement of unauthorized benefits. *Bell Brothers* got it right, so there is no need for modification. But this isn't just about whether that test is right or wrong; it's about whether the Court should take the extraordinary step of overruling precedent. That is a big ask under any set of circumstances. "From the very beginnings," this Court has "guarded the venerable doctrine of stare decisis and required the *highest possible showing* that a

precedent should be overruled before taking such a step." *McElroy v. State*, 703 N.W.2d 385, 394 (Iowa 2005) (quoting *Kiesau v. Bantz*, 686 N.W.2d 164, 180 n. 1 (Iowa 2004) (Cady, J., dissenting) (emphasis added)). Unless the precedent is "clearly erroneous," this Court will let it lie. *Id.* At 394-95 (collecting cases).

But that is an even bigger ask in this case, because the issue is not squarely presented. The employee, Kelly Brewer-Strong, is not asking for reimbursement of *unauthorized medical* benefits; she's asking for *healing-period* benefits. It's true that the issues are somewhat intertwined, since the Commissioner ruled that an employee cannot receive healing-period benefits as a result of an unauthorized surgery that is not reimbursable under *Bell Brothers*. But the application of the specific elements of the *Bell Brothers* test has never been an issue in this case; the parties have simply disputed whether (and how) these two things—healing-period benefits and unauthorized care—are linked together. That's a fairly tangential connection—especially where it is being used by an amicus for purposes of asking this Court to overrule a decision that has formed the basis for workers' compensation

underwriting in this State for seven years. Indeed, it would be unprecedented for this Court to overrule a prior statutory interpretation under these circumstances.[1]

But there's no need for the Court to think twice about it, because *Bell Brothers* was spot on. In fact, the relevant statutory terms leave no room for IAJ's interpretation, so this is not a case in which we even need to contemplate whether the precedent is "clearly erroneous" such that stare decisis gives way.

The "bargain" in section 85.27(4) is that "the employer is obliged to furnish" (meaning, pay for) "reasonable" medical care to treat the employee's injury, even if the employer is not at fault, but the employer "has the *right* to choose the care." Iowa Code § 85.27(4). The legislature's use of the word "right" is significant. It recognizes that, for any given injury, there is often more than one reasonable course of treatment. And among those reasonable courses, it gives the *employer*, not the employee, the ability to

[1] The "doctrine of stare decisis is most compelling" and thus the strongest when dealing with statutory interpretation, because the legislature has the ability to change the law if it believes that the Court got it wrong. *Hilton v. S.C. Pub. Railways Comm'n*, 502 U.S. 197, 205 (1991). The legislature, of course, has not acted here.

choose between them—at least if the employee wants the employer to cover the cost.

IAJ's test, on the other hand, would read the employer's "right to choose" right out of the statute. Under IAJ's proposal, the employer would have to pay for an *employee's* choice of medical care, *even if* the employer's choice is reasonable, *and even if* the employer's choice would lead to a better or equally advantageous outcome. As long as the unauthorized care is also reasonable (again, there may be multiple reasonable options, looking ex ante) and as long as the treatment made some positive difference, IAJ contends that the employer must pay for it.

According to IAJ, this alternative test is a proper "'balance of two desirable interests'": the employee's "interest in selecting a physician whom that worker can trust to provide medical care" and the employer's "interest in selecting a physician who will provide treatment that achieves the 'maximum standard of rehabilitation.'" IAJ Br. at 4 (quoting 8-94 *Larson's Workers' Compensation Law*, § 94.02(2)). Here is the problem with that formulation: It's not in the statute; it comes from Professor

Larson's decades old description of how workers' compensation laws *generally* treat medical expenses and choice of treatment.

We agree, of course, that *Larson's* is the "leading treatise on workers' compensation law,"[2] in that it—like no other source—exhaustively examines the topic. But workers' compensation is not a common law endeavor; it is, in Iowa and every other state, a statutory scheme. So while general principles from *Larson's* or some other treatise might provide helpful context, the words of the statute are what ultimately govern. And on that front, the Iowa legislature was very clear: The "right" of choosing employer-funded care is with the employer. The only limitation on that right, save for the exception for emergency services, is that the employer-selected care must be reasonable. *See* Iowa Code § 85.27(4).

If that is inconsistent with how Professor Larson would have balanced the competing interests, so be it. The Iowa Constitution places such policy decisions in the hands of the legislature, and the legislature has spoken quite plainly in section 85.27(4) about

[2] *Bell Bros.*, 779 N.W.2d at 203.

who is entitled to make the choice of care. *See Bell Bros.*, 779 N.W.2d at 202 (noting that "our legislature ultimately resolved the debate [outlined in *Larson's*] by giving the right to choose medical care to the employer"). In fact, no other state uses such straightforward language—"has the right to choose the care"—and *Larson's* categorizes Iowa, along with seven other states, as being the most employer-controlled when it comes to choosing employer medical services. *See* 10 Arthur Larson & Lex K. Larson, *Larson's Workers' Compensation Law*, Appendix B, Table 5 (2006). So IAJ's disagreement is not with the *Bell Brothers* test; it's with the legislature's policy decision. This is the wrong venue for that discussion.

Conclusion

The Court's unanimous decision in *Bell Brothers* correctly applied the terms of section 85.27. It should be reaffirmed for that reason alone.

But even so, IAJ has offered no statutory argument that justifies jettisoning the principles of stare decisis. Indeed, IAJ's test is inconsistent with section 85.27(4). It would force an

employer to pay for medical care that the *employee* chose, even if the employer (1) was already providing reasonable medical care and (2) the unauthorized care provided no greater benefit to the employee. That is a test that give the employee, not the employer, the right to choose, so the Court could not adopt it—even if it were reviewing the issue for the first time.

Employer Amici respectfully request that the Court reject IAJ's request to overturn *Bell Brothers*.

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December 8, 2016. /s/ Ryan Koopmans

Certificate of filing and service

I hereby certify that on December 8, 2016, I presented the foregoing document to the Clerk of the Court for the Iowa Supreme Court for filing and uploading into the Appellate ECF system, which will send notification to the following Appellate ECF system participants:

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