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

RESISTANCE OF THE APPELLANT TO THE APPLICATION OF FURTHER REVIEW
(DATE OF COURT OF APPEALS DECISION: MARCH 4, 2020)

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STATEMENT RESISTING FURTHER REVIEW

The basis for the appellee bank's further review application reduces to a quibble over whether the appeals court erred in applying Iowa's firmly entrenched legal rule that motions to dismiss based on a party's failure to state a claim for relief in a petition are strongly disfavored and rarely should be granted. As discussed below (and as is facially apparent in the appeals court's opinion itself), the appeals court faithfully applied the rule that motions to dismiss for failure to state a claim should not be granted unless that result is compelled even when the petition's pleaded allegations are construed liberally in favor of the nonmoving plaintiff party. As shown in its application, the bank instead would have the courts apply a searching—indeed, nit-picking—analysis to a petition, by narrowly construing the scope of the allegations and applying a dismissal-is-favored rule (the old rule, before Iowa adopted (as has the federal courts and nearly all other state courts) the rule of notice pleading).

And in this regard it is first worth noting that nowhere in its application does the bank even cite, let alone discuss, any of the criteria set forth in Iowa R. App. P. 6.1103(1)(*b*)—the rule that sets forth the grounds for further review. That rule expressly provides that "further review will not be granted in normal circumstances"; instead, such review is only to be granted when one or more of the following circumstances (or comparable ones) exist: the appeals court decision at

issue conflicts with an Iowa supreme court or appeals court opinion on an important matter (no such case is identified, let alone discussed, by the bank in its application); the appeals court in its decision decided a substantial constitutional question or an otherwise important question of law that has not been, but should be, decided by the supreme court (again, no such claim or argument is raised, let alone advanced, by the bank in its application); the appeals court decision at issue adjudicated an important question of changing legal principles (ditto on that one); or the decision otherwise determined an issue of broad public importance that the supreme court should determine (dittos again).

The bank's application constitutes a mundane argument that the appeals court erred in deciding a typical appellate case—and apparently in not interpreting the amended petition allegations narrowly and in the bank's favor—and that the Iowa supreme court should serve as a court of correcting such decisions. This demonstrably is not the purpose for further review. It is the everyday task of the appeals court to review district court rulings and judgments for error in the mine-run set of cases (and the appeals court exactly did its job in this case); that is not the function or purpose of the Iowa supreme court and as underscored by rule 6.1103(1)(*b*).

Now for some necessary background and in light of the constrained interpretation the bank gives to the facts alleged in the operative amended petition

filed by Benskin.[1] In brief and summary fashion, the claims set forth in the amended petition 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.)

Specifically, 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,

[1] In its application, and unlike the court of appeals in its ruling, the bank fails to state the salient facts pled in the amended petition in Benskin's favor. *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).

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—however, 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.)

As to the allegations in the amended petition that concern when the statute of limitations clock began to tick on the claims, 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, the 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 the 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, 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.) Benskin's causes of action are based on this central fact allegation. (Id.)

In its ruling at issue, the appeals court found under the applicable dismissal for failure to state a claim rule that Benskin's amended petition based on these facts easily generated a question as to when the limitations period commenced for all the claims at issue (July 22, 2016). This is so, because while the bank did inform Benskin on June 27, 2011 that the Polk County mortgages would not be released, at that time those mortgages did not actually encumber any property because the underlying promissory note (the line of credit) had never been accessed by Benskin (the mortgages had a zero monetary security lien value on the properties—at least as

Benskin reasonably believed at that time). In was only on July 22, 2016 did Benskin learn that the bank earlier had wrongly (and without Benskin's authority) tapped into the line of credit (and thereby activated the mortgage liens on the Polk County properties). And the bank misrepresented and otherwise concealed its actions from Benskin until that date (and even then, the bank did not confess to its conduct but Benskin discovered what the bank had done through obtaining on that date discovery in an unrelated lawsuit). (Amend. Pet., at ¶¶ 13-14; App. 27.) And if that is the claims accrual date (as the court of appeals correctly found under the dismissal standard), then Benskin's claims were filed before the running of any possibly applicable statute of limitations as its petition was filed on May 18, 2018—well before the minimum five year limitations periods that even the bank concedes are the minimum applicable periods given the causes of action raised. (Pet. of 05-18-2018; App. 10-14; Amend. Pet. of 07-02-2018; App. 25-32.) Iowa Code §§ 524.221(2) (banking contract claims limitations period of five years) and 614.1(4) (fraud claim limitations period of five years).[2]

[2] Benskin in his briefs further argued that the general written contract limitations period applies to the contract-based claims; that period being ten years from the claims accrual date. Iowa Code § 614.5(*a*); the appeals court did not reach this argument because, as shown, none of the claims were time barred given the claims accrual date when determined by application of the dismissal standard to the amended petition's pleaded allegations.

The appeals court in its ruling applied the correct review standard; the bank in its application does not pay tribute to that standard; accordingly, the standard requires some discussion for it demonstrates the weakness of the bank's application for further review. The bank's dismissal motion was singularly predicated on Iowa R. Civ. P. 1.421(1)(*f*)—that Benskin supposedly did not state "a claim upon which relief can be granted" and principally because of the running of the applicable statutes of limitations on four of its five claims. (Motion to Dismiss, at p. 1; App. 35.)

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 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. It is here that the appeals court got it right and the bank gets it wrong.

A closing comment on the demanding dismissal barrier is in order. It is not as if the Iowa supreme court has backed-off 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.]

There is no basis in law or fact for the Iowa supreme court to revisit these clearly established legal principles, and the bank itself sets forth no such convincing reason(s) in its application. And the demanding dismissal standard stops in its tracks the bank's application for further review.

BRIEF IN SUPPORT OF THE RESISTANCE

1. Further Review Is Not Warranted To Revisit The Appeals Court's Ruling On Estoppel As Applied To The Limitations Period For The Contract 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.

Under the governing dismissal review standard (and as the appeals court concluded), Benskin provided more than adequate allegations in its amended petition to show that the bank 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.) The bank in its further review application conclusory asserts there were insufficient factual allegations to apply equitable estoppel. But that barren argument ignores the facts pled in the amended petition, the dismissal review standard, and the case law on estoppel cited herein and in the appeals court's opinion.

The bank simply asserts that the allegations of fraud encompassing the estoppel assertion could have been set out in even yet more detail.[3] Well, that's not the salient question—the actual question for dismissal purposes is whether the pleaded facts set forth, even however minimally, are sufficient enough. And case law—cited both by Benskin and the appeals court—clearly says the facts set forth

[3] The bank also conclusory asserts that Benskin purportedly did not raise the estoppel argument respecting its briefing before the district court. That is not true. The bank argued an entirely different position before the appeals court on what error argument was supposedly not preserved; at the appeals court level the bank conceded estoppel was argued by Benskin respecting the limitations defense for both the contract and fraud-based claims, and the court of appeals appropriately specifically ruled on estoppel.

were more than sufficient. *See Pride v. Peterson,* 173 N.W.2d 549, 554 (Iowa 1970) (when the defendant raises the affirmative defense of the running of the statute of 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.") (emphasis added); *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.") (citing *Pride*, 173 N.W.2d at 554.).

2. Further Review Is Not Warranted To Revisit The Appeals Court's Ruling On Estoppel As Applied To The Limitations Period For The Fraud Claim.

The elements of a fraud claim 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 limitations period 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 the appeals court recognized, 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,* 173 N.W.2d at 549. 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.").

3. Further Review Is Not Warranted To Revisit The Appeals Court's Ruling That Benskin Sufficiently Pled A Slander Of Title Claim.

"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 unrelated 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. The bank nonetheless, and without citing any direct authority in support, claims that Benskin was required to identify a specific third-party to whom this title slander was communicated. The response to this position is an easy one—the improperly recorded and non-released mortgages were

communicated *to the public at large* (and not just to a single individual) as the result of the bank's wrongly accessing the credit line and refusing to release the recorded mortgages. *See Monroe*, 2018 WL 1875294, at *4-5 and *Nelson*, 2014 WL 4629382, at ¶¶ 86-87—these cases sensibly indicate a recorded mortgage is publication to the public at large that the mortgagee claims a lien interest in the realty described in the mortgages. Indeed, that is the purpose of the recordation statutes—to publish notice to the public, including interested third-persons, of a lienholder's claim against the real estate and its priority. The appeals court correctly ruled that for dismissal purposes Benskin sufficiently alleged a slander of title claim, particularly under the applicable dismissal review standard.

CONCLUSION

This case is not suitable for further review; the applicant bank itself fails to make an argument—let alone even attempt one—that review of the court of appeals' decision falls within rule 6.1103(1)(*b*)'s parameters for such review. Accordingly, the court should deny the application and in its entirety.

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

1. This resistance complies with the type-volume limitations of Iowa Rs. App. P. 6.903(1)(g)(1) or (2) and 6.1103(4) because this brief contains 5,226 words, excluding parts of the resistance exempted by Iowa R. App. P. 6.903(1)(g)(1).

2. This resistance 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 resistance 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

April 3, 2020
Date

CERTIFICATE OF FILING AND SERVICE

The undersigned certifies that on April 3, 2020, a copy of this Resistance of the Appellant to the Application for Further Review was filed electronically with the Clerk of the Iowa Supreme Court through EDMS, and which system further will provide access to and service of the Resistance on that same date to:

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