

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 REPLY 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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I. The District Court Incorrectly Affirmed the O'Brien County Board of Supervisors' Selection of Official Newspapers For 2018

C. The District Court Erred in Failing to Identify the Correct Principles of Statutory Interpretation in Determining The Meaning of "Same Geographic Area" Under Iowa Code Section 349.6

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D. The District Court Improperly Determined that the Sanborn Pioneer and the O'Brien County's Bell-Times-Courier Should be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6

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E. The District Court Improperly Determined that the Sheldon-Mail Sun and the N'West Iowa REVIEW Should be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6

II. The Legislative Purpose and History of Iowa Code Section Does Not Support the District Court's Ruling

A. Preservation of Error.

Albert v. Conger, 886 N.W.2d 877 (Iowa 2016)

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C. Appellee has Mislead the Court with its Contentions Regarding the Legislative Purpose and History of the 1986 Amendment of Iowa Code Section 349.6

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1. Appellee's Contention that Section 349.6 Only Requires a Publisher to Publish Official Notices in One of the Two Newspapers Combined by the Board of Supervisors is Based upon its Patently Fallacious Argument Regarding the Explanation of SF 326.

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2. Appellee's Contention that Section 349.6 Is a Tool that Allows a Board of Supervisors, Not a Publisher, to Combine Two Newspapers Under Certain Circumstances is Inaccurate.

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III. The Subscriber Lists For The Sheldon Mail-Sun and the N'West Iowa REVIEW in their Affidavits Are Not Bona Fide in Compliance with Iowa Code Chapter 349

A. Marcus News Did Preserve Error on the Issue of Whether to Strike Iowa Information's Subscriber Lists Because the Issue was Raised Before the District Court.

Ashton v. Story, 96 Iowa 197, 64 N.W. 804 (Iowa 1895)
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C. All of the Subscribers Listed in the Affidavits of Iowa Information, Inc were *not* Yearly Subscribers as Required in Iowa Code Section 349.7

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D. If the District Court were to Strike Subscribers from the Affidavits of Iowa Information, the Outcome would be Impacted.

ROUTING STATEMENT

Marcus News disagrees with the Routing Statement of Appellee, as there is NOT an established body of law in Iowa regarding the statutory interpretation of Iowa Code § 349.6. This is the first time the interpretation of this code section has been presented to the Iowa Supreme Court since its amendment in 1986, and, as such, contains “substantial issues of first impression.”

ARGUMENT

Iowa Information’s Brief does not follow or correspond to those headings utilized in Appellant’s Brief. Marcus News, however, will follow Iowa Information’s Brief headings in its Reply Brief.

I. The District Court Incorrectly Affirmed the O’Brien County Board of Supervisor’s Selection of Official Newspapers for 2018.

A. Preservation of Error.

Marcus News agrees error was preserved.

B. Scope of Review.

Marcus News agrees the standard of review is *de novo*.

C. **The District Court Erred in Failing to Identify the Correct Principles of Statutory Interpretation in Determining the Meaning of ‘Same Geographic Area’ Under Iowa Code Section 349.6.**

Iowa Information contends the statutory interpretation arguments of Marcus News are misplaced because “[l]egislative purpose only becomes important to the interpretation and application of the statute to the extent that the language is ambiguous and unclear.” *See* Appellee’s Brief at 8 (citing *Iowa Dep’t of Transp. v. Soward*, 650 N.W.2d 569, 571 (Iowa 2002)). Marcus News does not dispute the legal requirements for statutory interpretation; however, Marcus News contends the language of “same geographic area” in Iowa Code § 349.6 is ambiguous and unclear, requiring statutory interpretation that takes into account legislative purpose.

It is well-settled the purpose of statutory interpretation is to determine the legislature’s intent. *State v. Lindell*, 828 N.W.2d 1, 6 (Iowa 2013) (citing *Estate of Bockwoldt*, 814 N.W.2d 215, 223 (Iowa 2012)). 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.* Specifically, the Supreme Court 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.*

Judge Carr and Judge Lester both recognized ambiguity in the statute in both prior cases in O’Brien County. *See 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). Notably, in *Paullina Times*, Judge Lester noted that the “court’s interpretation of unnumbered paragraph two of Section 349.6 . . . cannot be read in isolation, but rather must be read and interpreted . . . ‘in a manner consistent with the statute as an integrated whole.’” *See* App. 209-10 (*Paullina* at 11-12). Therefore, Marcus News requested the District Court interpret Iowa Code § 349.6, with reference to the purpose of Chapter 349, to determine the meaning of “same geographic area.” Judge Lester refused and stated “[w]e 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 (Ruling at 8). In finding “same geographic area” is clear and unambiguous, Judge Lester’s analysis was contrary to his prior analysis in *Paullina Times*. *See* App. 207-13 (*Paullina*, at 9-15).

Iowa Information ultimately concedes, however, “[s]tatutory interpretation is required to determine the meaning of the phrase ‘same geographic area’, a term that is not defined in the statute. The purpose of statutory interpretation is to determine the legislature’s intent.” *See* Appellee’s Brief at 10 (citation omitted).

In 2009, in *Iowa Information*, Judge Carr reviewed the dictionary definitions of the various words and concluded “‘same geographic area’ must mean that the ‘region’ to which the newspapers are delivered must be ‘the same.’” *See* App. 197. The Court further noted:

“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.” *Id.*

To resolve the ambiguity, “same geographic area” should be defined by the Court in a manner consistent with the legislative purpose of the statute (i.e., to result in the largest circulation of the publications of the Board of Supervisors). For this intent to be accomplished, a more specific definition or demarcation of a geographic area is required by the Court.

Marcus News argued before the Board of Supervisors and the District Court that defining O'Brien County in its entirety can 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. Such established demarcations would provide guidance to future Boards and Applicants and avoid arbitrary and vague determinations by the Board or District Court, which have no specific boundary.

Marcus News contends Judge Lester's refusal to apply the correct principles of statutory interpretation relating to the legislative purpose of the statute, as the District Court had done in the past, was in error and should be reversed. Without application of those principles, there is no guide for the parties and the Board in determining what is the "same geographic area." Additionally, without such guidance the intent of the statute – to get the largest publication circulation for the County's notices – can be violated.

D. The District Court Improperly Determined that the Sanborn Pioneer and the O'Brien County's Bell-Times-Courier Should be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6

Iowa Information argues Exhibit 1 and Exhibit 2 reflect 92% of subscribers of O'Brien County Bell-Times Courier are located in the

Southern part of O'Brien County and 94% of subscribers to The Sanborn Pioneer are located in the Northern part of O'Brien County. *See* Appellee's Brief at 14. Marcus News disputes those percentage characterizations as they are merely the result of Iowa Information trying to construct another chart – one that was not presented in evidence to the District Court. *See* App. 97 and 98 (Exhibits 1 and 2). Moreover, those mathematical characterizations are misleading, and the more relevant and clear evidence on the topic is Exhibit 7, which was presented to Judge Lester during the initial appeal to District Court. *See* App. 103 (Exhibit 7).

As noted in Appellant's Brief, geographic areas have typically been analyzed in terms of specific areas with established boundaries.¹ An interpretation of "same geographic area" which provides a clear demarcation for the County Board's application, provides newspaper applicants with needed guidance in applying the statutory requirements; and, as demonstrated by this case, assists the Board and the parties in obtaining the result desired by the legislature identified in *Albia Publishing Company v. Klobnak*, 434 N.W.2d 636 (Iowa 1989) - to provide the widest possible

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).

overall circulation of county notices. Additionally, a clear standard would reduce recurring conflict between newspaper owners and possibly achieve more equitable results in which each owner has the opportunity to be treated as the publisher of a single newspaper to be selected for the county publications.

Marcus News disagrees with the Northern/Southern O'Brien County breakdown, based upon an arbitrarily drawn line on the map by Iowa Information, is the only relevant choice for demarcation. The Board and District Court, for example, could have used an Eastern/Western demarcation with Highway 59 as the dividing point, which would establish clearly defined areas on the county map. If Highway 59 were utilized as a boundary, the evidence (Exhibit 7) shows Marcus News has its highest concentration of subscribers West of Highway 59 – supporting its claims that there is “same geographic area” for its publications.

Additionally, the Board and District Court could have used the entire O'Brien County as the standard. Clearly, Iowa Information is utilizing that standard when it attempts to isolate one of its papers to the City of Sheldon, and the other paper to an area which includes the remainder of O'Brien County. Neither the Board nor the District Court provided any specific criteria for its determination of Iowa Information's publication areas.

The characterization by Iowa Information of Marcus News's papers being published in different geographic areas was self-serving, and the District Court failed to consider choices of other geographic areas which would better serve the purpose of the statute. The District Court's decision to not combine papers as a common publication violated the intent of Iowa Code § 349.6 and was erroneous, and should be reversed.

E. The District Court Improperly Determined that The Sheldon-Mail Sun and The N'West Iowa REVIEW Should Be Considered Separate Newspapers for the Purposes of Iowa Code Section 349.6

The confusion created by the lack of demarcation standards is supported by Iowa Information's own arguments and admissions. As admitted in its' brief, the Sheldon Mail-Sun has subscribers predominately located in the City of Sheldon and the N'West Iowa REVIEW is delivered throughout the County.

Iowa Information tries to avoid this problem through the use and reliance upon the percentages of its Exhibits 3 and 4, but those percentages are misleading when compared to the actual number of its subscribers. Exhibit 3 shows that Iowa Information has 42% of its N'West Iowa REVIEW subscribers in the City of Sheldon, which is approximately 481 subscribers. See Exhibit 3. Exhibit 4 shows that it has 87% of Iowa Information's Sheldon-Mail Sun subscribers in the City of Sheldon, which is

approximately 682 subscribers. *See* Exhibit 4. In total, Iowa Information has **1,163** of its **1,930** total subscribers in the City of Sheldon. Clearly, a significant amount of subscribers is located in this single area; therefore, the District Court should have treated both papers as published in the “same geographic area” and should therefore be treated as one publication for purposes of Iowa Code § 349.6. Additionally, neither the Board nor District Court identified any specific demarcation areas for the Iowa Information publications – another example of how the “same geographic area” analysis can produce arbitrary and confusing results without proper statutory interpretation and clear guidance from the Court.

II. The Legislative Purpose and History of Iowa Code Section 349.6 Does Not Support the District Court’s Ruling.

A. Preservation of Error.

Iowa Information argues under Iowa Code § 349.6, if two newspapers are combined, the Board can limit publication to only one of the combined newspapers. Iowa Information’s arguments in this section were never raised before the District Court, and as such, Iowa Information has not preserved these arguments on appeal.

It is undisputed, 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). It is well-settled, in *de novo*

appellate review, the Supreme Court will “examine the entire record and decide anew *the issues properly presented.*” See *In re Marriage of Rhinehart*, 704 N.W.2d 677, 680 (Iowa 2005) (citation omitted) (emphasis added).

As noted above, and as set forth in the well-settled case law, even though the standard of review on appeal is *de novo*, the issues on appeal must still have been properly raised, presented and preserved for appeal with the District Court. See *Rhinehart*, 704 N.W.2d at 680.

B. Scope of Review.

Marcus News agrees the standard of review is *de novo*.

C. Appellee has Mislead the Court with its Contentions Regarding The Legislative Purpose and History of the 1986 Amendment to Iowa Code Section 349.6

Iowa Information again asserts statutory interpretation in this section, however, it blatantly misleads the Court by citing legislative history not applicable to the amended Iowa Code § 349.6. Iowa Information cites to legislative history for the *original* submitted bill, which was fully amended, as discussed below, before it became the final passed version of Iowa Code § 349.6

In support of its legislative intent argument, Iowa Information cites the *original* S.F. 326, 71st General Assembly, First Session, and the

“Explanation” that was included with the *original* Senate File. Appellee’s Brief at 25. Iowa Information admits Senate File 326 was amended by the House before the final version was enacted on March 13, 1986, however, Iowa Information conveniently fails to cite the *original* language of Senate File 326, which is completely different than Iowa Code § 349.6 as passed by the House.

Senate File 326 is reflected as follows:

S.F. 326 H.F. _____

1 Section 1. Section 349.6, Code 1985, is amended by adding
2 the following new unnumbered paragraph:
3 NEW UNNUMBERED PARAGRAPH. If a publisher publishes two or
4 more separately designated newspapers having approximately the
5 same subscriber list or offered for sale in or delivered to
6 the same geographic area, the board of supervisors may choose
7 to select only one of those newspapers as an official
8 newspaper to receive payment for official publication. The
9 board of supervisors may select another newspaper of another
10 publisher having the next largest list of subscribers to
11 receive payment for official publication.

12 EXPLANATION

13 This allows the board of supervisors to select as an
14 official newspaper only one newspaper of a publisher having
15 two or more newspapers with approximately the same subscriber
16 list or offered for sale or delivered to the same geographic
17 area.

18

See S.F. 326, 71st General Assembly, 1st Session (Iowa 1986).

The Senate File 326, which passed the Senate, ultimately went to the Iowa House of Representatives, which, after a 100% complete rewrite, passed the House on February 18, 1986, in the following form:

Senate File 326

LOCAL GOVERNMENT: Waldstein, Chair, Neighbour and Vande Hoef

Local Government (A) (S. 11. 241) 1/2/86
Senate File 326

Local Government: Spear, Chair, Miller and Platt.

Local Government (A) (S. 11. 241) 1/2/86 (p. 501)

SENATE FILE **326**

BY WALDSTEIN

Submitted for H. F. 291 4/12/85

FILED FEB 21 1986

Passed Senate, Date 3-6-86 (p. 634)

Passed House, Date 2-18-86 (p. 347)

Vote: Ayes 45 Nays 4

Vote: Ayes 87 Nays 0

Approved March 13, 1986 (p. 727)

Approved Senate 3.3.86 (p. 517)

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A BILL FOR

- 1 An Act relating to the selection of official newspapers.
- 2 BE IT ENACTED BY THE GENERAL ASSEMBLY OF THE STATE OF IOWA:

HOUSE AMENDMENT TO
SENATE FILE 326

S-5109

- 1 Amend Senate File 326 as passed by the Senate as
- 2 follows:
- 3 1. Page 1, by striking lines 3 through 11 and
- 4 inserting the following:
- 5 "NEW UNNUMBERED PARAGRAPH. For purposes of this
- 6 section, in counties where there are more newspapers
- 7 than the number required for official county
- 8 newspapers, newspapers under common ownership
- 9 published in the same city, and having approximately
- 10 the same subscriber list or offered for sale in or
- 11 delivered to the same geographic area, shall be
- 12 treated as one newspaper. Each such newspaper under
- 13 common ownership should be considered eligible for
- 14 publishing public notices, but such newspapers shall
- 15 be treated as one newspaper for payment purposes to
- 16 allow for flexibility in notice publication
- 17 schedules."
- 18 2. Page 1, by inserting after line 11 the
- 19 following:
- 20 "Sec. 2. This Act becomes effective January 1,
- 21 1987."

S-5109 Filed February 20, 1986 Received from the House
Local Government 2/18 (p. 517)

See S.F. 326. The final version of Iowa Code § 349.6 is merely explained as “An Act relating to the selection of official newspapers.” *Id.*

Iowa Information provides no legal authority to support how an explanatory statement on an unapproved piece of proposed legislation has any relevancy to legislative intent of the final version of the statute, particularly when the final version of the legislation is 100% different than the original bill. Iowa Information’s position that the “explanation” contained in the original Senate File “has much more relevance than statements from statutes and caselaw that predate the enactment of the Amendment” is nonsensical and without any legal basis.

Marcus News does not dispute that the Iowa Supreme Court has previously opined “[w]e give weight to explanation attached to bills as indications of legislative intent.” *See City of Cedar Rapids v. James Properties, Inc.*, 701 N.W.2d 673, 677 (Iowa 2005) (citations omitted). *See also Star Equipment, Ltd. v. State of Iowa*, 843 N.W.2d 446, 455 (Iowa 2014) (reviewing “the plain text of the statute and with the legislative explanation accompanying the statutory amendment adding this provision” in its statutory interpretation analysis). Marcus News contends, however, that **no weight** should be given to explanation of bills which were completely rewritten before become the law of the State of Iowa. This

position of Marcus News is supported by *Iowa Insurance Institute v. Core Group of Iowa Ass'n for Justice*, 867 N.W.2d 58 (Iowa 2015), wherein the Iowa Supreme Court opined:

“[W]e give weight to explanations attached to bills as indications of legislative intent.” We have recently explained the relevance of legislative explanations:

The legislature enacts the bill—not the accompanying explanation. But, the internal rules governing the general assembly require the title and explanation to be accurate. **An explanation or title included when a bill is introduced may become irrelevant when the text of the bill is materially changed by subsequent amendments.** But, when the explanation accompanies the text of the bill enacted without a relevant substantive change, the explanation is part of the legislative history that can be examined in our efforts to determine the meaning of the text.

Id. (quoting *Star Equipment*, 843 N.W.2d at 454 n.3) (emphasis added).

The fact the House completely rewrote the Senate File 326 to the current version is evidence of the legislative intent to **not** follow the suggested explanation cited by Iowa Information. Iowa Information does not address the House’s rejection of the proposed bill as a possible total rejection of the “explanation” and alleged initial purpose of the bill. The analysis and citation of Iowa Information to Senate File 326 is, therefore, irrelevant, misplaced and without legal merit.

1. Appellee’s Contention that Section 349.6 Only Requires a Publisher to Publish Official Notices in One of the Two Newspapers Combined by the Board of Supervisors is Based upon a Patently Fallacious Argument Regarding the Explanation of SF 326.

Iowa Information argues, for the first time in this litigation, the Board of Supervisors, if it combines two newspapers, is allowed to “select *one* of the two combined newspapers to publish the notices.” *See* Appellee’s Brief at 26. Iowa Information contends because the Board need only select one paper, then the legislature’s intent was *not* to secure the largest circulation of its notices. Marcus News contends this issue was not preserved for appeal, and furthermore, is a nonsensical interpretation of the statute based upon the *original* and irrelevant “explanation” of S.F. 326, as explained above.

First, “[i]t is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal.” *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (citations omitted). Additionally, even though this is a *de novo* review, the Supreme Court is still limited to those issues and arguments raised before the District Court. *See Rhinehart*, 704 N.W.2d at 680, and *Albert*, 886 N.W.2d at 879.

In reviewing the appellate record, Iowa Information never argued this position to the Board or the District Court, and as such, has failed to

preserve the argument on appeal. Whether a Board, or publisher, is only required to publish in one of the two combined newspapers under Iowa Code § 349.6 was not presented to the District Court, and would clearly require the District Court to apply a “statutory interpretation” analysis of the statute. Iowa Information never argued to the District Court only one of two combined papers is “eligible” for publication, despite the Board combining two papers for selection purposes. As the arguments were not raised before the District Court, the arguments have not been preserved for consideration on this appeal.

Second, should the Supreme Court find the issue was preserved for appeal, Marcus News contends this argument by Iowa Information is an illogical fallacy and extension of their misleading citation and references to the “Explanation” of Senate File 326. While this argument may have been relevant to the *original* proposed language of Senate File 326, it is completely without merit to the final adopted version of Iowa Code § 349.6.

Additionally, Iowa Information further states, in support of this position, “[t]he language of the original Senate bill was changed by the House, but the purpose behind it was not modified in the final version[.]” *See Appellee Brief* at 26. This is completely unsupported by the facts. Iowa Information continues to attempt to mislead the Court by merely saying the

Senate bill was “changed”, but fails to advise the Court the Senate bill was completely rewritten. Furthermore, to state the purpose behind the bill was “not modified in the final version” is completely absurd as the entire proposed Senate bill was rewritten.

Iowa Information further argues in reviewing Iowa Code § 349.6, the Court should focus on the last sentence to support its’ argument that the purpose of the statute is for the Board to select *one* of the two combined papers. The last sentence provides:

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.

See Iowa Code § 349.6. Iowa Information’s argument completely misreads and misinterprets the statute. If the Board combines a common publication under the statute, then each paper under the common ownership is eligible to print the notices – the county only needs to provide a single payment to the common owner (rather than paying each individual paper directly).

Iowa Information continues to argue the “Explanation” of the original S.F. 326 supports their position, but as noted above, the “explanation” to the original unpassed bill is irrelevant to the final version of the bill, which is the statute before this Court for statutory interpretation. Iowa Information’s arguments are a totally illogical and nonsensical application of the statute.

First, why would the legislature allow a commonly owned newspaper to combine both of its papers for selection purposes, if the Board would only be required to publish notices in one paper? Such a position would be a blatant violation of the clear purpose and mandate of Iowa Code Chapter 349 – to select newspapers having the largest number of subscribers, and to secure the largest circulation of county notices throughout the County. Second, if subscribers are required to submit subscription numbers, then subscription numbers are clearly relevant to the Board’s selection process.

In the Amicus Brief of the Iowa Newspaper Association (hereinafter “INA”), it contends “Iowa’s newspapers play a critical role in notifying Iowans of the official proceedings occurring in their local communities including counties, cities and school districts.” *See* Amicus Brief at 4. To follow Iowa Information’s analysis would be to allow the County to select the smallest subscriber, if they so choose, which would be clearly contrary to the goal of notifying Iowans of official proceedings in the County.

2. Appellee’s Contention that Section 349.6 Is a Tool that Allows a Board of Supervisors Not a Publisher, to Combine Two Newspapers Under Certain Circumstances is Inaccurate.

Iowa Information now argues that Marcus News’ violated Iowa Code § 349.6 when it submitted its Affidavit and requested the Board combine its commonly owned publications for selection purposes. Appellee’s Brief at 28. Iowa Information never argued before the Board or the District Court that the Affidavit and submissions of Marcus News should be stricken based upon this alleged violation of Iowa Code Chapter 349. Iowa Information again raises a new argument on appeal, and as such, the issue should be rejected for failing to raise and preserve the issue before the District Court.

Iowa Information contends “the purpose” of Iowa Code § 349.6 “was not to increase total circulation numbers by combing newspapers owned by the same publisher.” Appellee’s Brief at 29. Interestingly, Iowa Information provides no argument to support this position.

As Marcus News argues in its Appellant’s Brief, the legislative intent of Chapter 349, as well as the case law interpreting the Chapter, is to provide notices to the largest number of bona fide subscribers as possible. In *Albia*, the Iowa Supreme Court stated “[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.” 434 N.W.2d at 638 (emphasis added) (quoting *Ashton v. Story*, 96 Iowa 197, 64 N.W. 804 (Iowa 1895) (other citations omitted). The first paragraph of Section 349.6 reflects this purpose of the section by referring to selection of newspapers “showing the largest number of bona fide yearly subscribers.” 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*.

The arguments of Iowa Information fail in the face of a common sense review of the applicable Iowa Code, as well as the Court’s prior discussions in *Albia*. Iowa Information’s argument are again misplaced and should fail for lack of merit.

III. The Subscriber Lists For The Sheldon Mail-Sun and the N’West Iowa REVIEW in their Affidavits Are Not Bona Fide in Compliance with Iowa Code Chapter 349.

A. Marcus News Did Preserve Error on the Issue of Whether to Strike Iowa Information’s Subscriber Lists Because the Issue was Raised Before the District Court.

Iowa Information raises yet another red hearing by contending Marcus News did not preserve error before the District Court. *See* Appellee’s Brief at 30. Marcus News agrees to preserve issues for review on appeal, they

“must ordinarily be both raised and decided by the district court.” *See Meier*, 641 N.W.2d at 537. However, Iowa Information conveniently fails to address the remainder of the preservation of error standard - “When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.” *Id.* (citing *Benavides v. J.C. Penney Life Ins. Co.*, 539 N.W.2d 352, 356 (Iowa 1995); *State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984)). The Supreme Court added “we have repeatedly stated that a rule 179(b) [now Rule 1.904] motion is necessary to preserve error ‘when the district court fails to resolve an issue, claim, or other legal theory properly submitted for adjudication.’” *Id.* (quoting *Explore Info. Servs. v. Court Information System*, 636 N.W.2d 50, 57 (Iowa 2001)). Marcus News did exactly what the Iowa Supreme Court has outlined for preservation of error. When the District Court failed to include the issue in the Ruling, Marcus News filed a Motion for Reconsideration on October 24, 2018. *See App. 326 (Motion).*

Marcus News first raised the issue of Iowa Information’s Affidavit in its’ Trial Brief. In Marcus News’ Trial Brief, it noted the subscriber list Marcus News 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* Appl. 219 (Marcus News Trial Brief at 3 (citing Factual Stipulation, ¶ 27, Exhibit 8)). Marcus News argued, in addressing Iowa Information’s subscriber lists, “[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.” *Id.* at 4; App. 220. Marcus News contended the inclusion of those subscribers in the Affidavits of Iowa Information, namely Exhibits 4 and 5, was clearly a violation of the statutory requirements regarding subscription duration. *Id.* at 7; 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 “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.” *See* App. 281-82 (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 (Motion to Reconsider, p. 5). However, in its ruling on the Motion to Reconsider, the Court again 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 (Order Denying Motion to Reconsider, p. 3).

Clearly, Marcus News repeatedly raised the issue with the District Court in both the Trial Brief and Oral Argument, and, as such, the Judge clearly was in error for saying it was never raised until the Motion for Reconsideration. The issue 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. Marcus News did raise the argument to the District and the issue was preserved for review on Appeal.

B. Scope of Review.

Marcus News agrees the standard of review is *de novo*.

C. All of the Subscribers Listed in the Affidavits of Iowa Information, Inc., were not Bona Fide Yearly Subscribers as Defined in Iowa Code Section 349.7.

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).

Additionally, 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).

In Appellant’s Brief, as well as the Trial Brief of Marcus News submitted to the District Court, 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 (Trial Brief at 4) (emphasis added). Marcus News also argued the inclusion of those subscribers in the affidavits of Iowa Information, namely Exhibits 4 and 5, was clearly a violation of the statutory requirements regarding subscription duration. App. 223 (Trial Brief at 7). 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).

Iowa Information argues that “[t]welve month subscriptions are not required by the statute.” *See* Appellee’s Brief at 34. Iowa Information further argues that “[a]ll of the subscribers shown in the lists attached to the Stipulation as Exhibit 9 have renewal terms of at least six months and were subscribers at the date of application submitted to the Board of Supervisors.”

See Appellee’s Brief at 34 (citing Stipulation, Exhibit 9; App. 120). There are, however, no facts in the Joint Stipulation submitted to the District Court to support Iowa Information’s factual contention, other than the attorney’s statement. A review of Exhibit 9 further does not reflect the veracity and truth of Iowa Information’s statements. *See* App. 120 (Exhibit 9). Iowa Information provided no evidence that subscribers with six-month subscriptions were, in fact, bona fide yearly subscribers.

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.

D. If the District Court were to Strike Subscribers from the Affidavits of Iowa Information, the Outcome would be Impacted.

Iowa Information contends the argument of Marcus News is insignificant, rationalizing that if the names were omitted, it would not affect the outcome; but, as argued by Marcus News before the District Court:

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 App. 281-82 (Transcript of Hearing, p. 20-21).

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. Iowa Information assumes that if the District Court considered the issue that, worst case scenario, the

names would just be stricken. To the contrary, the District Court and the Board of Supervisors could have stricken the entire affidavit of Iowa Information which would have created a substantial impact on the proceeding. As the District Court refused to consider the issue, it is speculative to assume the results had the District Court reviewed and opined on the topic. The District Court's refusal to consider the issue was erroneous and should be reversed.

CONCLUSION

The District Court erred in failing to identify and follow the correct principles of statutory interpretation in its analysis of "same geographic area." Additionally, the District Court erred in not combining the publications of both Iowa Information and Marcus News in selecting the county's official publishers.

Iowa Information's arguments and citations to legislative intent, namely the *original* S.F. 326, was a blatant attempt to mislead the Court and the Appellant regarding the underlying legislative intent. Marcus News contends no weight should be given to the original "explanation" of S.F. 326 and instead, the Court should follow the prior case law analysis and other applicable statutes under Chapter 349 in finding the legislative intent was to obtain the largest circulation of the county notices to the public.

Iowa Information's argument concerning its' proposed demarcation of geographic area "just north of the City of Archer" is not factually found in the record on appeal and should be rejected as an arbitrary, self-serving effort to skew the facts to its' benefit. Statutory analysis and interpretation is required to provide guidance on how to determine "same geographic area" and where/how to it as a guide to the Board and the parties. There was nothing in the record to support an arbitrary line through O'Brien County to divide the County in north/south sections. The Board and Court could have easily drawn a line through the middle of the County, based upon Highway 59, and divided the County into a definite East/West area. Additionally, the Board and the Court could easily have used O'Brien County as a whole, which is really what Iowa Information was suggesting when it said its area publication for one newspaper was the City of Sheldon and its area of publication for its other newspaper was the rest of O'Brien County.

Iowa Information failed to raise several issues to the District Court, which it now raises for the first time on appeal – that the Board of Supervisors only is required to publish notices in one of the two combined newspapers, and that Marcus News' Affidavit submitted to the Board violated Iowa Code Chapter 349. Those issues were never preserved for this Court's review on appeal. Additionally, allowing the Board to only publish

notices in one newspaper would be contrary to the clear mandate to the Board under Chapter 349 – to select newspapers with the largest numbers of subscribers.

Finally, Marcus News did clearly preserve error on the issue of the validity of Iowa Information’s Affidavit. The District Court’s refusal to address that issue was erroneous and should be reversed.

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 **6,128 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 Reply Brief consisting of **42** 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 Reply 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 Reply 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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