ELECTRONICALLY FILED MAR 11, 2019 CLERK OF SUPREME COURT

IN THE SUPREME COURT OF IOWA
No. 18-1966
Polk County No. LACL141251

---

BENSKIN, INC.,

Plaintiff-Appellant,

v.

WEST BANK,

Defendant-Appellee.

---

ON APPEAL FROM THE IOWA DISTRICT COURT FOR POLK COUNTY, HONORABLE SAMANTHA GRONEWALD, PRESIDING

---

# BRIEF OF THE APPELLANT

---

/s/ S.P. DeVolder
S.P. DeVolder AT0001876
THE DeVOLDER LAW FIRM, P.L.L.C.
1228 Sunset Drive, Suite C
Norwalk, IA 50211-2401
Tel: (515)981-5150
Fax: (515)981-5156
steven.devolder@devolderlawfirm.com

/s/ William W. Graham
William W. Graham AT0002953
DUNCAN GREEN, P.C.
400 Locust Street, Suite 380
Des Moines, IA 50309-2363
Tel: (515)288-6440
Fax: (515)288-6448
wwgraham@duncangreenlaw.com

ATTORNEYS FOR THE APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Statutes



Rules

## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

THE DISTRICT COURT ERRED IN DISMISSING COUNTS I TO IV OF THE AMENDED PETITION ON THE GROUND OF THE RUNNING OF THE STATUTE OF LIMITATIONS, AND FURTHER ERRED IN DISMISSING COUNT V ON THE GROUND OF LACK OF PROOF OF THE ELEMENT OF PUBLICATION

A. Error Preservation

Cases

*Meier v. Senecaut,* 641 N.W.2d 532 (Iowa 2002)

*Metz v. Amoco Oil Co.,* 581 N.W.2d 597 (Iowa 1998)

*Peters v. Burlington N. R.R.,* 492 N.W.2d 399 (Iowa 1992)

B. The Standard of Review

Cases

*American Nat'l Bank v. Sivers,* 387 N.W.2d 138 (Iowa 1986)

*Albrecht v. General Motors Corp.,* 648 N.W.2d 87 (Iowa 2002)

*Berger v. Gen. United Grp., Inc.,* 268 N.W.2d 630 (Iowa 1978)

*Clark v. Miller,* 503 N.W.2d 422 (Iowa 1993)

*Cutler v. Klass, Whicher & Mishne,* 473 N.W.2d 178 (Iowa 1991)

*Davis v. State,* 443 N.W.2d 707 (Iowa 1989)

*Lakota Consol. Indep. Sch. v. Buffalo Ctr./Rake Cmty. Sch.,* 334 N.W.2d 704 (Iowa 1983)

*Mason v. Schwizer Aircraft Corp.,* 653 N.W.2d 543 (Iowa 2002)

*Mlynarik v. Bergantzel,* 675 N.W.2d 584 (Iowa 2004)

*Rieff v. Evans*, 630 N.W.2d 278 (Iowa 2001)

*Robinson v. State*, 687 N.W.2d 591 (Iowa 2004)

*Schaffer v. Frank Moyer Const., Inc.*, 563 N.W.2d 605 (Iowa 1997)

*Schreiner v. Scoville*, 410 N.W.2d 679 (Iowa 1987)

*Schmidt v. Wilkinson*, 340 N.W.2d 282 (Iowa 1983)

*Smith v. Smith*, 513 N.W.2d 728 (Iowa 1994)

*Sokie v. Evan Matthews & Co.*, 302 N.W.2d 841 (Iowa 1981)

*Trobaugh v. Sondag*, 668 N.W.2d 577 (Iowa 2003)

*Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1 (Iowa 2007)

*Unertl v. Bezanson*, 414 N.W.2d 321 (Iowa 1987)

*U.S. Bank v. Barbour*, 770 N.W.2d 350 (Iowa 2009)

*Young v. Healthport Tech., Inc.*, 877 N.W.2d 124 (Iowa 2016)

Rules

Iowa R. Civ. P. 1.421(1)(*f*)

1. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Counts I To III Of The Amended Petition (The Breach Of Contracts And Breach Of Duty Of Good Faith And Fair Dealing Claims).

Statutes

Iowa Code § 524.221(2)

A. The Specific Banking Statute Of Limitations Does Not Apply To These Claims As The Relevant Entries Were Not Made In The Regular Course of Business.

Cases

*Louisiana Business College v. Crump*, 474 So.2d 1366 (La. App. 1985)

*State v. Fisher*, 178 N.W.2d 380 (Iowa 1970)

*Strand v. Great N. Ry. Co.*, 101 Minn. 85, 111 N.W. 958 (1907)

Statutes

Iowa Code § 524.221(2)

Iowa Code § 614.1(5)

B. Even If The Statute Applies, The Breach Based Claims Were Timely Brought As The Discovery Rule Extended The Accrual Dates.

Cases

*Albrecht v. General Motors Corp.*, 648 N.W.2d 87 (Iowa 2002)

*Brown v. Ellison*, 304 N.W.2d 197 (Iowa 1981)

*Chrischilles v. Griswold*, 260 Iowa 453, 150 N.W.2d 94 (1967)

C. The Specific Banking Statute Of Limitations Expressly Does Not Apply To The Breach Of Implied Duty Of Good Faith And Fair Dealing Claim.

Cases

*Legg v. West Bank*, 873 N.W.2d 763 (Iowa 2016)

Statutes

Iowa Code § 524.221(2)

Iowa Code § 614.1(4)

D. In Any Case, The Bank Is Equitably Estopped From Raising The Statute Of Limitations Defense, Either Based On The General Or Specific Limitations Statute, As To Each Of The Breach Based Claims.

Cases

*Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005)

*Matherly v. Hanson*, 359 N.W.2d 450 (Iowa 1984)

*Meiter v. Alfa-Laval, Inc.*, 454 N.W.2d 576 (Iowa 1990)

*Skadburg v. Gately*, 911 N.W.2d 786 (Iowa 2018)

2. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Count IV Of The Amended Petition (The Fraud Claim).

Cases

*Christy v. Miulli*, 692 N.W.2d 694 (Iowa 2005)

*Dier v. Peters*, 815 N.W.2d 1 (Iowa 2012)

*Hallet Constr. Co. v. Meister*, 713 N.W.2d 225 (Iowa 2006)

*Pride v. Peterson*, 173 N.W.2d 549 (Iowa 1970)

*Rieff v. Evans*, 630 N.W.2d 278 (Iowa 2001)

Statutes

Iowa Code § 524.221(2)

Iowa Code § 614.1(4)

3. The District Court Erred In Granting The Dismissal Motion On The Ground Of Failure Of Proof Of The Publication Element Respecting Count V Of The Amended Petition (The Slander Of Title Claim).

Cases

*Belcher v. Little*, 315 N.W.2d 734 (Iowa 1982)

*Davitt v. Smart*, 449 N.W.2d 378 (Iowa 1989)

*Monroe v. Bank of America Corp.*, 2018 WL 1875294 (N.D. Okla. 2018)

*Nelson v. Bayview Loan Servicing, L.L.C.*, 2014 WL 4629382 (Ill. App. 2014)

## ROUTING STATEMENT

This case should be transferred to the Iowa court of appeals under the criteria set forth in Iowa R. App. P. 6.1101(3)(a)—this appeal presents the application of existing legal principles to the facts.

## STATEMENT OF THE CASE

Nature of the Case. The appellant Benskin, Inc. filed its action, as subsequently amended, against the appellee West Bank on May 18, 2018. (Pet. of 05-18-2018; App. 10-14; Amend. Pet. of 07-02-2018; App. 25-32.) Benskin generally alleged, in the operative amended and substituted petition, that the bank was liable to Benskin on claims sounding in contract and tort liability. (Amend. Pet.; App. 25-32.) The claims arose out of the parties' dealings in two independent transactions, one that occurred in 2006 and the other in 2007. (Amend. Pet.; App. 25-32.) It is the manner in which the bank handled these separate transactions—and specifically, the bank's improperly conflating these transactions for its own benefit and to the detriment of its customer Benskin, and further actively misrepresenting its actions to Benskin—that forms the transactional facts underlying the claims. (Amend. Pet., at ¶¶ 3-16; App. 25-27.)

In brief, in 2006 Benskin obtained a loan from the bank that was secured by mortgages on real estate owned by Benskin and situated in Dickinson County. (Amend. Pet., at ¶ 3; App. 25.) In 2007, Benskin obtained a line of credit from the

bank secured by mortgages on real estate owned by Benskin and situated in Dickinson County and Polk County. (Amend. Pet., at ¶¶ 6-7; App. 26.) Ultimately, Benskin would not tap into the line of credit—that is, Benskin never utilized that credit line. (Amend. Pet., at ¶ 8; App. 26.) The credit line matured on May 30, 2008, and because Benskin never had accessed the credit line the bank under the terms of the transactional documents became obligated to release the mortgage security concerning that unused credit line (including the encumbrance on the Polk County properties). (Amend. Pet., at ¶ 9; App. 26.)

But the bank never did so. (Amend. Pet., at ¶¶ 10-11; App. 26-27.) Unbeknownst to Benskin, the bank itself had improperly tapped into the 2007 credit line to pay off, and before the note was even due, the 2006 loan that was not secured by any real estate owned by Benskin and situated in Polk County. (Amend. Pet., at ¶ 13; App. 27.) This was done without Benskin's knowledge and authorization. (Amend. Pet., at ¶ 12; App. 27.) To cover its tracks, the bank went so far as to alter its transactional records to hide what it had done from Benskin, and all the while the bank falsely represented to Benskin that it was in the process of releasing the mortgages on the real estate encumbered by the 2007 line of credit transaction—but these representations were nothing but lies. (Amend. Pet., at ¶¶ 10-14; App. 26-27.) It was only on or after July 22, 2016, and as the result of discovery obtained in a separate lawsuit involving these same parties, that Benskin learned of what the bank

had done and that, despite the bank's numerous assurances, it did not, and would not, release the real estate encumbered by the 2007 line of credit transaction. (Amend. Pet., at ¶¶ 13-14; App. 27.)

Course of the Proceedings. Benskin raised five claims against the bank: (1) breach of the 2007 line of credit agreement; (2) breach of the 2006 loan agreement; (3) breach of the duty of good faith and fair dealing inherent in each of these agreements; (4) fraud—both by concealment and affirmative misrepresentations; and (5) slander of title (concerning the Polk County real estate encumbered by the 2007 line of credit transaction). (Amend. Pet.; App. 25-32.) The bank responded with a motion to dismiss; the bank asserted that the first four claims were barred by the running of the applicable statute of limitations and that the fifth claim (slander of title) was deficient as to a showing of the element of "publication." (Mot. Dismiss of 07-16-2018; App. 35-50; Reply Mot. Dismiss of 08-16-2018; App. 59-70.) Benskin resisted the dismissal motion as it pertained to the statute of limitations on each of the following grounds—that, under the applicable dismissal review standard, the contract-based claims were not barred by the running of the statute of limitations, and in any event the discovery rule and the doctrine of equitable estoppel tolled the running of that period; as for the fraud claim, the claim was not barred based on the applicable limitations statute or the application of the discovery rule and equitable estoppel. (Resist. Mot. Dismiss of 07-30-2018; App.

51-58.) As for the slander of title claim, Benskin asserted that under the applicable dismissal review standard the element of publication was sufficiently pled. (Resist. Mot. Dismiss; App. 57-58.)

Disposition of the Case. By ruling entered on October 9, 2018, the district court granted in the entirety the bank's motion to dismiss. (Order Regarding Dismissal of 10-09-2018; App. 71-81.) The district court rejected each of Benskin's several arguments as to why, under the applicable dismissal review standard, none of the first four claims was time-barred and the fifth claim sufficiently pled the publication element. (Order; App. 71-81.) Benskin timely filed its notice of appeal on November 7, 2018. (Notice of Appeal of 11-07-2018; App. 82-84.)

## STATEMENT OF THE FACTS[1]

On or about October 6, 2006, Benskin entered into a written loan agreement (the "2006 Loan Agreement") with West Bank pursuant to which the bank loaned to Benskin the sum of $800,094.00 (the "2006 Loan"). (Amend. Pet., at ¶ 3; App. 25.) The 2006 Loan was secured by personal guarantees from Martin Benskin (owner of Benskin) and his spouse Susan Benskin as well as by a real estate mortgage

[1] Consistent with the dismissal review standard, the facts and inferences therefrom are taken from the amended petition and construed in favor of Benskin as the nonmoving party. *See Rieff v. Evans*, 630 N.W.2d 278, 284 (Iowa 2001) (in considering a motion to dismiss, the court must accept as true the allegations contained in the petition, resolve all doubts and ambiguities in those allegations in favor of the nonmovant plaintiff and further cannot rely on any purported facts not alleged in the petition except for those of which judicial notice may be taken).

encumbering property owned by Benskin in Dickinson County, Iowa. (Amend. Pet., at ¶ 3; App. 25.) The 2006 Loan Agreement was memorialized by a written promissory note (the "2006 Promissory Note"), written personal guarantees, and a written real estate mortgage. (Amend. Pet., at ¶ 4; App. 26.) The 2006 Loan Agreement was renewed by a written promissory note dated August 1, 2007 and it carried a maturity date of August 1, 2008. (Amend. Pet., at ¶ 5; App. 26.)

On or about October 24, 2007, Benskin entered into a written line of credit agreement (the "2007 Line of Credit Agreement") with West Bank pursuant to which the bank agreed to loan to Benskin sums up to $2,000,000.00. (Amend. Pet., at ¶ 6; App. 26.) The credit line was for the purpose of Benskin's possible purchase and development of certain real estate situated in Dickinson County. (Amend. Pet., at ¶ 6; App. 26.) The 2007 Line of Credit was memorialized by a written promissory note dated October 24, 2007 (the "2007 Promissory Note") and was secured by personal guarantees from Martin Benskin and Susan Benskin as well as mortgages encumbering real property owned by Benskin in both Dickinson County and Polk County, Iowa (the "2007 Mortgages"). (Amend. Pet., at ¶ 7; App. 26.) The 2007 Line of Credit was a separate and completely different lending transaction than the 2006 Loan Agreement, and the 2006 Loan Agreement did not provide the bank with any mortgage or other security right to Benskin's real property situated in Polk County. (Amend. Pet., at ¶ 7; App. 26.) Benskin ultimately never used or otherwise

accessed the credit line available under the 2007 Line of Credit Agreement and it never requested or otherwise received any advances under that credit line. (Amend. Pet., at ¶ 8; App. 26.)

The 2007 Promissory Note for the line of credit, along with the Dickinson County and Polk County real estate mortgages that secured it, matured on May 30, 2008. (Amend. Pet., at ¶ 9; App. 26.) On and after that date, West Bank was obligated to release the 2007 Mortgages including those encumbering Benskin's Polk County located real estate. (Amend. Pet., at ¶ 9; App. 26.) At various times after May 30, 2008, the bank, through its officers and employees, made multiple representations that the bank would promptly take the steps necessary, or already had begun to take those steps, to release the 2007 Mortgages; Benskin only later learned that these statements were false at the times they were made. (Amend. Pet., at ¶ 10; App. 26.) Despite its obligation to release the 2007 Mortgages, and contrary to its representations and promises to do just that, the bank ultimately failed and refused to release those mortgages, even after the repeated requests and demands from Benskin. (Amend. Pet., at ¶ 11; App. 26-27.)

The bank's first statement, and made through its officers and employees, to Benskin wherein the bank expressly refused to release the 2007 Mortgages was made on June 27, 2011. (Amend. Pet., at ¶ 12; App. 27.) Up until that date, the bank intentionally misled Benskin by making numerous statements and promises that it

would release those mortgages and was actively in the process of taking the procedural steps to do so. (Amend. Pet., at ¶¶ 11, 14; App. 26, 27.)

Why the bank ultimately did not do so, and why it lied to Benskin concerning its avowed intention to do so, were not discovered by Benskin until on and after July 22, 2016. (Amend. Pet., at ¶ 13; App. 27.) Benskin's discovery was made as the result of information disclosed in other litigation involving these parties. (Amend. Pet., at ¶ 13; App. 27.) During the course of that litigation, Benskin obtained information that indicated at some time after the execution of the 2007 Line of Credit Agreement, West Bank internally altered its transactional or business records so as to purport to show an advance was obtained under that credit line to pay off, and before it was even due, the 2006 Promissory Note (the earlier transaction that was unrelated to the later line of credit transaction). (Amend. Pet., at ¶ 13; App. 27.) Benskin did not authorize that advance, nor did he even otherwise know about it, when it occurred and as subsequently reflected in the bank's altered records. (Amend. Pet., at ¶ 13; App. 27.) The bank's wrongfully tapping into the credit line was actively and affirmatively concealed from Benskin by the bank; the money was taken by West Bank without Benskin's agreement, consent, or knowledge and was not discovered by Benskin until after July 22, 2016. (Amend. Pet., at ¶¶ 10-14; App. 26-27.) And the bank's wrongful action further resulted in Benskin's Polk County

real estate being encumbered with a mortgage in the amount of the unauthorized line of credit withdrawal. (Amend. Pet., at ¶ 15; App. 27.)

Thus, until at least as late as June 27, 2011, West Bank fraudulently misled Benskin into believing that the 2007 Mortgages would be released; furthermore, the bank actively misrepresented and concealed from Benskin until on or after July 22, 2016 that it wrongly and without authorization accessed the 2007 Line of Credit to pay off the 2006 Promissory Note—and that by doing so activated the mortgage encumbrance on Benskin's Polk County real estate. (Amend. Pet., at ¶¶ 7-16; App. 26-27.)

As a result of the bank's actions described above, the Polk County properties were wrongfully encumbered by the mortgages securing the line of credit in favor of West Bank. (Amend. Pet., at ¶¶ 7-14; App. 26-27.) West Bank's conduct in refusing to release the 2007 Mortgages constituted breaches of the terms of the 2007 Line of Credit, the 2006 Promissory Note, and the 2007 Mortgages. (Amend. Pet., at ¶¶ 21-29; App. 28-29.) Until at least June 27, 2011, West Bank's fraud, concealment, misrepresentation, and deception induced Benskin to refrain from bringing action on those breaches and, therefore, West Bank (as pled in Benskin's amended petition) became barred by, among other principles, the discovery rule and equitable estoppel from asserting that the written agreement breach related claims

accrued before that date for purposes of the statute of limitations. (Amend. Pet., at ¶¶ 18-19, 23, 28, 35 and 40; App. 28-31.)

And the same is true regarding the bank's conduct in advancing funds under the 2007 Promissory Note (the line of credit) to pay off the 2006 Promissory Note—that violated the terms of the 2007 Line of Credit, the 2007 Promissory Note, and the 2007 Mortgages. (Amend. Pet., at ¶¶ 18-19, 23, 28, 35 and 40; App. 28-31.) Until at least June 27, 2011, West Bank's fraud, concealment, misrepresentation, and deception induced Benskin to refrain from bringing action on those breaches and, therefore, West Bank (as pled in Benskin's amended petition) became barred by, among other principles, the discovery rule and equitable estoppel from asserting that the written agreement breach related claims accrued before that date for purposes of any statute of limitations. (Amend. Pet., at ¶¶ 18-19, 23, 28, 35 and 40; App. 28-31.)

Finally, the bank's conduct in wrongfully encumbering the Polk County properties with the debt represented by the 2006 Promissory Note constituted a slander of Benskin's title because it was a false use of words and documents to encumber the property and was done so with malice and lack of good faith; in addition, the bank's conduct in wrongfully tapping into the 2007 line of credit resulted in its wrongfully encumbering and without right those properties in the first

place that were not subject to the 2006 Loan Agreement. (Amend. Pet., at ¶¶ 37-40; App. 31.)

## ARGUMENT

THE DISTRICT COURT ERRED IN DISMISSING COUNTS I TO IV OF THE AMENDED PETITION ON THE GROUND OF THE RUNNING OF THE STATUTE OF LIMITATIONS, AND FURTHER ERRED IN DISMISSING COUNT V ON THE GROUND OF LACK OF PROOF OF THE ELEMENT OF PUBLICATION.

### A. Error Preservation.

Benskin preserved error. He resisted the bank's motion to dismiss the first four counts of the amended petition on the running of the statute of limitations defense, and he raised and briefed each of the issues he now raises on appeal to argue that the limitations period has not run and under the applicable review dismissal review standard; and the district court ruled on each of these bases. (Resistance to Motion to Dismiss; App. 51-58; Ruling on Motion to Dismiss; App. 71-81.) *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (error is preserved where the issues raised on appeal were first raised before the district court and ruled upon by that court); *see also Metz v. Amoco Oil Co.*, 581 N.W.2d 597, 600 (Iowa 1998) ("issues must be presented and passed upon by the district court" in order for appellate error to be preserved); *Peters v. Burlington N. R.R.*, 492 N.W.2d 399, 401 (Iowa 1992) (same). Benskin likewise raised the argument that the publication element for count V of the amended petition was met under the applicable dismissal review standard,

and it obtained a ruling from the district court on that position. (Id.; App. 56-57.) *Id.*

B. The Standard of Review.

A pre-answer motion to dismiss can be predicated on any of the following grounds: (i) the court lacks jurisdiction, either subject matter or personal; (ii) original notice is insufficient; or (iii) the plaintiff fails to state a claim upon which relief can be granted. Iowa R. Civ. P. 1.421(1)(*a*), (*b*), (*c*) and (*f*). As we have seen, West Bank proceeded under subsection (*f*)—that Benskin supposedly did not state "a claim upon which relief can be granted." (Motion to Dismiss, at p. 1; App. 35.)

The appeals court reviews a district court's order granting a motion to dismiss for the correction of errors at law. *Mlynarik v. Bergantzel*, 675 N.W.2d 584, 89 (Iowa, 2004). "A motion to dismiss is sustainable only when it appears to a certainty that the plaintiff would not be entitled to relief under any state of facts that could be proved in support of the claims asserted." *Albrecht v. General Motors Corp.*, 648 N.W.2d 87, 89 (Iowa 2002) (citation and internal quotation marks omitted). Thus, a dismissal at the pre-answer stage must rest exclusively on legal grounds. *Trobaugh v. Sondag*, 668 N.W.2d 577, 580 (Iowa 2003). For this reason, motions to dismiss for failure to state a claim upon which relief can be granted are rarely an appropriate vehicle for disposing of actions without trial. *American Nat'l Bank v. Sivers*, 387 N.W.2d 138, 140 (Iowa 1986).

A party that moves pre-answer for a dismissal on the ground that the other party has failed to state a claim upon which relief can be granted must clear a dauntingly high hurdle indeed. Even in one of the relatively rare cases in which the Iowa supreme court actually affirmed a rule 1.421(1)(*f*) dismissal motion, the court admonished practitioners not to submit such motions and, if such motions nonetheless are submitted, admonished district courts to deny them:

> [W]e mention the special risks and problems which attend premature attacks on litigation by motions to dismiss. Although we conclude the trial court should be affirmed, we certainly do not recommend the filing of motions to dismiss in litigation, the viability of which is in any way debatable. Neither do we endorse sustaining such motions, even where the ruling is eventually affirmed. Both the filing and the sustaining are poor ideas.

*Cutler v. Klass, Whicher & Mishne*, 473 N.W.2d 178, 181 (Iowa 1991). *See also Robinson v. State*, 687 N.W.2d 591, 592-93 (Iowa 2004) ("We recognize the temptation is strong for [a party] to strike [an opponent party's] vulnerable petition at the earliest opportunity. Experience has taught us that vast judicial resources could be saved with the exercise of more professional patience.").

Because Iowa is a notice pleading state, for a district court to properly sustain a motion to dismiss on the ground that the plaintiff has failed to state a claim upon which relief can be granted, the court "must conclude that no state of facts is conceivable under which the plaintiff might show a right of recovery." *Lakota Consol. Indep. Sch. v. Buffalo Ctr./Rake Cmty. Sch.*, 334 N.W.2d 704, 708 (Iowa

1983). The Iowa supreme court has emphasized that "[t]he impact of this philosophy of pleading [that is, notice pleading] has virtually emasculated the motion to dismiss for failure to state a claim." *Unertl v. Bezanson*, 414 N.W.2d 321, 324 (Iowa 1987). In that regard, "[n]early every case will survive a motion to dismiss under notice pleading." *U.S. Bank v. Barbour*, 770 N.W.2d 350, 353 (Iowa 2009). When a moving party attacks a claim through a motion to dismiss, that party "admits well-pleaded facts and waives ambiguity or uncertainty in the petition." *Schaffer v. Frank Moyer Const., Inc.*, 563 N.W.2d 605, 607 (Iowa 1997). The court must decide the merits of the dismissal motion on the facts alleged in the petition, not the facts alleged by the moving party or facts that may be developed in an evidentiary hearing (with the exception of judicially noticed facts). *Berger v. Gen. United Grp., Inc.*, 268 N.W.2d 630, 634 (Iowa 1978). The court must construe the claims in the light most favorable to the plaintiff and resolve "all doubts and ambiguities in [the plaintiff's] favor." *Schreiner v. Scoville*, 410 N.W.2d 679, 680 (Iowa 1987); *see also Turner v. Iowa State Bank & Trust Co.*, 743 N.W.2d 1, 3 (Iowa 2007).

As for the content of the petition, the plaintiff need not allege the ultimate facts to support each element of a stated cause of action; instead, the pleading need only contain such factual allegations that are sufficient to give the opposing party fair notice of each claim asserted so that the opposing party can adequately respond. *Smith v. Smith*, 513 N.W.2d 728, 730 (Iowa 1994); *Schmidt v. Wilkinson*, 340

N.W.2d 282, 283 (Iowa 1983). The fair-notice requirement is satisfied if the pleading containing the claim informs the other party of the general nature of the claim and the incident giving rise to it. *Soike v. Evan Matthews & Co.*, 302 N.W.2d 841, 842 (Iowa 1981). The label the plaintiff attaches to a claim is not dispositive; it is sufficient that the allegations contained in the pleading show that under conceivable facts the plaintiff may be allowed to recover. *Mason v. Schwizer Aircraft Corp.*, 653 N.W.2d 543, 553 (Iowa 2002) ("Moreover, the failure-to-warn claim at issue in this case implicates [defendant's] role as a manufacturer . . . regardless of the theoretical label attached to the claim."); *Union Planters, N.A. v. Fitzpatrick*, 2007 WL 911893, at *8 (Iowa Ct. App. 2007) ("Regardless of the label placed on a claim, the underlying facts giving rise to the claim determine its actual basis . . .."). 

A motion to dismiss may be granted based on the statute of limitations. *Clark v. Miller*, 503 N.W.2d 422, 424 (Iowa 1993). However, the defense of the statute of limitations is generally affirmatively asserted by a responsive pleading; only "when it is obvious from the uncontroverted facts shown on the face of the challenged petition that the claim for relief was barred when the action was commenced, the defense may properly be raised by a motion to dismiss." *Rieff*, 630 N.W.2d at 289 (citing *Davis v. State*, 443 N.W.2d 707, 708 (Iowa 1989)). That is, the same demanding standard for granting a motion to dismiss for failure to state a claim for

which relief can be granted, and as described above, applies when the running of the statute of limitations is at issue. *Id.* at 284.

A closing comment on the demanding barrier that the bank must clear given the basis for its dismissal motion is in order. It is not as if the Iowa supreme court has retracted (or even retrenched from) its strong admonitions (a) that practitioners should not be filing motions to dismiss on the basis of a failure to state a claim and (b) that district courts should not be sustaining such ill-considered motions if filed. The Iowa supreme court again cited the following excerpt from its *Cutler* decision when it affirmed on interlocutory appeal a district court's order that had denied a rule 1.421(1)(*f*) dismissal motion; the court in *Young v. Healthport Tech., Inc.*, 877 N.W.2d 124, 132 (Iowa 2016) emphasized at the close of its unanimous opinion that, "[as] we have previously stated":

> We recognize the temptation is strong for a defendant to strike a vulnerable petition at the earliest opportunity. Experience has however taught us that vast judicial resources could be saved with the exercise of more professional patience. Under the foregoing rules dismissals of many of the weakest cases must be reversed on appeal. Two appeals often result where one would have sufficed had the defense moved by way of summary judgment, or even by way of defense at trial. From a defendant's standpoint, moreover, it is far from unknown for the flimsiest of cases to gain strength when its dismissal is reversed on appeal. [Quoting *Cutler*, 473 N.W.2d at 181.]

The Iowa appellate courts really mean what they are saying here—except in the rarest of cases (usually those that present a pure issue of law even under any reasonable fact scenario), motions to dismiss filed on the ground of failure to state a claim should be summarily denied; such motions are a bad idea, are disfavored, and—when granted at the district court level—typically lead to appellate court reversal and the corresponding significant increase in costs to the parties involved and the concomitant dissipation of limited judicial resources. And the district court erred in granting the bank's dismissal motion in this case; the district court as we shall see did not faithfully follow the demanding dismissal review standard.

1. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Counts I To III Of The Amended Petition (The Breach Of Contracts And Breach Of Duty Of Good Faith And Fair Dealing Claims).

The district court rejected Benskin's several arguments for why these claims were not barred by the running of the statute of limitations and under the demanding motion to dismiss standard; the district court applied the limitations statute of Iowa Code § 524.221(2) to these claims and rejected the doctrines of the discovery rule and equitable estoppel to toll the limitations period on the pleaded facts. (Order Regarding Dismissal; App. 71-81.) The district court accepted the bank's argument that § 524.221(2) set forth the applicable limitations period for the breach-based claims; that section provides:

> All causes of action, other than actions for relief on the grounds of fraud or mistake, against a state bank based upon a claim or claims founded on a written contract, or a claim or claims inconsistent with an entry or entries in a state bank record, made in the regular course of business, shall be deemed to have accrued, and shall accrue for the purpose of the statute of limitations one year after the breach or failure of performance of a written contract, or one year after the date of such entry or entries. No action founded upon such a cause may be brought after the expiration of six years from the date of such accrual.

The district court found the "accrual" date for the claims to be in the summer of 2009, and that the breach-based claims accordingly under this limitation's statute needed to be filed by the summer of 2015 to be timely, absent equitable estoppel extending the time period. (Order, at p. 5; App. ___.) But the district court made several errors in this part of its analysis—and specifically, not accepting Benskin's following four arguments that he presented in his resistance to the dismissal motion.

A. The Specific Banking Statute Of Limitations Does Not Apply To These Claims As The Relevant Entries Were Not Made In The Regular Course Of Business.

The limitations statute relied on by the bank, and ultimately applied by the district court in its ruling, provides in relevant part that it applies only to claims against a bank based on written contracts and/or written bank records "made in the regular course of business". Iowa Code § 524.221(2). As it respects Benskin's claims based on written contracts or written entries in West Bank's records pertaining to the lending transactions at issue, Benskin pled in its amended petition

that the bank cooked the books—that is, created fraudulent entries pertaining to its using without right or authorization the 2007 credit line to improperly pay off the 2006 loan transaction. (Amend. Pet., at ¶ 13; App. 27.) And the bank further concealed its improper actions from Benskin; it ultimately took litigation for the bank's actions to be discovered. (Amend. Pet., at ¶ 13; App. 27.) By its express terms, the special banking limitations statute does not apply under these circumstances—and at least under the review standard for a motion to dismiss.

The operative phrase "made in the regular course of business" has a defined meaning in the law. For example, it is used in the business records exception to the hearsay rule, and requires a showing, among other things, "that the method and circumstances [of the preparation of the record in question] were such as to indicate trustworthiness". *State v. Fisher,* 178 N.W.2d 380, 382 (Iowa 1970). In that regard, a record is not made in the regular course of business where it does not have "honest appearance" and "absence of fraud in making the entries or destroying the supporting memoranda" for those entries. *Louisiana Business College v. Crump,* 474 So.2d 1366, 1371 (La. App. 1985); *see also Strand v. Great N. Ry. Co.,* 101 Minn. 85, 111 N.W. 958, 961 (1907) ("In view of the complicated and extensive business transactions of modern times, it seems to be the tendency of the courts to treat as original evidence such entries and reports as are made in the regular course of

business, provided they appear free from the charge of fraud, mistake, or self-interest.").

There is nothing pled in the amended petition that even hints the contracts and transactions involving the same as reflected in the bank's records were made in the regular course of business; to the contrary, the pleaded allegations state that the bank fraudulently altered its records as reflecting these transactions and actively concealed these facts from Benskin. In short—and under the dismissal review standard—we must take as true that the contract based transactions were not entered into the bank's records in the regular course of business; instead, the bank cooked the books. These actions are sufficient, and minimally under the dismissal review standard, to remove Benskin's breach-based claims from the limitations period set forth in § 524.221(2). Accordingly, as it respects the written contracts (counts I and II of the petition), the applicable limitations period is the ten years' period for breach of written contracts provided in for Iowa Code § 614.1(5). Even taking the district court's conclusion that the claims accrued in the summer of 2009, the breach-based claims were timely filed in 2018.

B. Even If The Statute Applies, The Breach Based Claims Were Timely Brought As The Discovery Rule Extended The Accrual Dates.

In general, "a statute of limitations runs from the accrual of a cause of action." *Albrecht*, 648 N.W.2d at 90. However, the discovery rule delays the date of accrual to "the later of the date of discovery [of the facts constituting each element of the

cause of action] or the date when, by the exercise of reasonable diligence, the plaintiff should have discovered" the necessary facts that constitute the complete cause of action. *Chrischilles v. Griswold*, 260 Iowa 453, 462, 150 N.W.2d 94, 100 (1967). And the Iowa supreme court has applied the discovery rule to breach of contractually based implied and express warranty claims. *Brown v. Ellison*, 304 N.W.2d 197, 201 (Iowa 1981). Further, that court has recognized the discovery rule would apply to general contract breach claims where the plaintiff's unawareness of the facts constituting a complete cause of action for breach of contract is "due to fraudulent concealment by the defendant." *Id.* (citation omitted).

As alleged in the amended petition, Benskin's claim for breach of the 2006 Loan Agreement did not accrued until on or after July 22, 2016, when Benskin finally learned of the bank's improper activity and active concealment (including making fraudulent entries into its records of this transaction) as it concerns the bank's tapping into the line of credit that Benskin never authorized the bank to use and that Benskin itself never had used. (Amend. Pet., at ¶ 13; App. 27.) Second, concerning the 2007 line of credit contract, that breach claim did not accrue until on or after June 27, 2011 when the bank finally informed Benskin—and against all of the counter-representations that it consistently had made until that date—that the bank would not release the mortgages encumbering Benskin's Polk County real estate. (Amend. Pet., at ¶¶ 12 and 14; App. 27.) Benskin filed its breach of written

contract based claims on May 18, 2011, well within six years of when each of these claims would have first accrued even if the special banking limitation's statute otherwise applies. (Petition, p. 1; App. 10.)

C. The Specific Banking Statute Of Limitations Expressly Does Not Apply To The Breach Of Implied Duty Of Good Faith And Fair Dealing Claim.

In Count III of the amended petition, Benskin sues the bank for breach of the duty of good faith and fair dealing and as it respects the bank's improper handling of the 2006 and 2007 transactions. (Amend. Pet., at ¶¶ 25-29; App. 29-30.) In Iowa, unless a written contract contains a specific provision imposing such a duty on the contracting party purportedly in breach, a claim for breach of the duty of good faith and fair dealing is considered to be premised on an unwritten contract (and even if written contracts otherwise exist that concern the relationship of the parties). The Iowa supreme court observed in *Legg v. West Bank*, 873 N.W.2d 763, 744 (Iowa 2016):

> In the past, when we have been faced with a claim based solely on the breach of the implied covenant of good faith, we found the claim was based on an unwritten contract and the five-year statute of limitations applied. *Sandbulte*, 343 N.W.2d at 460. However, we have also recognized that claims based on specific, written contracts fall under the ten-year statute of limitations contained in section 614.1. *See, e.g., Bob McKiness Excavating & Grading Co. v. Morton Bldgs., Inc*., 507 N.W.2d 405, 408 (Iowa 1993). In this case, the Leggs' claim for the breach of the duty of good faith comes from the Agreement itself. The document itself states that West Bank will act in good faith with regard to sequencing. Because we find that the

> plaintiffs may only proceed on a claim of a breach of the duty of good faith based on the written contractual provision between customers and West Bank, we likewise find that the appropriate statute of limitations that governs this action is the ten-year limitation for written contractual provisions.

There is no allegation in Count III of the amended petition that provides to the effect that the bank breached its duty of good faith and fair dealing with Benskin by violating a specific good faith provision expressly contained in either the 2006 or 2007 agreements at issue in Counts I and II of the amended petition. (Amend. Pet., at ¶¶ 25-29; App. 29-30.) Accordingly, the applicable statute of limitations for the Count III breach-based claim is the five years' period contained in Iowa Code § 614.1(4)—pertaining to the limitation's period for breach of an unwritten contract. And the special banking limitations period—Iowa Code § 524.221(2)—does not apply by its terms as that special limitations statute applies only to written contracts or account notations. *Id.; see also Legg,* 873 N.W.2d at 774.

For the reasons and pleading allegations already identified, the bank breached its duty of good faith and fair dealing in the transactions involving the 2006 promissory note and associated transactional documents on or after July 22, 2016. Benskin timely filed its breach of good faith and fair dealing claim well within the five year's limitation statute, as it filed the claim within two years of that breach and claim accrual date.

D. In Any Case, The Bank Is Equitably Estopped From Raising The Statute Of Limitations Defense, Either Based On The General Or Specific Limitations Statute, As To Each Of The Breach Based Claims.

The equitable estoppel doctrine "is one of the recognized defenses to the application of the statute of limitations." *Meiter v. Alfa-Laval, Inc.*, 454 N.W.2d 576, 578 (Iowa 1990). The Iowa supreme court has applied this doctrine to both contract and tort-based claims and where the defendant raises a statute of limitations defense. *Matherly v. Hanson,* 359 N.W.2d 450, 457-58 (Iowa 1984). This defense to the statute of limitations is separate and distinct from the defense of the discovery rule, as the equitable estoppel doctrine is premised on the defendant's fraud or fraudulent concealment that precludes the plaintiff from knowing that it has a cause of action within the applicable limitations period; when that occurs, the doctrine that applies is equitable estoppel. *Skadburg v. Gately,* 911 N.W.2d 786, 797 (Iowa 2018) (citing *Christy v. Miulli*, 692 N.W.2d 694, 700-01 (Iowa 2005)).

To establish whether the defendant by fraud is estopped from asserting the statute of limitations as a defense, the plaintiff must show by a clear and convincing preponderance of the evidence "(1) [t]he defendant has made a false representation or has concealed material facts; (2) the plaintiff lacks knowledge of the true facts; (3) the defendant intended the plaintiff to act upon such representations; and (4) the plaintiff did in fact rely upon such representations to his prejudice." *Christy*, 692 N.W.2d at 702. Ordinarily, the plaintiff must show the defendant engaged in some

affirmative act to conceal the cause of action, unless there exists a confidential or fiduciary relationship between the parties (in which case the defendant's silence alone—without being accompanied by an affirmative act of concealment—will suffice). *Skadburg*, 911 N.W.2d at 798.

Under the governing dismissal review standard, Benskin has made more than adequate allegations in its amended petition to show that the bank (at this pre-answer point of the proceedings) is equitably estopped from asserting the running of the limitations defense as to each and all of the claims asserted. Benskin alleges that the bank made false representations and concealed important facts that affirmatively misled Benskin and prevented it from knowing about any of its available legal claims. Specifically, Benskin alleges that "[a]t various times after May 30, 2008, West Bank, through its officers and employees, made multiple representations, now known to have been false, that it would take the steps necessary to release the 2007 Mortgage," yet failed to do so and it was not until June 27, 2011 that the bank first expressly stated to Benskin that it was now refusing to release the mortgage. (Amend. Pet., at ¶¶ 10-12; App. 26-27.) Benskin further alleges that the bank concealed that it had made an unauthorized advance under the 2007 line of credit to pay off the 2006 loan, in breach of its terms, and the bank's affirmative concealment (including falsifying its books) were not discovered until after July 22, 2016. (Amend. Pet., at ¶¶ 13-14; App. 27.) In rejecting Benskin's equitable estoppel

argument, the district court criticized Benskin for not offering "clear and convincing evidence" with respect to its allegations involving equitable estoppel and the discovery rule. (Ruling, at p. 7; App. 27.) But the district court's conclusion stands the dismissal review standard on its head. At the pre-answer dismissal stage, the allegations of the petition are to be taken as true and all permissible inferences therefrom drawn in favor of the plaintiff. The plaintiff does not need to meet its proof burden at this stage of the proceedings—evidence has yet to even be taken and presented. As we shall see, the district court committed the identical error in dismissing Benskin's fraud claim (referencing failure to meet the "degree of certainty" proof burden, which does not apply at the dismissal stage).

2. The District Court Erred In Granting The Dismissal Motion On The Ground Of The Running Of The Statute Of Limitations Respecting Count IV Of The Amended Petition (The Fraud Claim).

The specific limitations statute governing claims against banks—Iowa Code § 524.221(2)—applies only to claims based on written contracts and those based on notations in bank records kept in the regular course of business; the statute does not apply to tort-based claims and the statute further expressly provides that it does not apply to claims against a bank sounding in fraud. *Id.* Benskin's fraud claim against West Bank is subject to the five years' limitations period set forth in the general limitations statute pertaining to fraud, Iowa Code § 614.1(4).

The elements of a fraud claim, which must be established by a preponderance of the clear, satisfactory and convincing proof, are the following: "(1) [the] defendant made a representation to the plaintiff, (2) the representation was false, (3) the representation was material, (4) the defendant knew the representation was false, (5) the defendant intended to deceive the plaintiff, (6) the plaintiff acted in [justifiable] reliance on the truth of the representation, (7) the representation was a proximate cause of [the] plaintiff's damages, and (8) the amount of damages." *Dier v. Peters*, 815 N.W.2d 1, 7 (Iowa, 2012) (brackets in original). The elements of fraudulent concealment are similar, only instead of a fraudulent representation the defendant must fraudulently conceal a material fact. *Christy*, 692 N.W.2d at 702.

As it respects a fraud claim, the discovery rule applies—the claim does not accrue until the plaintiff party knew or in the exercise of reasonable diligence should have discovered facts supporting each of the elements of the claim. *Rieff*, 630 N.W.2d at 291 (applying discovery rule to toll the running of the statute of limitations in a fraud case). And the defendant who committed fraud can be equitably estopped from asserting the running of the five years' limitations statute where the defendant's fraudulent misrepresentations or affirmative acts served to conceal the truth from the plaintiff and otherwise kept the plaintiff from knowing that it had a fraud cause of action within the limitations period. *Christy*, 692 N.W.2d at 702; *Hallet Constr. Co. v. Meister*, 713 N.W.2d 225, 231 (Iowa 2006).

As already noted, a defendant typically raises the running of the limitations statute as an affirmative defense in a responsive pleading; when the defendant raises limitations in a pre-answer motion to dismiss, it must be "obvious from the uncontroverted facts appearing on the face of the assailed pleading not only that the claim for relief may be barred but that it is necessarily so barred when the action is commenced" by the running of the statute of limitations. *Pride v. Peterson,* 173 N.W.2d 549, 554 (Iowa 1970). In that regard, a plaintiff does not have to anticipate in its petition the defendant's raising a statute of limitations defense through a motion to dismiss, as opposed to the typical way of an affirmative defense contained in an answer, and accordingly it is sufficient if the plaintiff in its petition raises in general facts that could support a discovery rule or equitable estoppel basis to counter the motion to dismiss. *Id.* at 554-55 (Iowa supreme court reversing district court's grant of a motion to dismiss on basis of the running of the statute of limitations, finding plaintiff's general allegation that defendant failed to advise or inform plaintiff of the transaction in question "was sufficient if later proven at trial to toll the statute of limitations"); *see also Rieff,* 630 N.W.2d at 291 ("With these [basic] facts of inability for discovery pled, coupled with allegations of fraud, the [plaintiffs] have sufficiently placed the onset of the statute of limitations in dispute. When such is the case, a dismissal of the petition based on statute of limitations grounds is not appropriate. *Pride*, 173 N.W.2d at 554.").

As stated in division 1.D of this brief, Benskin has specifically alleged numerous acts of affirmative fraud on the bank's part—including its false representations that the 2007 mortgage encumbering the Polk County realty would be released, and its active concealment of using the 2007 line of credit to pay off the 2006 promissory note—that show the bank fraudulently misled Benskin. At the minimum, Benskin sufficiently placed, under the dismissal review standard, the fact that the onset of the statute of limitations is in dispute. The district court erred in ignoring the dismissal review standard by again rejecting Benskin's argument for not "offer[ing] any degree of certainty" respecting the fraud claim where Benskin did offer sufficient allegations for dismissal pleading purposes. (Ruling, at p. 9; App. 79.)

3. The District Court Erred In Granting The Dismissal Motion On The Ground Of Failure Of Proof Of The Publication Element Respecting Count V Of The Amended Petition (The Slander Of Title Claim).

The district court granted the bank's motion to dismiss Benskin's final count of the amended petition—Count V, slander of title—not for the running of the statute of limitations but rather on a finding that the bank's alleged improper taking of a mortgage on Benskin's Polk County situated real estate did not constitute a "publication" sufficient to slander Benskin's title. (Ruling, at pp. 9-10; App. 79-80.) The district court apparently was critical that Benskin did not specifically name in

its amended petition any third-parties to whom the title slander was communicated. (Id.)

"There are five elements to a slander-of-title action: (1) an uttering and publication of slanderous words; (2) falsity of those words; (3) malice; (4) special damages to the plaintiffs; and (5) an estate or interest of the plaintiff in the property slandered." *Davitt v. Smart*, 449 N.W.2d 378, 379 (Iowa 1989). As for the element of "publication," this word "merely means a communication of the statement to some third person or persons." *Belcher v. Little,* 315 N.W.2d 734, 737 (Iowa 1982). That is, "there can be no slander [of title] without a publication of the defamatory statement to someone other than the person defamed." *Id.* And when it is the entity that is defamed itself that repeats the slanderous statement to a third person, that usually does not constitute publication unless "the wrongdoer should have foreseen" that the wronged party would likely have to inform a third party of the slanderous statement. *Id.* Thus, publication occurs when a third party is told of the slanderous statement by other than the wronged party, unless it is reasonably foreseeable that the wronged party itself would have to inform a third party of the slanderous statement.

Courts have found that a bank's wrongfully taking out of a mortgage on a customer's real estate, or otherwise wrongfully failing to release such an encumbrance (even if appropriately taken in the first instance), can constitute a

slander of title. *See, e.g., Monroe v. Bank of America Corp.*, 2018 WL 1875294, at *4-5 (N.D. Okla. 04-19-2018) (failure to release an *authorized* mortgage after expiration of the statute of limitations to foreclose on it does not constitute "publication" for a slander of title claim, for the mortgagor can file a quiet title action; however, an unauthorized mortgage or an authorized one that is satisfied but not released and where the limitations period to foreclose on it has not expired would constitute slander of title); *Nelson v. Bayview Loan Servicing, L.L.C.*, 2014 WL 4629382, at ¶¶ 86-87 (Ill. App. 2014) (while mortgagee's failure to release mortgage can constitute title slander, that claim in this case was factually the same as the mortgagor's statutory claim for release of mortgage for which the mortgagor had failed to prove damages). And the "publication" basis for title slander based on the mortgagee's failure to release a mortgage can be publically noting its purported mortgage right by recording the mortgage. In these cases, the courts did not require the mortgagor to identify in its petition a specific third person or persons whom were otherwise directly told of the mortgage filing and the mortgagee's failure to release it.

Under the dismissal standard, the allegations of Benskin's amended petition—and reasonable inferences therefrom—are to be taken as true. Benskin has alleged that the bank obtained a mortgage to secure the 2007 line of credit, and that mortgage encumbered Benskin's real estate situated in Polk County. (Amend. Pet., at ¶ 7;

App. 26.) Benskin further alleges that the bank wrongfully refused to release the mortgage, and instead fraudulently tapped into the 2007 credit line to pay off the 2006 loan transaction. (Amend. Pet., at ¶¶ 9-12; App. 26-27.) That is, Benskin has pled that the 2007 mortgage is still of record and has not been released—a recorded mortgage is "published" to the public at large via its recording. Under the dismissal review standard, the publication element is sufficient stated—at the minimum, the bank is on clear notice of the claim. Nothing more at this stage of the proceedings is required.

## CONCLUSION

For the reasons stated and authorities cited in this brief, the appeals court should reverse the district court's dismissal of each and all of Benskin's claims asserted against West Bank and remand this action back to the district court for further proceedings.

## REQUEST FOR ORAL ARGUMENT

The appellant, through counsel, requests to be heard in oral argument upon the submission of this cause.

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION AND TYPE AND TYPE-STYLE REQUIREMENTS

1. This brief complies with the type-volume limitations of Iowa R. App. P. 6.903(1)(g)(1) or (2) because this brief contains 7,992 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This brief complies with the typeface requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Office Word format 2010 in Times New Roman 14-point style.

/s/ S.P. DeVolder
S.P. DeVolder

March 11, 2019
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on March 11, 2019, a copy of this Brief of the Appellant was filed electronically with the Clerk of the Iowa Supreme Court through the EDMS system, and which system further will provide access to and service of the Brief on that same date to:

Dennis P. Ogden, Esq.
BRICK GENTRY, P.C.
6700 Westown Parkway, Suite 100
West Des Moines, IA 50266

/s/ S.P. DeVolder
S.P. DeVolder