

IN THE SUPREME COURT OF IOWA

NO. 22-1865

COUNTY BANK,
Plaintiff-Appellee,

vs.

CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA
Defendants-Appellants.

CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA,
Counterclaim Plaintiffs-Appellants,

vs.

COUNTY BANK,
Counterclaim Defendant-Appellee,

CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA,
Third Party Plaintiffs-Appellants,

vs.

CHRIS GOERDT and PEOPLES TRUST AND SAVINGS BANK
Third Party Defendants-Appellees.

APPEAL FROM THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY
THE HONORABLE MICHAEL SCHILLING, and SHAWN SHOWERS, JUDGES

APPELLANTS' REVISED REPLY BRIEF

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LEGAL ARGUMENT

I. **WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND LATER DIRECTED VERDICT ON SHALLAS' NON-CONTRACT CLAIMS BASED UPON THE IOWA CODE SECTION 535.17 CREDIT AGREEMENT STATUTE OF FRAUDS?**

Peoples Bank and Goerdts acknowledge Shallas preserved error on this issue, Peoples Brief, p. 21, Goerdts Brief, p. 37, and County Bank takes no position on this issue, County Bank Brief, p. 40.

The Trial Judge granting summary judgment felt constrained to follow the unreported Court of Appeals decision Geiger v. Peoples Trust and Savings Bank, 940 N.W.2d 46 (Iowa Ct. App. 2019). The December 9, 2021 Order granting Peoples' Rule 1.904 Motion states:

Instead, acting as district court judge, the better path is to follow *Geiger* and allow the appellate courts to decide whether *Geiger* correctly decided the scope of section 535.17 claims. At present, the court believes *Geiger* means that the statute of frauds bars counts IV and V. (December 9, 2021 Order, App. 654)

The Trial Court Judge granting Directed Verdict felt constrained to rely on the prior ruling. App. 1647-1648

Of course, an unpublished opinion does not constitute controlling legal authority. Iowa R. App. P. 6.904(2)(c). Peoples argues, Peoples Brief, p. 22 that the Iowa Supreme Court was satisfied with Geiger, by denying further review.

Peoples' inference is not appropriate. Iowa R. App. P. 6.1103(1)(b) makes clear further review is discretionary. The Iowa Supreme Court may not view Geiger as the appropriate case to address the scope of Iowa Code Section 535.17. Shallas believe their case is an appropriate case to address the scope of the statute.

To the extent Peoples and Goerdts argue the Legislative history does not support a limited scope on the Credit Agreement Statute of Frauds, a comparison between the prohibition in the initial bill, and what was enacted make clear the legislature limited the statute's scope. To argue as a matter of statutory construction the statute is entitled to a broader scope beyond cases involving contract law, would require mental gymnastics. This will be demonstrated by first providing the text of the operative provision in the initial draft of 535.17, followed by the relevant provisions that were cited by the parties in their Briefs, showing the portions highlighted by Peoples

and Goerdt juxtaposed to the clear language Shallas cited to show the statute was limited to contract law.

The operative provision of the initial draft stated:

A debtor shall not maintain an action on a credit agreement and evidence of a credit agreement is not competent unless the credit agreement is in writing, expresses consideration, sets forth the relevant terms and conditions and is signed by the creditor and the debtor.

This is the proposed language the Legislature rejected.

The relevant provisions of the enactment follows, and show language Peoples highlighted, which are underlined, and from Peoples' Brief at pages 25 and 26, and the language Shallas rely on in italics:

535.17 Requirements of credit agreements—statute of frauds—modifications:

1. A credit agreement is not enforceable *in contract law* by way of action or defense by any party unless a writing exists that contains all the material terms of the agreement and is signed by the party against whom enforcement is sought. (Emphasis supplied)

5. For purposes of this section, unless the context otherwise requires:

a. "*Action*" includes petition, complaint, counterclaim, cross-claim, or any other pleading or proceeding to enforce affirmatively any right or duty or to recover damages for the nonperformance of any duty.

b. "*Contract*" means a promise or set of promises for the breach of which the law would give a remedy, or the performance of which the law would recognize a duty, and

includes promissory obligations based upon any instruments and similar documents on the contract doctrine of promissory estoppel.”

c. “*Credit agreement*” means any contract made or acquired by a lender to loan money, finance any transaction or otherwise extend credit for any purpose, and includes all of the terms of the contract.

6. This section shall be interpreted and applied purposely to ensure that *contract actions and defenses on credit agreements* are supported by clear and certain written proof of the terms of such agreement to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements.

7. This section entirely displaces principles of common law and equity that would make or recognize exceptions to otherwise limit or dilute the force and effect of its provisions concerning the enforcement *in contract law* of credit agreements or modifications of credit agreements. However, this section did not displace any additional or other requirements of which shall continue to apply, with respect to the making or enforcement of contracts, including the requirements of consideration or other basis of validation. (Emphasis supplied).

It should be noted that the claim Shallas do not claim a breach of an agreement to make a loan. In fact, Goerdts did procure a loan for Shallas at County Bank. Rather, Shallas’ tort claims are based on Goerdts’ failures in connection with advice and assistance Goerdts provided in connection with the exercise of the option. Significantly, those activities were consistent with a provision in what was initially

proposed, as subsections 535.17(4)(a) and (b), which were not included in the final enactment.

4. One or more of the following actions do not give rise to a claim that a new credit agreement is created, unless the agreement satisfies the requirements of subsection 2.

a. The rendering of financial advice by a creditor to a debtor.

b. The consultation by a creditor with a debtor.

Peoples, Brief, pp. 27-28, and Goerdts, Brief, pp. 45-48, cite cases from other jurisdictions that were relied upon in Geiger, as well as two Federal cases that cited Geiger.

A review of the cases cited by the Geiger court will show they were based on broad Credit Agreement Statutes of Fraud, similar to the draft bill Iowa rejected, and cases from other jurisdictions based on narrow statutes, like Iowa's, go the other way.

Peoples, Brief, p. 28, and Goerdts, Brief, p. 47, also refer to two Federal cases that were cited by the Trial Court. One case, Twiford Enterprises, Inc. v. Rolling Hills Bank & Trust, 2020 WL 5248561 (D. Wyo. Aug. 5, 2020) involved a Wyoming transaction based upon promissory notes selecting Iowa as the governing law. The Court did cite Geiger to support finding the tort claims were barred. A citation by a Federal District Court which is trying to discern Iowa law, of an

unpublished Iowa Court of Appeals decision, does not make the status of Geiger stronger. Peoples suggests, Brief, p. 28, both Federal cases cited Geiger, the other being Ramsey v. Bank of Oklahoma, 2008 WL 4936316 (N.D. Ok 2008). Of course, the District Court in Ramsey was not prescient and did not cite a case not handed down until eleven years later. Moreover, fn. 2 in the Ramsey case noted unpublished decisions are not precedential but may be cited for their persuasive value. The Credit Agreement Statute of Frauds Ramsey cite at p. 3, was not clearly limited to contract claims like the Iowa statute. A close reading of the case also shows that there really wasn't a discussion of the application of the Credit Agreement Statute of Frauds to tort claims, but rather the case involved contracts.

Peoples, Brief, p. 27, cite Dixon v. Countrywide Financial Corp., 664 F.Supp.2d 1304, 1309 (S.D. Fla. 2009), which involved a Florida statute which provided:

Debtor may not maintain an action on a credit agreement unless the agreement is in writing, expresses consideration, sets forth the relevant terms and conditions, and is signed by the creditor and the debtor.

Peoples, Brief, p. 28, and Goerdts, Brief, p. 45, 48 cite Horseshoe Entm't. L.P. v. Gen. Elec. Capital Corp., 990 F.Supp. 737, 743 (E.D.

Mo. 1997). That case involves a statute the District Court described as prohibiting "...a debtor from maintaining an action on or defense to a credit agreement unless the agreement is in writing."

Peoples, Brief, p. 28, and Goerdt, Brief, p. 46 cite Ohio Valley Plastics, Inc. v. Nat'l. City Bank, 687 N.E.2d 260, 264-65 (Ind. Ct. App. 1997) involved a statute which provided "a debtor may bring an action upon an agreement with a creditor to enter into a new credit agreement..." again without any limitation to contract law claims.

Other cases from outside of Iowa have held to the contrary. In particular, Mika v. Central Bank of Kansas, 112 S.W.3d 82, 90-92 (Miss. App. 2003) not only found the Missouri Credit Agreement Statute did not bar tort claims, but was critical of the Federal Court's decision in Horseshoe Entertainment as misreading a State Appellate Court's determination of Missouri law.

Pease v. Wacovia SBA Lending, Inc., 6 A.3d 867, 416 Md. 211, (M.D. App. 2010) reviewing the plain language and legislative history of Maryland's Credit Agreement Statute of Frauds, which was passed in 1989, found it should only apply when a borrower or lender attempts to recover on a venerable promise to lend or borrow or enforce a verbal modification of the agreement.

II. WHETHER THE TRIAL COURT ERRED IN DENYING SHALLAS THE OPPORTUNITY TO CONDUCT DISCOVERY BASED ON AN AGREEMENT TO SUSPEND DISCOVERY PENDING DEFENDANT GOERDT'S CRIMINAL PROSECUTION?

REPLY ARGUMENT

Discovery was interrupted in this case because Goerdts counsel belatedly realized his client was subject to a Federal criminal investigation, and asked to cancel Goerdts deposition the day before it was to be held. Shallas and Peoples then documented an agreement to suspend discovery and reset deadlines in their court filings while awaiting for the resolution of Goerdts criminal proceeding. This agreement was reasonable. Goerdts was the President of Peoples during the period Shallas' claim Goerdts committed tortuous conduct, and was the loan officer who got County Bank to make a loan to Shallas' although at a much higher amount thanks to Goerdts actions and inactions with respect to the option.

Even though all parties had agreed on March 12, 2019 to defer Goerdts deposition, and Goerdts was indicted on May 8, 2019 (July 25, 2019 Motion to Suspend Proceedings, App. 341), Peoples filed their Motion for Partial Summary Judgment to which Goerdts and

County Bank joined. The procedural history is recounted in Shallas' initial Brief, pp. 22-23.

Shallas then filed their July 25, 2019 Motion to Suspend Proceedings. The relevant allegations of the July 25, 2019 Motion are as follows:

10. Counsel for Shallas inquired of counsel about suspending proceedings on the Motion for Summary Judgment, and counsel for Peoples and Goerdt will agree that the proceedings on the Motion for Summary Judgment should be suspended until Goerdt's deposition can be taken if all proceedings are rescheduled, the trial continued and that new deadlines be set.

11. Shallas would agree to the Third Party Defendants' proposal.

12. Counsel for Plaintiff County Bank has not stated a position.

13. As an alternative, Shallas would agree to the Court entering an Order suspending proceedings in connection with the Motion for Summary Judgment until Goerdt is able to testify, which presumably would be after the criminal proceedings as Shallas believe the time between the two trials will be sufficient time to take Goerdt's deposition and have time to submit to the Court the Motion for Summary Judgment.

Peoples responded on August 7, as follows:

6. As accurately reflected in Paragraph No. 10 of the Shallas' Motion to Suspend Proceedings, Peoples, as well as Mr. Goerdt, has agreed to suspend the summary judgment proceedings until after Mr. Goerdt's deposition can be taken, provided that all proceedings are rescheduled, the trial is continued and new pre-trial deadlines are set. The Shallas

agree with Third-Party Defendants' proposal. *See Paragraph Nos. 10 and 11 of the Motion to Suspend Proceedings.*

7. As an alternative, the Shallas proposed in their Motion that the Court suspend the summary judgment proceedings until after Mr. Goerdts's deposition is taken, without suspending any other proceedings in this case, and keeping the same trial date and pretrial deadlines. *See Paragraph No. 13 of the Motion to Suspend Proceedings*

County Bank was seeking to foreclose a mortgage, and would not agree. The Trial Court granted the Motion on December 20, 2019, stating as follows:

The Court finds that Mr. Goerdts's deposition should be taken prior to this case proceeding. Accordingly, the motion to suspend the proceedings is GRANTED.

Based on this record, to which Goerdts and County Bank made no meaningful objection and County Bank's objection was denied, Shallas proceeded with the understanding that they would have additional time to conduct discovery. It is not really relevant that additional discovery would be before or after the summary judgment motion, as the primary issue there was not a factual one but rather a legal issue.

The parties had, at a minimum, an informal agreement, if not one approved by the Court, which is clearly documented in Shallas' statements, the response by Peoples, and the Court's Order.

Shallas will not make further reply argument as to Issues III and IV. Shallas have sufficiently covered those issues in their Brief, and if the Court grants the relief sought under Issues I and II, Issues III and IV are moot.

COUNTY BANK ATTORNEY FEE REQUEST

County Bank, in Division V of its Brief, p. 58, asserts a request for appellate attorney fees. Shallas believe this should appropriately be left to the District Court for two reasons. First, the District Court can review documentation on the fees, which will not be complete until the appeal is concluded. In addition, the parties may be able to agree to the amount of the fees. The District Court record would reflect after the appeal, a fee claim submitted on January 13, 2023, was ultimately resolved by agreement by a Consent Order entered March 2, 2023. The District Court would be in a better position to resolve attorney fee issues assuming the parties are unable to resolve the matter.

CONCLUSION

The scope of the Credit Agreement Statute of Frauds in the initial bill was broad. What Legislature passed and the Governor signed was expressly limited in application to contract law claims.

Review of the plain meaning of the statute, coupled with the Legislative history, make clear the statute does not preclude tort claims. The Geiger case is in error and should be overruled.

It is not Shallas' fault the President of Peoples Bank and the responsible loan officer at County Bank committed numerous felonies. The criminal investigation led to a request by Goerdts' counsel to delay Goerdts' deposition. Shallas agreed to this and then documented an agreement to suspend the proceedings which the Court granted. The length of the delay was not anticipated, caused in part by the Covid-19 pandemic. Nonetheless, the parties' agreement should be enforced.

The judgments entered should be reversed and this case should be remanded for further proceedings, including additional discovery, subject only to the limitations based upon the agreement between Shallas and Peoples Bank.

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Dated this 20th day of July, 2023.



Peter C. Riley

CERTIFICATE OF SERVICE

The undersigned hereby certifies that the preceding Appellant's Revised Reply Brief was served on the 20th day of July, 2023, upon the Clerk of the Supreme Court and the following by electronic filing:

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The undersigned hereby certifies that the preceding Appellant's Revised Reply Brief was filed with the Supreme Court of Iowa by the EDMS system on the 20th day of July, 2023.


