

IN THE SUPREME COURT OF IOWA

Appeal No. 18-2096

MARCUS NEWS, INC.,

PLAINTIFF/APPELLANT

vs.

THE O'BRIEN COUNTY BOARD OF SUPERVISORS,

DEFENDANT/APPELLEE

and

IOWA INFORMATION, INC.

INTERVENOR/APPELLEE

**FINAL BRIEF OF PLAINTIFF/APPELLANT
MARCUS NEWS, INC.**

Appeal from the Iowa District Court for O'Brien County
Case No. EQCV 022991
Honorable David A. Lester
District Court Judge, Presiding

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ROUTING STATEMENT

Pursuant to Iowa Rules of Appellate Procedure 6.903(2)(d) and 6.1101, this case should be retained by the Iowa Supreme Court as it contains “substantial issues of first impression.”

STATEMENT OF THE CASE

The present case is the third District Court case in a recurring battle in O’Brien County concerning selection of the county newspapers under Iowa Code Chapter 349 since 2005. *See The Paullina Times and the Sutherland Courier v. The O’Brien County Board of Supervisors*, O’Brien County Case No. EQCV 019463 (March 8, 2007) and *Iowa Information, Inc. v. The O’Brien County Board of Supervisors*, O’Brien County Case No. EQCV 019970 (August 10, 2009). *See* Appendix (hereinafter “App.”) 191 and 199.

In the present case, on December 21, 2017, Plaintiff-Appellant Marcus News, Inc. (hereinafter “Marcus News”) filed an application with the O’Brien County Board of Supervisors requesting the combined newspapers of Marcus News be considered one of the official newspapers for O’Brien County, pursuant to Iowa Code Chapter 349. *See* App. 9. On December 26, 2017, Intervenor-Appellee Iowa Information, Inc. (hereinafter “Iowa Information”) filed its request for consideration of each of its two newspapers as official publications for O’Brien County. *See* App. 10 and 11

On January 9, 2018, a hearing was held before the O'Brien County Board of Supervisors for determination of the two official newspapers for the County for the 2018 year. *See App. 76 and 79.* The Board of Supervisors ultimately awarded the newspaper selections to Iowa Information for the 2018 year. *See App. 79.*

On January 25, 2018, Marcus News filed a timely appeal of the Board of Supervisor's decision to the District Court for O'Brien County. *See App. 81.* On October 10, 2018, after a *de novo* appellate review, the O'Brien County District Court affirmed the decision of the O'Brien County Board of Supervisors in designating the two official newspapers of Iowa Information (i.e., N'West Iowa REVIEW and Sheldon Mail-Sun publications) as the official newspapers for O'Brien County notice publications. *See App. 316.* On October 24, 2018, Marcus News filed a timely Motion for Reconsideration, and on November 28, 2018, the District Court denied the Motion for Reconsideration. *See App. 326 and 339.*

On November 30, 2018, Marcus News filed a timely Notice of Appeal regarding the October 10, 2018 Ruling and Order of the O'Brien County District Court, as well as the November 28, 2018 Order Denying Motion for Reconsideration. *See App. 343.*

STATEMENT OF FACTS

On July 23, 2018, in the underlying appeal to the District Court, the parties executed a Joint Stipulation of Facts for the District Court's review. *See* App. 90 (July 23, 2018 Stipulation of Facts (hereinafter "Stipulation")). Those undisputed facts and the Iowa Code provisions controlling publication of the official notices of the County Board of Supervisors are summarized, in part, below.

I. The Process Under Iowa Code Chapter 349 for Selection of Publishers of Official County Notices

Under Iowa Code § 331.303(6), one of the duties of a county board of supervisors is to "[s]elect official newspapers and cause official publications to be made in accordance with chapters 349 and 618." Iowa Code § 349.16 sets forth the mandatory subjects for publication by a county board of supervisors in "each of said official newspapers at the expense of the county during the ensuing year."

Under Iowa Code § 349.1, "[t]he board of supervisors shall, at the January session each year, select the newspapers in which the official proceedings shall be published for the ensuing year." The Iowa Code further provides that "[s]uch selection shall be from newspapers published, and having the largest number of bona fide yearly subscribers, within the county." *See* Iowa Code § 349.2. In a county, such as O'Brien County,

wherein the population is less than 15,000, only two newspapers are selected pursuant to Iowa Code § 349.3(1).

Pursuant to Iowa Code § 349.4, if there are more newspaper applications than the number to be selected, which was the case in the present matter, the appeal is deemed a **contested matter**, and hearing must be set before the Board of Supervisors.

Under Iowa Code § 349.5, if the matter is a contested case, each applicant “shall deposit with the county auditor, in a sealed envelope, a statement, verified by the applicant, showing the names of the applicant’s bona fide **yearly subscriptions** living within the county and the place at which each such subscriber receives such newspaper, and the manner of its delivery.” (emphasis added).

The statute at issue in the present case is Iowa Code § 349.6, which sets forth the standard utilized in determining a newspaper selection in a *contested case*. The statute provides:

“The county auditor shall, on the direction of the board while it is in session, open said envelopes. The board may receive other evidence of circulation. **In counties in which two newspapers are to be selected, the two newspapers showing the largest number of bona fide yearly subscribers living within the county shall be selected as such official newspapers ...**

For purposes of this section, in counties where there are more newspapers than the number required for official county newspapers, **newspapers under common ownership published in the same city, and having approximately the same subscriber list or offered for sale in or delivered to the same geographic area, shall be treated as one newspaper**. Each such newspaper under common ownership should be considered eligible for publishing public notices, but such newspapers shall be treated as one newspaper for payment purposes to allow for flexibility in notice publication schedules.” Id. (emphasis added).

In order for a combination of newspapers to be considered as one newspaper under Iowa Code § 349.6, the following elements must be met:

- 1) **The newspapers must be “under common ownership.”** It is undisputed in the present case the Sanborn Pioneer and O’Brien County’s Bell-Times-Courier are both owned by Marcus News. *See* Stipulation at ¶ 4. Likewise, it is undisputed that both N’West Iowa REVIEW and Sheldon Mail-Sun are owned by Iowa Information. *See* Stipulation at ¶ 5. As such, there is no dispute that this factor #1 has been met.
- 2) **The newspapers must be “published in the same city.”** It is also undisputed both publications of Marcus News are published in Paullina, Iowa, and both publications of Iowa Information are published in Sheldon, Iowa. *See* Joint Stipulation of Facts at ¶¶ 5-6 and 9-10. As such, there is no dispute that factor #2 has been met.
- 3) **The newspapers must have (either one):**
 - a. **Approximately the same subscriber list.** It is undisputed the O’Brien County’s Bell-Times-Courier and the Sanborn Pioneer do not have “approximately the same subscriber list” (with very low subscriber duplication as shown in Trial Brief Exhibit 5);

likewise, the N’West Iowa REVIEW and the Sheldon Mail-Sun do not have “approximately the same subscriber list” (although they do have considerable duplication of subscribers). *See* Joint Stipulation of Facts at ¶¶ 29-30 and Trial Exhibit 5. This alternative requirement is not at issue in this case.

- b. **Be offered for sale in or delivered to the same geographic area.** The meeting of this requirement is the disputed factor in the decisions of the Board of Supervisors and District Court.

Finally, Iowa Code § 349.7 provides, when determining subscribers for consideration by the Board of Supervisors:

“The board of supervisors shall determine the bona fide **yearly subscribers** of a newspaper within the county, as follows:

1. Those subscribers listed by the publisher whose papers are delivered, by or for the publisher, by mail or otherwise, upon an order or subscription for same by the subscriber, and in accordance with the postal laws and regulations, and who have been subscribers at least six consecutive months prior to date of application.
2. Those subscribers who have been subscribers at least six consecutive months before the date of application, whose papers are regularly delivered by carrier upon an order or subscription, or whose papers are purchased from the publisher for resale.” *Id.* (emphasis added).

II. The Parties, Their Newspapers and The Subscribers

Richard and Mari Radtke purchased three newspapers published in O’Brien County from Mike Otto in 2003. *See* App. 91 at ¶ 8 (Stipulation).

Those newspapers were “The Paullina Times,” “The O’Brien County Bell,”

and “The Sutherland Courier.” *Id.* The Sutherland Courier ceased publication in 2006, and its subscription base was rolled into The Paullina Times. *Id.* In February 2017, the Paullina Times and O’Brien County Bell began publication as the “O’Brien County’s Bell-Times-Courier,” which was published in Paullina, Iowa. *Id.* In December 2017, ownership of the O’Brien County’s Bell-Times-Courier was transferred to Marcus News and, about that same time, Marcus News purchased “The Sanborn Pioneer.” *Id.* The **Sanborn Pioneer** and **O’Brien County’s Bell-Times-Courier** are both published in Paullina, Iowa, and both meet all of the requirements under Iowa Code § 618.3 for official publication newspapers of general circulation. *Id.* at ¶¶ 6-7.

On July 1, 1972, Creative House Enterprises, Inc. founded “The N’West Iowa REVIEW,” and said newspaper was ultimately acquired by Iowa Information. *See* App. 92 at ¶ 11 (Stipulation). On January 1, 1986, Iowa Information acquired two additional newspapers, “The Sheldon Mail” and “The Sheldon Sun.” *Id.* Both of these newspapers were later combined into “The Sheldon Mail-Sun.” *Id.* The **N’West Iowa REVIEW** and the **Sheldon Mail-Sun** are both published in Sheldon, Iowa, and both meet all of the requirements under Iowa Code § 618.3 for official publication

newspapers of general circulation. *See* App. 91 at ¶ 9 and App. 92 at ¶ 10 (Stipulation).

In preparation for the January 2018 session of the O'Brien County Board of Supervisors, pursuant to the statutory requirements of Iowa Code Chapter 349, Marcus News and Iowa Information both submitted applications to the Board of Supervisors requesting their respective newspapers be selected as the official county publications. *See* App. 9 (Email of Marcus News to Board of Supervisors) and App. 10-11 (Letters from N'West Iowa REVIEW and Sheldon Mail-Sun). Marcus News submitted its two newspapers for consideration as one newspaper, whereas Iowa Information submitted its two newspapers as separate newspapers.

Pursuant to Iowa Code § 349.4, the Board of Supervisors set a hearing on the publication applications, and sent a Notice to the parties on January 3, 2018 regarding the hearing date. *See* App. 12-13 (BOS Letters to Marcus News and Iowa Information).

On January 7, 2018, Marcus News, through Mari Radtke, submitted a combined verified application regarding the Sanborn Pioneer and O'Brien County Bell Times-Courier. *See* App. 14. On January 8, 2018, Iowa Information, through Peter Wagner, submitted separate verification

applications for the Sheldon Mail-Sun and the N'West Iowa Review. *See* App. 32 (Sheldon Mail-Sun) and App. 50 (NWIA Review).

The Affidavit of Marcus News swore the total number of bona fide yearly subscribers to the Sanborn Pioneer and O'Brien County Bell-Times-Courier, when combined, was 814. *See* App. 14. Individually, the total number of subscribers for the Sanborn Pioneer was 342 and 471 for the O'Brien County's Bell-Times-Courier. *See* App. 92 at ¶14. The Affidavit of Iowa Information swore the total number of bona fide yearly subscribers to the N'West Iowa REVIEW was 1,146 and 784 subscribers for the Sheldon Mail-Sun. *See* App. 32 and 50 (Affidavits of Iowa Information).

On January 9, 2018, the O'Brien County Board of Supervisors held a hearing concerning the applications, which was transcribed. *See* App. 76. The Board heard testimony of Mari Radtke, on behalf of Marcus News, and Peter Wagner, on behalf of Iowa Information. *See* App. 76-77 (Transcript).

The Board ultimately awarded one legal publication right to N'West Iowa REVIEW (Iowa Information), as it was the largest newspaper with 1,146 subscribers. *See* App. 79 (Minutes). The Board further determined the newspapers of Marcus News (Sanborn Pioneer and the O'Brien County Bell-Times Courier) should not be considered as one combined newspaper under Iowa Code § 349.6 and, since neither exceeded the 784 subscribers of

the Sheldon-Mail Sun, the Board awarded the second county publication right for the 2018 year to the Sheldon Mail-Sun (Iowa Information). *Id.*

On January 25, 2018, Marcus News filed a Notice of Appeal to the O'Brien County District Court, pursuant to Iowa Code § 349.11. *See App. 81.* On February 13, 2018, the O'Brien County Attorney filed his appearance. *See App. 82.* On March 20, 2018, Iowa Information filed a Motion to Intervene, and such intervention was granted on March 22, 2018. *See App. 83 and 86.*

The transcript of the Board proceeding was filed with the District Court on January 30, 2018; however, the minutes of the Board meeting, which contained the written decision, were apparently not filed with the transcript. *See App. 76 (Transcript) and 79 (Minutes).*

On July 13, 2018, the Court set a deadline for a joint stipulation of facts, as well as briefs by the parties. *See App. 88.* On July 23, 2018, a Joint Stipulation of Facts was filed by the parties. *See App. 90 (Stipulation).* Additionally, there were nine (9) exhibits submitted to the District Court for review pursuant to the Joint Stipulation. *See App. 97 (Exhibit 1), 98 (Exhibit 2), 99 (Exhibit 3), 100 (Exhibit 4), 101 (Exhibit 5), 102 (Exhibit 6), 103 (Exhibit 7), 104 (Exhibit 8) and 120 (Exhibit 9).*

On August 1, 2018, the parties each filed their respective trial briefs. *See App. 217 (Marcus News) and App. 176 (Iowa Information)*. On August 15, 2018, the parties each filed their respective Reply Briefs. *See App. 245 (Marcus News) and 253 (Iowa Information)*.

Based upon the Joint Stipulation and Briefs, the matter was submitted to the District Court solely on oral arguments. A transcript of the oral argument has been filed with the Court. *See App. 262*. Pursuant to Iowa Code § 349.13, the appeal to the District Court was tried *de novo*. *Id.*

Marcus News made several arguments on appeal to the District Court: (i) Upon proper statutory interpretation of Iowa Code Chapter 349.6, the two publications of Marcus News should be treated as one newspaper as they are offered for sale or delivered to the same geographic area; (ii) The legislative intent of Chapter 349 is supported by combining both newspapers of Marcus News as one newspaper, and both newspapers of Iowa Information as one newspaper; and (iii) There was a considerable number of Iowa Information subscribers listed on the Iowa Information Affidavit which do not meet the statutory requirements – that is, the customers were not yearly subscribers to the Iowa Information newspapers, but only six (6) month subscribers and should not have been included on Iowa Information’s Affidavit. *See App. 220-25*. In regards to the subscriber issue, Marcus News argued that under

Iowa Code § 349.5, the verified list of subscribers must be “bona fide **yearly** subscribers living within the county.” *See* App. 222-23. (Noteworthy is that all subscribers to the Marcus News publications are yearly subscribers, because only yearly subscriptions to those publications are offered. *See* App. 94 at ¶ 27 (Stipulation)).

Iowa Information disagreed and argued the newspapers of neither party should be combined under Iowa Code Iowa Code § 349.6 (i.e., that they should be treated as separate newspapers). *See* App. 187-88. As such, each Iowa Information publication would have more subscribers than either publication of Marcus News. *See* App. 188-89.

On August 15, 2018, Marcus News filed its Reply Brief and argued, based upon an analysis of the Exhibits to the Stipulation, there are three possible circulation alternatives. *See* App. 246. The **first option** combines Iowa Information’s publications (N’West Iowa REVIEW and Sheldon Mail-Sun), which would result in a circulation to 1,508 subscribers. *Id.* The **second option** combines the Marcus News’ publications (O’Brien County Bell-Times-Courier and Sanborn Pioneer) with the N’West Iowa REVIEW, which would result in a circulation to 1,697 subscribers. *Id.* The **third option** combines both papers of Marcus News and Iowa Information, which would result in a circulation to 1,994 subscribers. *Id.* (Those figures include

an adjustment for duplicate subscriptions (i.e., for those who subscribe to more than one publication), but this adjustment does not affect the largest to smallest comparison of circulation numbers.)

Marcus News argued to the District Court that the Board of Supervisors chose alternative #1, notwithstanding the fact that it is the alternative with the lowest subscriber circulation of its notices. *Id.* Marcus News argued this reasoning of the Board and the result thereby obtained is inconsistent with both the purpose and the specific requirements of Chapter 349. *Id.*

Iowa Information argued in its Reply Brief that the District Court should rely upon the prior rulings of O'Brien County District Court and apply them as precedent for this case. *See App. 255.* Iowa Information argued "same geographic area" must mean something less than the entirety of O'Brien County, and that the Court previously focused on the northern and southern parts of the County in prior cases. *Id.*

Iowa Information further argued, regarding the subscriber list allegation of Marcus News, that all Iowa Information subscribers on Exhibit 9 had "renewal terms of at least 6 months" and were "bona fide subscribers" under Iowa Code § 349.7. *See App. 259.* Additionally, Iowa Information alleged "[t]he durations on the [Exhibit 9] merely show the length of a

subscriber's renewal term. All subscribers in question were subscribers before their renewal term began and all renewed their subscriptions for an additional six months." *Id.* These alleged facts, however, were not supported by the Joint Stipulation of Facts (including any of the admitted exhibits), and Marcus News, therefore, contended that they should not be considered by the Court.

On October 10, 2018, the District Court entered its Ruling and Order and affirmed the decision of the Board of Supervisors to consider the Sanborn Pioneer and O'Brien County Bell-Times Courier as separate newspapers for the purposes of Iowa Code § 349.6. *See App. 323.* Additionally, the District Court affirmed the Board of Supervisors designation of the N'West Iowa REVIEW and Sheldon Mail-Sun as the official newspapers for O'Brien County for the year 2018. *See App. 324.*

On October 24, 2018, Marcus News filed a Motion for Reconsideration, which was resisted by Iowa Information on November 2, 2018. *See App. 326 and 332.* Marcus News argued the Court (i) failed to provide proper guidance to the Board of Supervisors in determining the "same geographic area," (ii) failed to give proper consideration to the area in which the Marcus News newspapers were circulated such that the "same geographic area" requirement would be met, (iii) failed to properly identify

the single area in which the Iowa Information newspapers were circulated, (iv) failed to consider legislative intent for the statute, and (v) failed to address the fact the subscriber list of Iowa Information did not consist entirely of “yearly subscribers.” *See* App. 326-31

The District Court entered its ruling on November 28, 2018, denying the Motion for Reconsideration of Marcus News. *See* App 339. The District Court rejected the possibility that the “whole of O’Brien County” could be a “single geographic area” and chose to follow determinations under the 2007 and 2009 District Court rulings. *See* App. 340. The District Court further rejected the argument that the Iowa Information newspapers should be considered as one newspaper, purportedly applying the results of the 2007 and 2009 District Court rulings. *Id.* The District Court found the applicable statutes “clear and unambiguous” and declined to pursue a legislative purpose analysis. *See* App. 341. Finally, the District Court declined to address Marcus News allegations that the subscriber lists of Iowa Information did not comply with the Iowa Code requirements for verified lists, basing this on its belief that the argument was not properly raised at the time of trial (which the record indicates was clearly incorrect). *Id.*

On November 30, 2018, Marcus News filed a Notice of Appeal. *See* App. 343.

STANDARD OF REVIEW

Iowa Code § 349.13 provides the appeal from the Board of Supervisors to the District Court was “triable *de novo* as an equitable action without formal proceedings.” As this is an appeal of an equitable proceeding, the standard of review before the Supreme Court is also *de novo*. See *Albert v. Conger*, 886 N.W.2d 877, 879 (Iowa 2016).

ARGUMENT

I. THE DISTRICT COURT ERRED IN REFUSING TO CONSIDER THE PURPOSE OF IOWA CODE CHAPTER 349

In the underlying appeal to the District Court, Marcus News requested the Court consider the legislative intent of Iowa Code § 349.6 in making its’ determination of the meaning of “same geographic area”; however, the District Court refused to analyze the intent of the statute and stated “We will not search for meaning beyond the express terms of the statute when the statute is plain and its meaning is clear.” See App. 323. Marcus News contends a review of Iowa Code § 349.6 (including the uncertain meaning of “same geographic area”), as well as the fact there have been three lawsuits in O’Brien County since 2005 involving Iowa Chapter 349, justify an analysis of legislative intent, which includes consideration of the purpose of Iowa Code § 349.6, second paragraph.

As noted by Judge Lester in the underlying decision, the “pivotal language” at issue in the present case is the meaning and application of **“offered for sale in or delivered to the same geographic area.”** See App. 319. This second paragraph of Iowa Code § 349.6, which is the issue in this case, was added by the General Assembly in 1986. See Acts 1986 (71 G.A.) ch. 1013, § 1, eff. Jan. 1, 1987. There are no Iowa Supreme Court or Iowa Court of Appeals cases interpreting the relevant language of the statute, since its 1986 enactment.

In *Albia Publishing Company v. Klobnak*, 434 N.W.2d 636 (Iowa 1989), which was decided prior to the 1986 amendment to Iowa Code § 349.6, the Iowa Supreme Court did discuss the intent of Chapter 349:

“Although not dispositive of the question before us, we may glean from even the earliest of these cases the principle that ‘[t]he reason for selecting the papers having the largest number of subscribers is **to secure as large a general circulation of the official publications of the county among its citizens** as is practicable in two newspapers.’” Id. at 638 (emphasis added), (quoting *Ashton v. Story*, 96 Iowa 197, 64 N.W. 804 (Iowa 1895) (other citations omitted)).

In the first newspaper case in O’Brien County, *Paullina Times* (2007), which was also a case decided by Judge Lester, the Court (in contrast to the present case) **applied** general principles of statutory interpretation to Iowa Code § 349.6, as further discussed below. See App. 207 (*Paullina Times*).

In the Ruling, Judge Lester, in citing *Albia*, 434 N.W.2d 636, identified the earlier holdings of cases prior to the 1986 amendment of Iowa Code § 349.6, as a “legislative mandate directing county boards of supervisors to select official newspapers ‘having the largest number of subscribers is to secure as large a general circulation of the official publication of the county among its citizens as practicable.’” *See* App. 209 (quoting *Albia*, 439 N.W.2d at 638) (citing *Ashton*, 64 N.W. at 801; *Times Guthrian Pub. Co. v. Guthrie County Vedett*, 125 N.W.2d 829, 832 (Iowa 1964)).

Judge Lester stated in *Paullina Times*:

the advancement of this underlying principle would best be accomplished by allowing commonly owned newspapers, such as The Times and The Courier, which are offered for sale in or delivered to the same geographic area to combine their subscriber lists, because a larger subscriber base clearly translates into a larger circulation of the official publications of the county among its citizens.

See App. 209.

Judge Lester further stated in *Paullina Times* “another well-established tenet of statutory interpretation that courts are not authorized to read a limitation into a statute that is not supported by the words chosen by the general assembly.” *See* App. 211 (citing *Zomer v. West River Farms, Inc.*, 666 N.W.2d 130, 134 (Iowa 2003); *Moulton v. Iowa Employment Sec. Comm.*, 34 N.W.2d 211, 216 (Iowa 1948)). In the 2009 O’Brien newspaper

case, *Iowa Information*, Judge Carr also applied the concepts of statutory interpretation in determining the meaning and application of “same geographic area” under Iowa Code § 349.6. *See App. 195-98.*

In the present case, Marcus News contends Judge Lester erred in refusing to apply principles of statutory interpretation relating to the legislative purpose of the statute, as the District Court had done in the past. Without application of those principles, there is no guide for the parties and the Board of Supervisors in determining what is the “same geographic area.” Additionally, without such guidance as to the meaning of “same geographic area,” the intent of the statute – to get the largest publication circulation for the County’s notices – can be violated. As a result, the District Court’s refusal to apply the principles of statutory interpretation was erroneous, and the Court’s ruling should be reversed.

II. THE CORRECT INTERPRETATION OF THE “SAME GEOGRAPHIC AREA” CRITERIA IN IOWA CODE § 349.6 REQUIRES SELECTION OF CLEARLY DEFINED AREAS, SUPPORTIVE OF THE LEGISLATIVE PURPOSE OF CHAPTER 349

It is well-settled that the purpose of the interpretation of statutes is to determine the legislature’s intent. *See State v. Lindell*, 828 N.W.2d 1, 6 (Iowa 2013) (citing *Estate of Bockwoldt*, 814 N.W.2d 215, 223 (Iowa 2012)). Additionally, this Court has previously stated:

“We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. We also consider the legislative history of a statute, including prior enactments, when ascertaining legislative intent. When we interpret a statute, we assess the statute in its entirety, not just isolated words or phrases.” *Id.* (quoting *Doe v. Iowa Dep’t of Human Servs.*, 786 N.W.2d 853, 858 (Iowa 2010) (citations omitted)).

Furthermore, in ascertaining legislative intent, the Court considers “the statute's subject matter, the object to be accomplished, the purpose to be served, underlying policies, remedies provided, and the consequences of the various interpretations.” *Id.* (citing *State v. Dohlman*, 725 N.W.2d 428, 431 (Iowa 2006)). Finally, the Court should also “consider the legislative history of a statute when determining legislative intent.” *Id.* In this case, however, the legislative history provides no enlightenment as to the legislative purpose for the “same geographic area” language.

The Iowa Supreme Court has also previously opined in *Griffin Pipe Products Co. v. Guarino*, 663 N.W.2d 862, 864-65 (Iowa 2003):

“When we interpret a statute, we attempt to give effect to the general assembly’s intent in enacting the law ... Generally, this intent is gleaned from the language of the statute. ... To ascertain that meaning of the statutory language, we consider the context of the provision at issue and strive to interpret it in a manner consistent with the statute as an integrated whole.” *Id.*

First, as there is no “statutory definition” of “same geographic area,” we look to the common and ordinary meaning of the words. Black’s Law Dictionary defines “same” as “identical, equal, equivalent.” The word ‘same,’ however, does not always mean ‘identical.’ It frequently means of the kind or species, not the specific thing.” *See* Black’s Law Dictionary 6th Edition, p. 1340. Webster’s Dictionary defines “geographic” as “belonging to or characteristic of a particular region.” *See* Merriam-Webster Dictionary Online (www.Merriam-webster.com). Black’s Law Dictionary further defines “area” as “a surface, a territory, a region.” *See* Black’s Law Dictionary 6th Edition, p. 106. These definitions provide some guidance as to the common and ordinary meaning of the defined words, as well as the phrase “same geographic area,” but they do not provide a clear understanding of the legislative intent in using the phrase in Iowa Code § 349.6, particularly, as it relates the various publication areas of the newspapers within O’Brien County.

As noted by Judge Carr in the 2009 *Iowa Information* case, after applying the dictionary definition of the various words, “‘same geographic area’ must mean that the ‘region’ to which the newspapers are delivered must be ‘the same.’” *See* App. 196. The Court further noted, as the phrase applied to the Times and Sentinel newspapers:

“To be fair ... the phrase “same geographic area” is a very loose term. The same geographic area could just as easily describe a single neighborhood, the whole state, or the Upper Midwest. It is most reasonable, in the Court’s view, to focus on the real area of interest, O’Brien County.” *See App. 197.*

Judge Carr was correct in recognizing the ambiguity of the phrase “same geographic area.” The Court should therefore look to what the legislature intended in using the term. *See Lindell*, 828 N.W.2d at 6 (quoting *Doe*, 786 N.W.2d at 858).

In this regard, it is important to note that the prefatory wording of the second unnumbered paragraph of Iowa Code § 349.6 indicates that the geographic area and subscriber criteria are “For purposes of this section ...” The first paragraph of Section 349.6 reflects the purpose of the section by referring to selection of newspapers “showing the largest number of bona fide yearly subscribers.” *Id.* Additionally, the same reference to the “largest number of bona fide subscribers” is also in Iowa Code § 349.2. Clearly, Iowa Code § 349.6 should, therefore, be interpreted to support circulation to the “largest number of bona fide yearly subscribers,” as such interpretation is consistent with and reinforces *Albia*.

In this case, in defining “same geographic area,” in a manner complying with the legislative purpose of the statute (i.e., to result in the

largest circulation of the publications of the Board of Supervisors), a more specific definition or delineation of applicable areas is in order. Marcus News argued before the Board of Supervisors and the District Court that O'Brien County in its entirety would meet the requirement of "same geographic area" and that this would facilitate the largest circulation of the Board's publications in the County. Marcus News argued, in the alternative, if the Board or the District Court were to look to specific areas within the County, the areas should be clearly identified. It noted in its Motion for Reconsideration that its publications are predominately circulated in the geographic area west of Highway 59, as shown in Exhibit 7 (App. 103), which creates a clearly delineated eastern/western division of the County. Such established demarcation would provide guidance to the applicants, as well as the Board, as opposed to the arbitrary and vague northernly/southerly division adopted by the Board and the District Court, which has no specific boundary,

Judge Lester ultimately refused, however, to consider the clear intent of Iowa Code § 349.6 and accepted the Board's northern/southern terminology. *See App. 323.* He also declined to extend the meaning of "same geographic area" to the entire O'Brien County, summarily concluding the "whole cannot be considered the 'same geographic area' under these

facts without effectively doing away with the impact of the legislatively created limitations created by the phrase, itself.” See App. 321. There was no explanation of the limitation to which he was referring.

In other cases and authority, geographic areas have typically been analyzed in terms of specific areas with established boundaries.¹ Requiring the boards of supervisors to utilize that type of analysis would provide them and the newspaper applicants with needed guidance in applying the statutory requirements; and, as demonstrated by this case, assist in obtaining the result desired by the legislature identified in *Albia*--to provide the widest possible overall circulation of county notices. Furthermore, there would be less potential for recurring conflict between the owners of more than one newspaper and possibly achieve more equitable results in which each owner has the opportunity to be treated as the publisher of a single newspaper that can be selected for the county publications. As the statute was interpreted in this case, the boards are left to identify geographic zones as they see fit in order to choose one publisher over another, without any consistent analysis and application among the counties in the State of Iowa.

¹ Cf. *City of Postville v. Upper Explorerland Regional Planning Commission*, 834 N.W.2d 1 (Iowa 2013) (having subscriptions in all but one county of the Commission’s five-county region met statutory requirement of publication in one newspaper of general circulation within the geographic area served by board); 1990 Iowa Op. Atty. Gen. 61 at 3 (1990 WL 484865) (describing listing of state, district, county, township, city and ward in Iowa Code § 69.2 as enumeration of geographic areas).

Iowa Code § 349.6, second paragraph, therefore supports Marcus News' position in this matter, and requires that the District Court's ruling be reversed.

III. THE BOARD AND DISTRICT COURT ERRED IN NOT COMBINING THE PUBLICATIONS OF MARCUS NEWS AND IOWA INFORMATION

Marcus News submitted to the District Court, in support of its claim that its papers are offered for sale in the same geographic area under Iowa Code § 349.6, Exhibits 4, 5, and 7, which show in table and graphic form the numbers of subscribers that would be reached in various combinations of those newspapers, taking into account subscriber duplication between and among them. *See* App. 100 (Exhibit 4), 101 (Exhibit 5), and 103 (Exhibit 7). The county map provided with the trial exhibits indicates the overall breadth of Marcus News' subscribers throughout the county, and that there is concentration west of Highway 59. *See* App. 103 (Exhibit 7). It supports a finding that the newspapers of Marcus News are published in the "same geographic area."

Likewise, the information submitted with the exhibits supports a finding that the publications of Iowa Information should be combined for purposes of the statute as a single publication. Exhibit 3 shows that it has 42% of its N'West Iowa REVIEW subscribers in the City of Sheldon, which

is approximately 481 subscribers. *See* App. 99. Exhibit 4 shows that it has 87% of its Sheldon-Mail Sun subscribers in the City of Sheldon, which is approximately 682 subscribers. *See* App. 100. In total, Iowa Information has 1,163 of its 1,930 subscribers in the City of Sheldon. Clearly, both of its publications can and should be treated as published for the “same geographic area” and should therefore be treated as one publication.

Exhibit 5 shows the subscription number with a combination of subscribers of Marcus News (both of its publications together) and Iowa Information’s N’West Iowa REVIEW as 1,697. *See* App. 101. In this analysis, subscribers who are duplicated in the circulation of those three newspapers are counted only once. Disallowing Marcus News as a publisher of the board notices, and choosing only N’West Iowa REVIEW and Sheldon Mail Sun for the publications results in circulation of board notices to only 1,508 subscribers, without duplications. This exhibit reinforces the fact that the legislative intent, to provide the broadest circulation of county notices throughout the County, is supported by an interpretation and application of the statute which combines the publications of Marcus News with at least one of the Iowa Information publications. (As explained in the Statement of Facts, this conclusion is not changed if there is no adjustment for duplicate subscribers.)

Thus, subscription analysis confirms that the Board's and District Court's decision to not combine papers as common publications and not award both Marcus News and Iowa Information publication rights, violates the intent of Iowa Code § 349.6 and was erroneous, and should be reversed.

IV. THE DISTRICT COURT ERRED IN FAILING TO CONSIDER THE AFFIDAVIT OF IOWA INFORMATION AS NOT COMPLYING WITH THE IOWA CODE

In the Joint Factual Stipulation provided to the District Court, the parties agreed that Exhibit 8 was “a listing prepared by Plaintiff of the subscribers identified in the affidavit it submitted to the Board of Supervisors, with details regarding each of their subscriptions. **Each of their subscriptions is for duration of 12 months**, as that is the only subscription period offered by Plaintiff.” *See* App. 94 at ¶ 27 (Stipulation) (emphasis added). The factual stipulation further provided that Exhibit 9 was “a listing, prepared by Intervenor, of the subscribers identified in the affidavit it submitted to the Board of Supervisors, with details regarding each of their subscriptions. **Some of their subscriptions are for less than one year.**” *See* App. 94 at ¶ 28 (Stipulation) (emphasis added).

In its trial brief, Marcus News noted that the subscriber list it provided to the Board, which amounted to a combined 813 subscribers, were all “yearly subscribers, all of whom were subscribers for at least six consecutive

months prior to the date of the application of the Board, as required under §§ 349.6 and 349.7.” *See* App. 219 (citing Factual Stipulation, ¶ 27, Exhibit 8). Marcus News argued, in addressing the subscriber lists offered by Iowa Information, “[t]here are a considerable number of subscribers to each of those publications who were not yearly subscribers for at least six consecutive months prior to the date of the application to the Board, as required under §§ 349.6 and 349.7.” *See* App. 220. Marcus News also contended the inclusion of them in the affidavits of Iowa Information, namely Exhibits 4 and 5, was clearly a violation of the statutory requirements regarding subscription duration. *See* App. 223. Marcus News argued the Court would have authority to strike those subscribers. *Id.* (citing *Ashton*, 64 N.W. at 805) (noting the District Court did strike 119 names from a publisher’s list that did not meet the quoted requirement).

Additionally, during oral arguments before the District Court, the attorney for Marcus News argued:

“I would like to call to your attention ... what came out in discovery ... something that was not before the board because this detail didn’t exist in what was provided to the board. That has to do with the fact that quite possibly the list provided by intervenor of its subscribers did not in its entirety meet the requirement of listing only yearly subscribers who had been subscribers within the preceding six months, which is the wording in the statute.

When we analyzed those lists, there were 28 of the Sheldon Mail-Sun subscribers that had six-month subscriptions, and there 37 of the N'West Iowa Review that had less than one-year subscriptions for a total of 65, 65 who had less than one-year subscriptions.

Now, in its brief, Intervenor says that that's really insignificant. It's insignificant because it doesn't affect in its view what the outcome should be, and it's insignificant because a lot of those six-month subscribers were actually yearly subscribers. Well, there is nothing in this record that substantiated that they were yearly subscribers, and if this information that we received during discovery regarding these less-than-one-year subscriptions had been available to the board, maybe it would have had an opportunity to ask intervenor about the significance of those numbers and to get clarification as to whether or not they really were yearly subscribers. So I think at a minimum, Your Honor, those numbers should be stricken from each of their lists. And if you do so, then what we have here even results in a more significant difference between the choices that would have been available to the board.

I think there is also an issue here of the truthfulness of the intervenor in what it listed because it signed an affidavit saying that it was providing a list of yearly subscribers who had been subscribers for at least six months. So there could be other questions about its list if it were looked at more closely, and those questions would be possibly prompted by the fact that it really hasn't provided a truthful representation of the nature of its subscriptions." *See* Transcript of Hearing, p. 20-21.

Judge Lester failed to address this issue in his Ruling, prompting Marcus News to raise the issue again in the Motion to Reconsider. *See* App.

330. However, in its ruling on the Motion to Reconsider, the Court refused to address the issue, stating it was raised for the first time in the Motion to Reconsider and therefore would not be addressed. *See App. 341.*

Clearly, Marcus News repeatedly raised the issue with the District Court. It was extremely relevant to the underlying case, as Iowa Code § 349.5 requires applicants to submit a statement, verified by the applicant, showing the names of its “bona fide yearly subscribers.” If Iowa Information’s affidavit violated Iowa Code § 349.5, the Board and/or the District Court would have authority to strike the improper subscribers or even strike the entire Affidavit. The District Court’s refusal to consider the issue was erroneous and should be reversed.

CONCLUSION

As a result of the failure to identify the purpose of the statutory requirements under Iowa Code Chapter 349 for selection of newspapers for publication of the official county notices for O'Brien County, the County Board of Supervisors and the District Court incorrectly excluded the newspapers of Marcus News from the designation of its official publishers. If the Board had sought to achieve the objective of obtaining the largest possible circulation of the notices, in accordance with the prior decisions of this Court and the terms of the statute itself, it would have been able to

easily select specific, clearly identifiable area(s), including the County as a whole, that would have satisfied the statutory criteria for combining the publications of either or both Marcus News and Iowa Information as one newspaper, published in the same geographic area. The District Court further erred in allowing Iowa Information to utilize subscriber lists in the selection process that included subscribers with only six-month subscriptions, contrary to the requirement under Iowa Code Chapter 349 to include only "yearly subscribers" in the lists submitted to the Board. The Supreme Court, under its *de novo* review authority, should therefore reverse the decision of the District Court.

REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument upon submission of this case.

Respectfully submitted this 15th day of April, 2019.

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Iowa Rules of Appellate Procedure 6.903(1)(g)(1) because this brief contains **6,860 words**, excluding the parts of the brief exempted by Iowa Rules of Appellate Procedure 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa Rules of Appellate Procedure 6.903(1)(e) and the type-style requirements of Iowa Rule of Appellate Procedure 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Word version 2010, Times New Roman font type, size 14 font.

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COST CERTIFICATE

I, Colby M. Lessmann, hereby certify that, *as this brief was electronically filed pursuant to EDMS Appellate Rules*, the actual cost of reproducing the necessary copies of the preceding Appellant’s FINAL Brief consisting of **41** pages (including Cover Page) was **\$0.00** and that amount has been actually paid in full by Appellants.

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CERTIFICATE OF FILING

I, Colby M. Lessmann, hereby certify that on April 15, 2019, I filed one (1) copy of Appellant's FINAL Brief by electronic filing into the Iowa Supreme Court EDMS online filing system, pursuant to Rule 16.1221(1).

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CERTIFICATE OF SERVICE

I, Colby M. Lessmann, hereby certify that on April 15, 2019, I served the attached Appellants' FINAL Brief by filing said brief in the Iowa Supreme Court EDMS online filing system, and no additional service is required upon Appellant pursuant to Rule 16.1221(2).

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