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FIELD OF DREAMS CASE PROVIDES OPPORTUNITY FOR THE IOWA SUPREME COURT TO SET THE STANDARD OF REVIEW FOR REZONING IN IOWA: PLAY BALL!

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Susan M. Hess

On December 9, 2016, the Iowa Supreme Court issued the opinion *Residential & Agricultural Advisory Committee, LLC (RAAC) v. Dyersville City Council*. In a 7-0 decision authored by Justice Zager, the Supreme Court, among other things, attempted to define the legal standard of review for rezoning in Iowa.[2] The case began in the District Court for Dubuque County in 2012 and involved several issues related to the rezoning of the property around the original site of the 1989 movie, *Field of Dreams*. The movie was filmed on a Dubuque County farm outside of Dyersville, Iowa. This iconic movie site is perhaps one of the most well-known tourist attractions in the State of Iowa, drawing an estimated 65,000 visitors each year from all over the country and the world.

IN THE FIRST INNING

The film is based on the 1982 novel by William P. (WP) Kinsella, entitled *"Shoeless Joe"*. The novel was described by *Sports Illustrated* as, "A moonlit novel about baseball, dreams, family, the land, and literature." The story features a farmer, Ray Kinsella, who hears a voice telling him,

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WHAT'S INSIDE

IDCA President's Letter

Richard Whitty
IDCA President

Dear Colleagues,

I write regarding two timely issues: judicial branch funding and tort reform.

Judicial Branch Funding: Years ago, House Speaker Tip O'Neill proudly shared a bit of advice that he had received from his father: "*All politics is local*." As officers of the court and IDCA members, we should pay heed to 'Ole Man O'Neill when it comes to the current political issue of judicial funding.

The judiciary, an equal branch of Iowa government, continues to fight for funding that will allow it to simply maintain its current level of service to Iowans. In the last fiscal year budget, the judiciary failed to receive over $5,000,000 that was necessary to maintain that current level of service. As a consequence, the court decided to establish hiring freezes for all vacancies in the judicial branch with very, very few exceptions; hold open judicial vacancies for an average of six months; reduce travel by 10 percent; institute a moratorium on the expansion of specialty courts and impose other budget-tightening measures.

If the judicial branch receives the same treatment this time around, potential consequences include:

- the elimination of specialty courts (family treatment courts, drug courts, mental health courts, etc.) whose diversion programs result in far fewer subsequent encounters with the criminal justice system and costly incarceration;
- Iowans will experience greater delays in civil litigation as priority will necessarily be given to criminal cases;
- maintenance of electronic filing system will be further delayed;
- Courthouses will either be closed or see a reduction of hours of operation and layoffs.

Indeed, we all recall the sacrifices endured in 2009 and 2010 (www.iowacourts.gov/About_the_Courts/Supreme_Court/Orders/)

Unfortunately, it appears the judicial branch will be treated the same way this time around. The State's Revenue Estimating Conference lowered its projection for FY17, the current fiscal year. The revised estimate meant that the FY17 state budget was no longer in compliance with the statutory 99 percent spending limitation. To remain in compliance, the fiscal year budget had to be reduced by approximately $118,000,000.00. The judiciary's current budget (through June 30, 2017) was deappropriated by $3 million dollars. Accordingly, State Court Administrator David K. Boyd sent a notice to all judicial branch personnel on January 27, advising that many current vacancies will remain vacant at least through June 30, 2017, and all judicial branch employees (other than judges and magistrates) will need to take unpaid leave on May 26 as all court offices including the clerk of court offices will be closed.

We now need to now focus on the FY 2018 budget pending before the legislature. In that regard, you will find two pages of information that Chief Justice Cady made available to us on February 3 at www.iowadefensecounsel.org/IDCAPdfs/Revised_FY18_Judicial_Budget_Request.pdf

All politics is local. Please, take time to reach out to your area legislator to discuss the critical importance of providing sufficient funding to the judicial branch of government. The failure to do so will undoubtedly result in a level of judicial branch services that neither we nor the clients we serve will find acceptable. You will find a list of your area legislators in both the House and Senate at www.legis.iowa.gov/legislators.

Time is of the essence, as the budgeting process is well underway.

Tort Reform: You have undoubtedly seen reports in the media that tort reform efforts are underway in Iowa. As those efforts continue to take shape, you will undoubtedly read about specific proposals. If one or more issues catches your attention, exercise your right to inform the leadership of the Iowa Defense Counsel Association of your thoughts. The contact information for the IDCA board members can be found on the IDCA website, www.iowadefensecounsel.org.

Our next IDCA Board of Directors meeting is March 3. The opinions you express will better inform IDCA leadership as to the direction our association should move on the various legislative proposals.

Thank you for your attendance at our events. Thank you for your membership. Thank you for your service. And thank you for your collegiality and camaraderie.

Best personal regards.

Richard Whitty

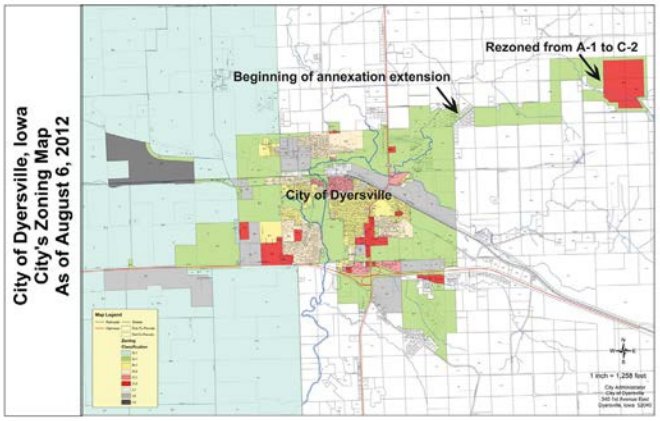
Continued from page 1

"If you build it, he will come." He interprets this as his calling to build a baseball diamond in his corn field to honor his father's hero, baseball legend "Shoeless" Joe Jackson. His neighbors are puzzled as to why he would plow up rich farm land to accomplish this endeavor. That is the book and movie version of the story. In real life, Chicago developer, Denise Stillman, through her company, Go The Distance Baseball, LLC, purchased the farm through real estate contract and proposed to develop 193 acres of farm land surrounding the movie site to build a 24-field baseball and softball training center for youth aged 8-14.[3] The City of Dyersville took steps to pave the way for Stillman's planned complex.

The *RAAC* case was followed closely by local and national media at various times during the litigation, but no one followed it more closely than the Petitioners. The Petitioners that challenged the rezoning are a group of 16 neighboring land-owners and farmers asserting their livelihood and future would be impacted each day by the planned development. The Petitioners, like Ray Kinsella's neighbors, were also puzzled by the reasoning for taking 193 acres of prime Dubuque County farm land out of production and converting it for use as commercial development.[4] The purpose of this article is to provide a thumb-nail, Play-By-Play analysis of the interesting background of this case and the potential impact of this ruling on future rezoning cases in Iowa.

NOW BATTING

***Introduction to RAAC v. Dyersville City Council*:** In late 2011, Stillman unveiled her proposed project. She frequently made appearances at Dyersville City Council meetings. At times, she would bring baseball legends and Hollywood stars to Dyersville to tout her project. The Council appeared star-struck. In the months that followed, the Dyersville City Council meetings were well-attended and regularly featured heated debates over the proposed development, pitting neighbor against neighbor. The process finally culminated in a written agreement between the City and Stillman to move forward with the project. At the June 18, 2012 City Council meeting, the City of Dyersville entered into a Memorandum of Understanding, which set forth certain obligations on the part of each party. The City agreed, among other things, to put forth its best effort to annex all of the property the Stillman's company had under contract into the city limits, and, further, to use its best efforts to rezone the property to commercial use, or other appropriate use, to allow the company to use it for its intended purpose. On July 2, 2012, the City Council annexed property (through a "voluntary" annexation process) stretching from then Dyersville City limits, out to the movie site, located in rural Dubuque County. The following map depicts the annexation and area that was rezoned following August 6, 2012.



At the same City Council meeting, the City immediately passed a Resolution to refer the rezoning of this property from A-1 to C-2 to the Dyersville Planning and Zoning Commission. The rezoning process is set forth in the Dyersville City Ordinances. The City proposed the rezoning not extend to the border of the property, and instead proposed a 200 foot "buffer zone" between the Ag- and Commercial-zoned designations. This 200 feet measurement is the same distance that is provided in the Dyersville Ordinance 165.39(5) for a right of protest allowed by neighboring land owners. The City maintained early on that the buffer zone was to alleviate any problems that neighbors would have with noise or farming practices. The City Administrator later testified at trial the buffer zone was used to prevent any protest by neighboring landowners, as was done in a similar rezoning when the City of Dyersville was involved in a development agreement for an ethanol plant. On July 8, 2012, Stillman hosted a community overview meeting regarding the development. Planning & Zoning members were in attendance but were not seated as a board during the overview, which was led by Stillman.

STEALING BASE

The Planning and Zoning Board met the following day to discuss rezoning the Field of Dreams property from Ag to Commercial. Many of the Petitioners were present to express concerns with the development and also concerns with the 200 foot buffer zone which, at least on its face, seemed to prevent a written protest by neighbors within 200 feet. Ultimately, the Zoning Board voted to send a positive report to rezone to the City Council. On July 16, 2012, the City Council met to consider a resolution to set a date of August 6, 2012 for the Council to hold a public hearing on the rezoning. On July 25, 2012, that notice was published in the local newspaper, pursuant to the ordinance on rezoning.

The public hearing was held on August 6, 2012. On the same day, Petitioners, through their attorney, submitted a detailed letter to the City Council outlining a number of claimed legal violations and

enclosing a signed Petition contesting the rezoning pursuant to Dyersville Ordinance 165. Petitioners asserted that even though the City attempted to use a 200 foot buffer zone to prevent any protest, Petitioner's had a sufficient number of signatures to invoke the provisions of an Ordinance that required a unanimous vote by the City Council. The then-City Attorney withheld this letter and signed protest from the City Council and claimed that it was "full of inaccuracies and fatally flawed". No one spoke at the public hearing in favor of the rezoning. One City Council member moved to table the vote pending review of the letter and protest. That motion died for lack of a second. The City Council then voted 4-1 in favor of the rezoning, also known as Dyersville Ordinance 770.

INSTANT REPLAY

Subsequently, Petitioners filed a Petition for Writ of Certiorari ("Writ One"). The matter was set for hearing on issuance of the Writ and to determine whether bond should be set and whether Petitioners would be allowed to conduct discovery. Stillman filed a Petition to Intervene in the action which was later withdrawn. Following that hearing, the District Court dismissed the Writ outright. Petitioners appealed this dismissal. While that matter was pending on appeal, Stillman applied for a building permit from the City to allow her to begin construction of the complex. At the City Council meeting addressing the permit request, Petitioners appeared and contested the issuance of the building permit based, in part, on an incorrect legal description that was used on all public notices leading up to the rezoning. The Petitioners uncovered an error in the legal description used by the city which mis-described an entire 40-acre parcel related to the 193 acre rezoning. The legal description rezoned property as the SW ¼ of the SE ¼ instead of the SE ¼ of the SE ¼ of Section 22. This error resulted in 40 acres of the Stillman property not being included in the rezoning and 40 acres of someone else's property being included.

The Petitioners urged the Council to table the issuance of the building permit to legally correct the erroneous legal description as it did not substantially comply with the rezoning ordinance. The City, in response, moved forward with issuance of the building permit. In further response to this issue, the City proposed Ordinance 777 at the next City Council meeting to "correct a scrivener's error" in the legal description. This was done as an agenda item and Petitioners asserted it did not follow the statutory rezoning process which requires published notice and opportunity to be heard at a public hearing.

Petitioners filed a second Writ of Certiorari concerning Ordinance 777, which was issued by the District Court in June, 2013 ("Writ Two"). The Iowa Court of Appeals reversed and remanded Writ One in November of that same year. *(Residential & Agric. Advisory Comm., L.L.C. v. Dyersville City Council,* 2013 WL5951191 (Iowa Ct. App. Nov. 6, 2013)).[5] Petitioners moved to consolidate the two Writs, which motion was granted and the matters were set for trial in February, 2015. Following a six day bench trial on Writs One and Two, the District Court sustained the Writs and upheld all actions of the City Council.[6] Petitioners appealed the decision and the Supreme Court retained jurisdiction.

BOTTOM OF THE SEVENTH

Standard of Review: The District Court's Ruling found that rezoning is legislative, not adjudicative, the Supreme Court agreed, but seemed to make an exception for a Rezoning involving a PUD:

Petitioners asserted, right off the bat, that *Sutton v. Dubuque City Council*, 729 N.W.2d 796 (Iowa 2006) was applicable to this matter. The Petitioners cited *Sutton* in their letter dated August 6, 2012 directed to the City Council asserting the council is required to follow quasi-judicial requirements when considering a rezoning of this nature. In *Sutton,* the City of Dubuque passed an ordinance that reclassified property from a Commercial Recreation District to a Planned Unit Development (PUD) district with a Residential District Designation, including a Conceptual Development Plan. On appeal, the Supreme Court ultimately ruled that Certiorari is the exclusive remedy for reviewing the legality of a decision made by city councils and boards of supervisors in zoning matters. The Supreme Court dismissed the appeal for failure to bring the Certiorari action timely. Although they did not necessarily need to go beyond their holding, the Supreme Court went to great lengths, in what amounts to *dicta*, to discuss the standard of review applicable in a rezoning matter:

> The Washington Supreme Court has applied the following principles in determining whether zoning activities are quasi-judicial in character: "Zoning decisions may be either administrative or legislative depending on the nature of the act. [W]hen a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change."

Sutton, 729 N.W.2d at 798 (quoting *Fleming v. Tacoma*, 502 P.2d 327, 331 (1972))

The Court went on to favorably cite *Fleming,* laying out factors that will render rezoning decisions quasi-judicial in character. Those factors include (1) rezoning ordinarily occurs in response to a citizen application followed by a statutorily mandated public hearing; (2)

as a result of such applications, readily identifiable proponents and opponents weigh in on the process; and (3) the decision is localized in its application affecting a particular group of citizens more acutely than the public at large. *Id.* All of the factors identified by the Washington court in *Fleming* come into play in the present conflict, a circumstance that leads us to the conclusion that the action of the city council being challenged in the present case was quasi-judicial in character. As such, a challenge to the legality of the action taken was subject to review by certiorari. *Id.* at 798. In the instant matter, The District Court did not discuss or distinguish, or mention, the *Sutton* case. Petitioners relied on *Sutton* for the proposition that rezoning actions are not legislative, but rather quasi-judicial actions, which require the City Council to follow more strict procedural requirements and adhere to court- like procedures. Respondent, City of Dyersville, advocated that the decision was legislative such that the standard of review was whether the decision was "fairly debatable" and, therefore, the Council's decision was valid if it has any real, substantial relation to the public health, comfort, safety, and welfare of the citizens.

Petitioners advanced the position and principles articulated in *Fleming*, and discussed in *Sutton*, which provided the notion that quasi-judicial proceedings must follow the basic standards of due process, including: Proper notice of the hearing; providing everyone with an interest in the proceeding an opportunity to be heard and to hear what others have to say; full disclosure, to everyone, of the facts being considered by the decision-making body (*i.e.*, no *ex-parte* contacts; an impartial decision-maker free from bias and conflicts of interest; and decisions made based on the facts of the case, not on political pressure or vocal opposition).

In advancing their position, Petitioners relied upon language from *Fleming* that provided:

> Generally, when a municipal legislative body enacts a comprehensive plan and zoning code it acts in a policy making capacity. But in amending a zoning code, or reclassifying land thereunder, the same body, in effect, makes an adjudication between the rights sought by the proponents and those claimed by the opponents of the zoning change. The parties whose interests are affected are readily identifiable. Although important questions of public policy may permeate a zoning amendment, the decision has a far greater impact on one group of citizens than on the public generally. Another feature of zoning amendment decisions, which distinguish them from other types of legislative action, is their localized applicability. Other municipal ordinances which affect particular groups or individuals more than the public at large apply throughout an entire geographic area within the municipal jurisdiction, whereas ordinances that amend zoning codes or reclassifying land thereunder apply only to the immediate area being rezoned. Finally, legislative hearings are generally discretionary with the body conducting them, whereas zoning hearings are required by statute, charter or ordinance. The fact that these hearings are required is itself recognition of the fact that the decision making process must be more sensitive to the rights of the individual citizen involved. *Fleming*, 502 P.2d at 299.

In its decision, the District Court did not discuss the concepts set forth in *Sutton* and, instead, adopted the argument advanced by the City. Relying on *Montgomery v. Bremer County Board of Supervisors*, 299 N.W.2d 687, 692 (Iowa 1980), the court stated:

> Generally, a quasi-judicial function is involved if the activity (1) involves proceedings in which notice and an opportunity to be heard are required, or (2) a determination of rights of parties is made which requires the exercise of discretion in finding facts and applying the law thereto. *Buechele v. Ray,* 219 N.W.2d 679, 681 (Iowa 1974). In the performance of an adjudicatory function, the parties whose rights are involved are entitled to the same fairness, impartiality, and independence of judgment as are expected in a court of law. *Martin Marietta Materials, Inc. v. Dallas County,* 675 N.W.2d 544, 554 (Iowa 2004) (citing *Jarrot v. Scriviner,* 225 F.Supp. 827, 833 (D.D.C. 1964). However, the "essential nature of the decision to rezone is legislative and the hearing before the [council] was of the comment-argument type. The [council] is not determining adjudicative facts to decide the legal rights, privileges or duties of a particular party based on that party's particular circumstances. *Montgomery,* 299 N.W.2d at 694."

UMPIRE'S RULING

On appeal, the Supreme Court agreed and held that the *Montgomery* case was more analogous to this case than *Sutton.* In *Montgomery,* the Board of Supervisors rezoned two parcels of land from Ag to Industrial after two rezoning petitions were filed. That case held that the zoning decision by the board was an exercise of its delegated police power and held that "the generally limited scope of review applicable to this case is to determine whether the decision by the Board to rezone is fairly debatable." ***Id***. If the reasonableness of a zoning ordinance is "fairly debatable," then the court will decline to substitute their judgment for that of the city council or board of supervisors. *Shriver v. City of Okoboji,* 567 N.W.2d 397, 401 (Iowa 1997)). The reasonableness of a zoning ordinance is "fairly debatable" if

> for any reason it is open to dispute or controversy on grounds that make sense or point to a logical deduction and where reasonable minds may differ; or where the evidence provides a basis for a fair difference of

> opinion as to its application to a particular property. *Id. see also Neuzil v. City of Iowa City*, 451 N.W.2d 159, 163-64 (Iowa 1990)

The Supreme Court retreated from the *Fleming* case, stating, "While we cited these factors with approval, we had the opportunity to review the entirety of the *Fleming* case and did not choose to adopt the Washington court's holding in that case that all public zoning hearings should be classified as adjudicatory." (Ruling at p. 25) They noted that the *Fleming* decision was later overruled following a legislative amendment in *Raynes v. City of Leavenworth,* holding that a decision amending a zoning ordinance was a legislative function.

WHERE'S THE STRIKE ZONE?

The Supreme Court distinguished the *Sutton* case on the basis that it dealt with a PUD rezoning. They went on to describe the difference between traditional rezoning and PUD zoning:

> Creating zoning districts and rezoning land are legislative actions, and ...trial courts are not permitted to sit as "super zoning boards" and overturn a board's legislative efforts.
>
> • • •
>
> The planned unit development concept varies from the traditional concept of zoning classifications. It permits a flexible approach to the regulation of land uses. Compliance must be measured against certain stated standards...
>
> ...Since the Board was called upon to review an interpretation and application of an ordinance...and the ordinance was not challenged per se, the Board's decision was "clearly quasi-judicial.

The Supreme Court held that the situation in the case at hand was more analogous to the one faced in *Montgomery* than in *Sutton*. The Court seemed to suggest, without expressly stating, that if the rezoning action involved a PUD, they would impose a quasi-judicial standard of review. So, once again, Petitioners are left wondering if there are different standards of review applicable for different types of rezoning actions in Iowa.

STOLEN BASE

Spot zoning: The District Court's Ruling found that this rezoning did not constitute spot zoning, the Supreme Court agreed.

The Petitioners asserted that the Council's action constituted illegal spot zoning. The Respondents argued that the spot zoning was valid given the unique nature of the property. The District Court provided little analysis regarding this issue, stating:

> There was a reasonable basis for making a distinction between the newly zoned land and the surrounding property. The property is extremely unique. It has included a baseball diamond for the past 25 years, and baseball has been played on that field rather consistently for the past 25 years. A portion of the property was apparently rezoned some years ago to allow for some sort of commercial activity consistent with the continuing the Field of Dreams business endeavors.

In this reference to "commercial activity", the District Court referred to an earlier legal battle that plagued the *Field of Dreams* movie site. The property owners at the time of the filming of the movie, the Ameskamp family, were embroiled in a legal battle with the neighboring property owner over the right to operate a souvenir stand and corn maze as a tourist attraction. As a result of that dispute, the Dubuque County Board of Supervisors authorized the Ameskamp's company, Left and Center Field of Dreams, to operate limited business type activity so long as that entity existed. The record at trial demonstrated that Left and Center ceased to exist in 2007. It was also noted that the proposed rezoning in this instance encompassed 193 acres of farm ground and the property and the movie site makes up approximately 40 acres of the total development.

The Supreme Court, in reviewing this case, acknowledged that "the rezoning appears to constitute spot zoning. The property surrounding the new commercial area is agricultural land. The rezoning created a commercial 'island' of property amidst land zoned as agricultural." The Court then went through the legal analysis of determining whether the spot zoning was valid under *Perkins v. Board of Supervisors*, 636 N.W.2d 58, 65 (Iowa 2001) Spot zoning occurs when an ordinance creates a small island of property with restrictions on its use that are different from those imposed on surrounding property. *Id.* Not all spot zoning is illegal. Under the *Perkins* test, when determining the validity of spot zoning, the court considers:

(1) Whether the new zoning is germane to an object within the police power; (2) whether there is a reasonable basis for making a distinction between the spot zoned land and the surrounding property; and (3) whether the rezoning is consistent with the comprehensive plan."

See also, *Little v. Winborn*, 519 N.W.2d 384, 388 (Iowa 1994). The Supreme Court determined that the spot zoning was not invalid. They found that the rezoning was made within the scope of the City Council's general police power; that the Council had a reasonable basis for its decision to rezone the land despite the surrounding property because of the unique site; that the field has been used in the community for baseball and softball games, that in addition to local and national tourism, part of the location's charm is simply that it is a baseball field surrounded by farmland; and, that the spot zoning is consistent with the overall comprehensive plan.

AND THE PITCH IS GOOD!

Petitioners disputed that the rezoning was consistent with the Dyersville City Comprehensive Plan, which did not contemplate commercial development stretching out as far as the Field of Dreams movie site. The District Court noted that as of 2003, the Field of Dreams property was not contained within any of the areas considered to be annexed in to the City within the next 20 years. The City did not amend the annexation plan, or the comprehensive plan, prior to the rezoning. The District Court noted that the closest and most difficult analysis in this case was whether the rezoning is consistent with the comprehensive plan.

The District Court found that the rezoning was passed in accordance with and in furtherance of the comprehensive plan, despite none of the council mem=aphazard zoning. *Wolf v. City of Ely*, 493 N.W.2d 846, 849 (Iowa 1992). The purpose of the comprehensive plan requirement is to ensure a board or council acts rationally in applying its delegated zoning authority. *Id*. The Supreme Court cited *Iowa Coal Min. Co v. Monroe County,* 494 N.W.2d 664, 669 (Iowa 1993) for the proposition that "compliance with the comprehensive plan requirement merely means that zoning authorities have given 'full consideration to the problem presented, including the needs of the public, changing conditions, and the similarity of other land in the same area.'" They agreed with the District Court, that the Respondents' reliance on references to tourism in the plan was sufficient to find that the rezoning was in accordance with the plan and that Petitioners failed to meet their burden of demonstrating the rezoning did not meet the requirements of the plan.

FAIR BALL

The Supreme Court determined that the Petitioners failed to trigger the provisions of Dyersville Ordinance 165.39(5) to Require a Unanimous Vote and found that the Use of a 200 Foot Buffer Zone was acceptable.

Petitioners asserted that they complied with the requirement of Dyersville City Ordinance 165.39(5) in filing a valid protest by the requisite neighboring landowners. There is a similar provision in the Iowa Code regarding a protest, but the Ordinance does not mirror that statute, and there are key differences that render the Ordinance more restrictive, and therefore controlling. The text of the Ordinance is as follows:

> Council Vote. If the [Zoning and Planning] Commission recommends against, or if a protest against such proposed amendment, supplement, change, modification or repeal **is presented in writing to the Clerk, duly signed by the owners of twenty percent (20%) or more** either of the area of the lots included in such proposed change, or of those immediately adjacent in the rear thereof extending the depth of one lot or not to exceed two hundred (200) feet therefrom, **or of those directly opposite thereto, extending the depth of one lot or not to exceed two hundred (200) feet from the street frontage of such opposite lots, such amendment, supplement, change, modifications, or repeal shall not become effective except by the favorable vote of all members of the Council.** (Emphasis added)

The text of Iowa Code Section 414.5 is as follows:

> The regulations, restrictions, and boundaries may, from time to time, be amended, supplemented, changed, modified, or repealed. Notwithstanding section 414.2, as part of an ordinance changing land from one zoning district to another zoning district or an ordinance approving a site development plan, a council may impose conditions on a property owner which are in addition to existing regulations if the additional conditions have been agreed to in writing by the property owner before the public hearing required under this section or any adjournment of the hearing. The conditions must be reasonable and imposed to satisfy public needs which are directly caused by the requested change. In case, however, of a written protest against a change or repeal which is filed with the city clerk and signed by the owners of twenty percent or more of the area of the lots included in the proposed change or repeal, or by the owners of twenty percent or more of the property which is located within two hundred feet of the exterior boundaries of the property for which the change or repeal is proposed, the change or repeal shall not become effective except by the favorable vote of at least three-fourths of all the members of the council. The protest, if filed, must be filed before or at the public hearing. The provisions of section 414.4 relative to public hearings and official notice apply equally to all changes or amendments.

Petitioners asserted they met the requirement of the ordinance by delivering a valid, signed protest to the City Clerk prior to the City Council Meeting and therefore the vote to rezone would need to be unanimous. The City Attorney did not deliver the letter and signed protest to the council. Petitioners argued that the use of the buffer zone and also the conduct of the City amounted to a violation of their due process and equal protection rights. The Supreme Court acknowledged that at first blush, the 200 foot buffer zone can appear to be unfair, as it limits the number of adjacent landowners who can object to the rezoning. However the court noted that it

does provide a benefit to adjacent landowners by addressing their express concerns with the rezoning.

The court also noted that a number of other courts have held that a council may avoid a supermajority vote requirement by creating a buffer zone between the property to be rezoned and the land of adjacent property owners. The Supreme Court applied Iowa Code section 414.5 finding that the vote passed by eighty percent which is a supermajority. They did not adopt the Petitioner's argument that Ordinance 165.39 applied, requiring a unanimous vote.

BASES LOADED, FULL COUNT

The District Court found that City substantially complied with the rezoning ordinance in correcting a "scrivener's error" in the legal description without the necessity of going through the statutory rezoning process.

Throughout the nation, there is very little case law on what constitutes a "scrivener's error". In this case the term came up in the context of an error in the legal description used on every public notice related to the rezoning of this matter. This was the subject of Writ Two filed by Petitioners relating to Ordinance 777. Petitioners asserted that *Gorman v. City Development Bd.*, 565 N.W.2d 607 (Iowa 1997) applies. The *Gorman* case involved a voluntary annexation of 120 acres in Linn County. The legal description was incorrect (one quarter section was intend to be described as "the N ½ of the SW ¼ but was inadvertently described as the "N ½ of the SE ¼"), resulting in 80 acres of the property not being listed and 40 acres of someone else's property being included in the proposed annexation. The notice and the incorrect legal description were published. The Linn County Board of Supervisors approved the annexation and corrected the error in the legal description, finding the annexation substantially complied with administrative rules. On review, the Iowa Supreme Court held that the application did not substantially comply with the statutory requirements for a voluntary annexation because the applicable statute requires a legal description of the property to be annexed.

Respondents asserted that *Heintz v. City of Fairfax,* 730 N.W.2d 210 (Iowa App. 20007)(Table) was more applicable to this matter. In *Heintz*, which involved an annexation moratorium agreement, no legal description was required for the process and therefore the court found that there was statutory compliance. In the instant matter, the District Court found that neither the Iowa statute, nor the Dyersville City zoning ordinance require notice of the legal description for rezoning. The Iowa Supreme Court agreed, holding that while Dyersville Ordinance 165.39(1) requires a "clear description" of the land to be rezoned, it does not require an actual legal description. The Court further found that "none of the members of the public were misled about the property the council voted to rezone" and therefore the city council substantially complied with the statutory requirements.

NINTH INNING, BASES LOADED, STRIKE OUT

The instant matter provided the Iowa Supreme Court with an opportunity to step up to the plate and state with certainty the standard of review on a rezoning matter in Iowa. On one hand, the rezoning of any real property in the State of Iowa requires a public hearing. A public hearing constitutes the presentation of evidence by proponents and opponents, much in the same manner that two teams play against each other on the baseball field. On the baseball field, each team knows the rules. While the Supreme Court articulated additional rules applicable to zoning matters, it did not define or clearly establish the standard of review in all zoning cases. In baseball, you know that you are out after three strikes and the inning is over after three outs. In Iowa zoning matters, we are a bit closer to defining the rules, but not with the same certainly as in baseball.

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[1] The Author was the plaintiff's attorney for this case and was also involved in the Sutton case discussed herein.

[2] Petition for Rehearing was denied on January 17, 2017.

[3] Denise was originally joined by her now ex-husband, Chicago Attorney, Mike Stillman.

[4] Trial Testimony confirmed that the property to be developed as Phase I of the development had a Corn Suitability Rating ("CSR") of 85. CSR is the measurement of the condition of the soil ranging from 5-100 with 100 being the highest and best soil. There are only twelve out of the ninety-nine counties in the entire state of Iowa that average in the 70's.

[5] On November 5, 2013, one day before the decision of the Court of Appeals, Dyersville voters, by a significant margin, ousted the long-serving Mayor Heavens and all city councilmen that voted in favor of the rezoning.

[6] It should be noted that as of the date of this article, no dirt has been moved and no construction has started at the Field of Dreams site and the planned development has not moved forward at the 193 acre parcel. To date, there has been no city infrastructure extended out to the property.

View from the "Inside"

by Michele Hoyne, Farm Bureau Property & Casualty Insurance Company, West Des Moines, Iowa

Why can't we just all get along? I was asked if I could put together some thoughts on improving relationships between outside counsel and insurance in-house personnel. This article is the result of that request. It contains my own thoughts, as well as contributions from others on the "inside."

From time to time, I hear seasoned attorneys lament that working for insurance companies is not like it used to be. I will not try to dispute that statement. However, keep in mind that seasoned adjusters can make many of the same observations. For example, "back in the day", it may have been the practice for an adjuster to visit each county in his territory once a week and handle all claims for the county on that day. In today's world, policy holders and claimants are not willing to wait a whole week for someone to look at their claim. The world has changed for all of us, and adaptation by all is necessary.

Most carriers now have Billing Guidelines of some sort. Make sure you have read and understand the different guidelines for each carrier you do work for. If you have questions, make sure you ask the company representative what is expected. It seems that in insurance litigation, as well as in life in general, so many of the issues boil down to lack of clear and timely communication. Easy to say, but sometimes communication is not as easy as it seems. No one likes to have to convey bad news, for example. However, trying to bury the bad news is never an effective strategy. Some of the recurrent comments that I put together include:

1. **I need information on a timely basis.** Know your carrier's reporting requirements. Assuming you do work for more than one carrier, the requirements will be different from carrier to carrier. If necessary, keep a chart or spreadsheet as a quick reminder of who wants what, when they want it, and in what format. When it comes time to request authority for a settlement or mediation, find out from your file adjuster what the requirements are on the company side for requesting authority. Oftentimes, the adjuster will be required to present the file to an internal meeting. It certainly is helpful for you to know that carrier's meeting schedule. If you don't know, ask! If your adjuster has a meeting every Wednesday and you contact the adjuster on Thursday requesting authority for a mediation on Friday, you have put the adjuster in a bind. No surprise is a good surprise when it comes to claims. Good communication would solve this problem most of the time.

2. **I don't want a request for policy limits on the eve of trial.** No adjuster likes to be asked to spend money on depositions, accident reconstruction experts, IME experts, FCE experts, and economic experts only to be told shortly before trial that counsel's recommendation is to pay policy limits. If this is the direction the case appears to be going, the information should be relayed sooner rather than later. To quote a colleague, "I want an accurate assessment of the good, the bad and the ugly as soon as practicable. I did not appreciate sudden pleas for policy limits on the eve of trial." Again, good communication would solve this problem most of the time.

3. **What has changed?** Assume that counsel has provided the carrier a comprehensive case summary and value range on a case. Several months pass and the case is now approaching its trial date. A new summary is received. No facts of the case have changed, and no additional evidence has been received. The only thing that has changed in the summary is the valuation range has gone up. Why? It is very frustrating for a carrier to see evaluations creep up when nothing has changed in the case but the closeness of the trial date.

4. **I can't believe how long this took.** I do not think that any local attorneys are purposely trying to overbill carriers. As an aside, I have actually seen an out of state attorney bill over twenty-four hours in a single day period. Thankfully, that type of over-billing is not seen here. However, it is good to examine if work in your office is being done as efficiently as possible. Carriers expect efficiency from their adjusters. The same efficiency is expected from outside counsel. Many file supervisors are attorneys themselves and have tried cases. They have a feel for how long it takes to prepare an answer, answer discovery, complete a Motion for Summary Judgment, etc. If your office is taking multiple

Continued on page 10

hours longer than the norm, you either need to explain why it is legitimately taking so long to complete a task or examine the efficiencies in your office. While every case is different, every automobile accident case or slip and fall case will have enough similarities that the wheel does not need to be reinvented for each new file. Also, if you find yourself working with a company representative who is also a lawyer, take advantage of that situation. Most of them enjoy the opportunity to talk shop with you! Good communication certainly helps with this problem.

5. **I have a scheduling conflict on this day.** When you are setting dates for anything that will require the presence of a company representative, always check with the representative regarding availability. Don't put the representative in a bind by scheduling something without checking, only to determine the representative is on vacation that week and now has to scramble to find someone to cover the appearance. Good communication would solve this problem.

6. **Is our attorney ever going to get this case moving?** We have all dealt with a plaintiff attorney that is less than prompt in getting discovery responses, responding to deposition requests, or any other issue that may need attention on a case. While a certain amount of professional courtesy is warranted, allowing a case to drag on indefinitely is not acceptable either. Repeated reports to the company representative that you are still waiting on plaintiff's attorney are not appreciated. File the Motion to Compel.

7. **Why am I just now getting billed for this?** Follow the carrier's billing guidelines when submitting your bills for payment. Some carriers want monthly bills, some want quarterly bills. If you want to deviate from the policy, discuss the reasons for this with the carrier. I know that billing is not most attorneys' favorite activity, but not getting bills out timely helps no one. Carriers have legal budgets. When your bill comes outside the period that it was budgeted for, it causes problems for the carrier. Also, submitting a rash of months old bills at the end of the year because your accounting department has reminded you that you haven't sent them out, and then expecting the file adjuster to do rush payments on all of your old bills, makes you no friends.

One area that I have noticed seems to concern defense counsel more than it concerns file handlers is adverse jury verdicts. Bottom line is they happen. If outside counsel is thoroughly prepared for trial and has thoroughly discussed the strengths and weaknesses of a case with the carrier before heading into trial, an adverse verdict is not the end of the world, and certainly not the end of the relationship. I own horses. The saying goes if you haven't fallen off it is because you don't ride enough. The same holds true for trial attorneys. If you have never lost, you aren't trying enough cases. While losing is an awful feeing for a trial attorney (and I know it is awful as I have personally experienced it), it certainly does not diminish our view of outside counsel.

Another area of concern centers around whether or not associates can work on files assigned to a partner in the firm. The answer to this dilemma will vary from carrier to carrier. It is obviously best to clarify the issue before you turn a file over to an associate rather than having the carrier find out about the transfer when the first bill is received. So, once again, good communication is key.

In summary, relationships between carriers and outside counsel in Iowa seem to be working well for the most part. With an eye towards effective communication, we can make them great again.

Counseling a Commercial Loan Banker to Avoid Lender Liability Claims

by William Vernon, Simmons Perrine Moyer Bergman PLC, Cedar Rapids, Iowa

William Vernon

Old school commercial bankers commonly use the "3 C's"—Collateral, Capacity, and Character—to analyze a borrower's credit for a commercial loan. When a commercial loan is in default the banker first looks to the repayment components—Collateral and Capacity. Foreclosure upon loan collateral is a garden variety lawsuit. However, when the borrower tries to shift loss or default responsibility to their banker by asserting a lender liability counterclaim in the foreclosure action the banker realizes the error of the initial assessment on the borrower's Character. Early detection of a potential lender liability claim triggers special strategies to counsel the banker and defend against liability as well as avoid any misinterpretation of the banker's behavior throughout the loan transaction. This paper begins with a brief summary of the Iowa common law lender liability rules and ends with some practice pointers to counsel the banker so the banker's behaviors stay out of court.

Scope of Lender Liability Duty. The first key in counseling or defending against a common law lender liability claim is to determine the "duty" source the borrower claims was owed by the banker to the borrower. Iowa recognizes a lender's common law duty to a borrower sourced from the banker/borrower acts occurring during the loan transaction that sound in tort[1] or contract, whether that contract is express or implied[2].

Claims Sounding in Tort. Breach of fiduciary duty[3] and misrepresentation[4] are common torts recognized in Iowa to support a lender liability claim. To establish a breach of fiduciary duty a borrower must first establish the banker is the borrower's fiduciary for the specific transaction[5]. The Iowa Supreme Court described fiduciary duty[6] as:

> A fiduciary duty imparts a position of a peculiar confidence placed by one individual in another. A fiduciary is a person with a duty to act primarily for the benefit of another. A fiduciary is in a position to have and exercise, and does have and exercise influence over another. A fiduciary relationship implies a condition of superiority of one of the parties over the other. Generally, in a fiduciary relationship, the property, interest or authority of the other is placed in the charge of the fiduciary. (Emphasis added)

A fiduciary relationship is determined by reviewing all the facts and circumstances giving rise to the borrower's grant of an implicit trust to a banker fiduciary and acceptance of that implicit trust by the banker fiduciary[7] . Relevant factors evidencing a fiduciary relationship include the extent which the banker has taken control of a transaction[8] , will receive any undisclosed benefits from the outcome of the transaction[9] , has given extensive business advice relied upon by the borrower[10] , or has a self-interest in the transaction[11] . For borrowers, the courts review the borrower's educational[12] and business experience[13] , facts alerting the banker to "know or should know" that the borrower is relying upon the bank information[14] , and any indicia that the borrower is recognizing the banker as a business confidant[15].

The legal consequence of a fiduciary relationship is an independent duty requiring the bank to act in the best interest of the beneficiary borrower[16]. Acting in the borrower's best interest has included the duty to disclose information to avoid the default or loan loss[17] or a duty of loyalty[18].

A false representation[19] or omission[20] by the banker to the borrower which the borrower reasonably relied is another lender liability duty source. That is, the borrower asserts the banker made certain false explicit or implicit representations that borrower relied upon that caused the default or loan loss[21].

Claims Based in Contract. Claims based in contract require as a condition precedent the existence of an implied (whether implied in law or implied in fact by the circumstances [22]) or express contract. Ordinary contract rules apply, including requirements of the existence of an agreement containing definite mutually agreeable terms[23] . Typical claims include a lender's failure to follow through with a commitment to loan money[24] or discontinuance of loan advances as previously agreed[25].

Most alleged oral contract claims can be eliminated by including a statutory notice that limits enforceability of loan terms to the written terms[26]. If properly used, the statutory notice will bar parol evidence of an alleged oral representation[27]. Specifically, the required notice to include in loan documents is:

IMPORTANT: READ BEFORE SIGNING. THE TERMS OF THIS AGREEMENT SHOULD BE READ CAREFULLY BECAUSE ONLY THOSE TERMS IN WRITING ARE ENFORCEABLE. NO OTHER TERMS OR ORAL PROMISES NOT CONTAINED IN THIS WRITTEN CONTRACT MAY BE LEGALLY ENFORCED. YOU MAY CHANGE THE TERMS OF THIS AGREEMENT ONLY BY ANOTHER WRITTEN AGREEMENT.

Counseling a Banker to Avoid the Lender Liability Claims. The attorney's value-add service to the banker is to keep the lender's challenged behaviors out of court and keep the defaulted loan a garden variety collection case. 10 ways to counsel a banker to avoid lender liability are:

1. **Second Review of Loan Status After Loan Delinquency**. Once a loan becomes delinquent or full payment concerns exist for a delinquent loan, have the banker choose another banker to review the delinquency causes and collectively develop a repayment plan. For a more complex loan, the banker should add the delinquent loan as an agenda item to the next loan committee meeting for a group review.

2. **Analyze Benefits to Bank or Loan Officer**. Review the pros and cons of the repayment plan to determine whether the bank or loan officer have a private, personal interest in any of the planned resolution transactions to resolve the loan delinquency with the borrower. If the lender-borrower involves more than a loan relationship where the bank will receive repayment of the loan and some additional benefit then review the fiduciary rules to make sure any potential fiduciary duties—whether duty of disclosure or loyalty—are not breached.

3. **Review Loan Documentation**. Have the loan officer make a second review of the existing loan documentation to ensure nothing was missed when the loan was made. Typical inquiries are whether the bank's lien interest in the collateral correctly perfected, erroneous loan forms used that obligate the lender to follow consumer rules that were not intended to apply and, if multiple loans, is there a dragnet clause securing multiple borrower promissory notes. If there are document deficiencies then put a plan in place to shore-up the bank's perfected collateral position before enforcing the bank's collection rights.

4. **Perform an Inspection to Obtain a Current Collateral List**. Performing a current collateral inspection will highlight any change in the collateral list and value, help understand the borrower's repayment ability and show the lender's best exit plan for full payment.

5. **Double Up with Borrower Meetings**. Advise the banker to have two loan officers present during any face-to-face meeting with the borrower. This will eliminate any misunderstanding of what was stated at the meeting and, more importantly, corroborate words that weren't stated.

6. **Follow Up Meeting with Written Correspondence**. For bank-borrower meetings where the banker or borrower agree to perform post-meeting tasks, have the banker state the tasks to be performed with specific deadlines in a letter or email to the borrower. Having a written record will corroborate tasks to be completed, eliminate uncertainly of the consequences if a task is not timely performed, and establish the reasons changes in any prior course of dealing practice because of a loan delinquency.

7. **Confirm No Fiduciary Relationship** Exists. If a fiduciary relationship is shown the bank must accept responsibility to act as the borrower's fiduciary. During negotiations the banker should advise the borrower to have an attorney review any loan modification agreement and confirm that the banker is not acting for or on behalf of the borrower.

8. **Address Effect of Partial Performance**. Be mindful that the bank's acceptance of borrower's partial performance can waive a borrower's breach or default. Make sure if partial performance is made by a borrower that partial performance does not cure the loan default.

9. **Agreements Should Always Include Iowa Code § 537.16 Notice**. To eliminate alleged oral contracts after a final agreement is reached, the statutory notice provision of Iowa Code 537.16 stated above should be stated in all documents evidencing the agreement.

10. **Obtaining a Mutual Release to Conclude Matter**. Once an agreement is reached with the borrower, obtain a mutual release of past actions and have the banker be vigilant to not leave any tasks unfinished. There is no greater banker nightmare than thinking a matter is resolved in final form only to find out later the borrower can assert a claim.

Conclusion. A banker would never make a loan if the banker concludes the borrower lacks sound character. However, bankers, like lawyers, are not soothsayers. When a loan unexpectedly goes south and the borrower points the finger to the banker to fix, your review with the bank client of the lender liability rules and learned counsel on the 10 steps to avoid a lender liability claim will go a long way to salvaging that erroneous decision.

ENDNOTES

[1] *Kurth v. Van Horn*, 380 N.W.2d 693, 695 (Iowa 1986).

[2] *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa 1990).

[3] *Kurth v. Van Horn*, 380 N.W.2d at 698.

[4] *First National Bank in Lenox v. Brown*, 181 N.W.2d 178, 182 (Iowa 1970).

[5] *Kurth v. Van Horn*, 380 N.W.2d at 698.

[6] *Id.*

[7] *Peoples Bank & Trust Co v. Lola*, 392 N.W.2d 179, 186 (Iowa Ct. App. 1986).

[8] *Mills County State Bank v. Fisher*, 282 N.W.2d 712, 714 (Iowa 1986).

[9] *First National Bank in Lenox v. Brown*, 181 N.W.2d at 183 (Iowa 1970).

[10] *Mills County State Bank v. Fisher*, 282 N.W.2d at 714.

[11] *First National Bank Ia Lennox v. Brown*, 181 N.W.2d at 184.

[12] *Manson State Bank v. Tripp*, 248 N.W.2d 105, 108 (Iowa 1976).

[13] *Id.*

[14] *Nie v. Galena State Bank*, 287 N.W.2d 373 (Iowa Ct. App. 1986).

[15] *Kurth v. Van Horn*, 380 N.W.2d at 698.

[16] *Peoples Bank & Trust Co v. Lola*, 392 N.W.2d at 188.

[17] *First National Bank in Lenox v. Brown*, 181 N.W.2d at 182.

[18] *Nie v. Galena State Bank*, 287 N.W.2d at 376.

[19] *Mills County State Bank v. Fisher*, 282 N.W.2d at 714.

[20] *State Bank of Iowa Falls v. Brown*, 119 N.W.2d 81, 83 (Iowa 1909).

[21] *Id.*

[22] *Irons v. Community State Bank*, 461 N.W.2d 849, 855 (Iowa 1990).

[23] *Clinton National Bank v. Saucier*, 580 N.W.2d 717, 720 (Iowa 1998).

[24] *Harsha v. State Sav. Bank*, 346 N.W.2d 791, 796 (Iowa 1984).

[25] *Peterson v. First National Bank of Iowa*, 392 N.W.2d 158, 166 (Iowa 1986).

[26] Iowa Code § 537.16.

[27] *Beal Bank v. Siems*, 670 N.W.2d 119, 126, 127 (Iowa 2003).

NEW LAWYER PROFILE

Graham Carl,
Simmons Perrine Moyer Bergman PLC,
Cedar Rapids, Iowa

In every issue of *Defense Update*, we will highlight a new lawyer. This issue, we get to know Graham Carl, Simmons Perrine Moyer Bergman PLC., in Cedar Rapids, Iowa.

Graham is a native of Mount Vernon, Iowa and attended Loras College where he was a member of the Iowa Conference All-Academic Team in basketball and track. He graduated with a degree in economics with a minor in business before attending the University of Iowa College of Law. While at the University of Iowa, Graham was a board member of Phi Delta Phi and the Sports Law Society, as well as a member of the Baskerville Moot Court Team. Graham graduated from law school in 2014 with highest distinction, earned the ALI/CLE Scholarship and Leadership Award, and was named Order of the Coif. Graham is an associate at Simmons Perrine Moyer Bergman PLC where his primary areas of practice are transportation, medical malpractice defense, appellate advocacy, municipal law, and personal injury.

Case Law Update

by Andrea D. Mason, Lane & Waterman LLP, Davenport, Iowa

Andrea D. Mason

Blake James Jacobs v. Iowa Dep't of Transp., Motor Vehicle Div., No. 16-0133 (Nov. 18, 2016).

Why it matters: *Jacobs* is another case interpreting and expanding upon our conversion to EDMS. This case allows some liberality in the otherwise-strict appellate deadlines when the deadline is missed due to the outlined EDMS-related circumstances. Like *Concerned Citizens* and *Ewing Concrete*—discussed in the Spring 2016 *Defense Update*—*Jacobs* gives some guidance on every attorney's nightmare, the dreaded missed deadline. Reading in conjunction with *Concerned Citizens* and *Ewing Concrete*, the appellate courts appear to be taking an equitable, interest-of-fairness approach for circumstances related to technological failures or minor errors coupled with good intent and a more traditional, bright-line approach for human missteps. *Jacobs* is also good for those making an equitable argument or asking the court to overlook some minor technicality in favor of reaching a determination on the merits.

Summary: A petition for judicial review was filed on the last day to do so. The next morning, the clerk of court returned the petition because of two errors on the cover sheet: the petitioner's address was missing and the filing had not been described as a "civil-administrative appeal". A new cover sheet was completed and the petition was resubmitted, which were accepted by the clerk of court that day. However, the petition was dismissed as untimely for having been filed one day late.

The Court concluded a filing may relate back to the original date it was received by EDMS, for purposes of meeting a deadline, when the filing party demonstrate three conditions: 1. The document was received by EDMS prior to the deadline and it was otherwise proper except for minor errors in the cover sheet; 2. The proposed filing was returned by the clerk's office after the deadline because of these minor errors; and 3. The party promptly resubmitted the filing after correcting the errors.

While the DOT relied on *Concerned Citizens* to argue a general rule that the file-stamped filing date is dispositive for all purposes, the Court found such an overreading of *Concerned Citizens*. The Court noted Rule 16.309(3)(c) contains the statement it is "the responsibility of the filer to keep a record of the notice generated by [EDMS] to verify the date and time of the original submission." This language must have some meaning, lest it be rendered superfluous. As such, there must be some circumstances when the date of the original submission has some significance Further, some of the equitable considerations, like the fact Jacobs recognized the actual appellate deadline and attempted to follow it, foww wund in *Concerned Citizens* favored Jacobs. If the DOT's position were adopted, the Court said, the appellate deadline court be effectively shortened because litigants would need to protect themselves by allowing adequate time for the clerk of court to review, and possibly reject, filings. These issues would result in a "muddying of deadlines" when the ultimate consideration in *Concerned Citizens* was clarity of appellate deadlines. Further, adopting the DOT's position would result in the vesting of jurisdiction turning on discretionary acts of the clerk's office.

Dinsdale Construction, LLC v. Lumber Specialties, Ltd., No. 15-0164 (Dec. 23, 2016).

Why it matters: *Dinsdale* examines the often applied, yet confusing, tort of negligent misrepresentation. The case clarifies if a business is a mixed business—providing both tangible products and supplying information—the specific transaction must be examined to determine if the person had a pecuniary interest in the transaction. This can include an expectation of a future pecuniary interest or other indirect consideration. If you are battling the duty issue in a claim for negligent misrepresentation, look to *Dinsdale* to provide additional information and a background of other existing caselaw. Additionally, if you are looking to narrow the imposition of a duty in other torts, *Dinsdale* provides your basis.

Summary: An implement dealership hired a lumberyard to provide building materials and oversee the construction of an addition to its dealership. The lumberyard subcontracted with

Lumber Specialties to provide the truss package, headers and columns for the doors, and connections and hold downs, plus some engineering services. The contract did not provide for engineering services pertaining to the temporary bracing of the trusses and did not required Lumber Specialties to evaluate the temporary bracing during the course of construction. The dealership also hired Dinsdale Construction to supply labor and building materials. The owner of the lumberyard visited the site with the owner of Dinsdale Construction; together, they agreed the construction should be evaluated to ensure the temporary bracing was sufficient. The owner of the lumberyard emailed Ryan Callaway, a sales representative for Lumber Specialties. Callaway visited the site that afternoon believing his opinion sufficient upon which to rely, which Callaway characterized as a courtesy to the customer lumberyard. Another individual was to be doing the final inspection of the building, including inspecting the bracing, of which the lumberyard was aware. When asked if there was anything "obvious...that [he] could see that could create more stability during the set stage", Callaway replied "[n]othing 'jumped' out". Nine days later, the structure collapsed due to inadequate temporary bracing as Dinsdale had not following the industry standard temporary bracing plan.

Dinsdale brought suit against Lumber Specialties on breach of contract and negligent misrepresentation theories. Lumber Specialties moved for summary judgment and directed verdict arguing it had no duty to use reasonable care in providing Callaway's interim assessment of the adequacy of the temporary bracing erected by Dinsdale Construction, both of which were denied, and the jury found in favor of Dinsdale Construction on the negligent misrepresentation claim. Lumber Specialties' motion for judgment notwithstanding the verdict was denied.

Under Iowa law, normally only those in the business of supplying information to others owe a duty to ensure that information is correct, accurate, and thorough. Where the defendant is not in the business of supplying information, and the parties deal at arm's length in a commercial transaction, no duty arises. In this case, Lumber Specialties contracted to provide both construction materials and intangible engineering services—a mixed business—and thus the specific transaction must be examined to determine if the person had a pecuniary interest in the transaction. "The key to the imposition of a duty to use reasonable care in supplying information", said the Court, "necessarily involves a pecuniary interest in supplying the information." Because there was no evidence of a pecuniary interest in supplying the information concerning the adequacy of the temporary bracing, and no evidence to support an indirect pecuniary interest, the tort of negligent misrepresentation was not broad enough to cover the facts here. The Court found "[t]he tort of negligent misrepresentation is not broad enough for the pecuniary interest in a transaction to come from general goodwill potentially derived by a business in supplying requested advice or information to a customer as a courtesy following the sale of a product. A transaction of this nature is too attenuated and abstract from those contemplated by the Restatement to impose a duty of care."

IDCA Schedule of Events

May 19, 2017

LET'S ROOT, ROOT, ROOT FOR THE HOME TEAM!
CLE AND NIGHT AT THE I-CUBS

Mark your calendars now, and make plans to join IDCA for an afternoon of CLE followed by a night at the I-Cubs game at Principal Park. The night will be capped off with fireworks!

3:30–5:30 P.M.
2 HOURS CLE

"Accident Investigation and Reconstruction 101"
"Fires and Explosions 101"
Sponsored by Exponent. Hosted at Whitfield & Eddy, downtown Des Moines.

6:00 P.M.

Picnic, I-Cubs v. Tacoma, and fireworks at Principal Park.
Family welcomed!
Watch for event registration details online.

September 14–15, 2017

53RD ANNUAL MEETING & SEMINAR

Stoney Creek Hotel & Conference Center
Johnston, IA