In the Supreme Court of Iowa

Case No. 19-0514

PSFS 3 Corporation,

Plaintiff/Appellee,

vs.

Michael P. Seidman, D.D.S., P.C. d/b/a Dental Associates of Cape Cod, Michael P. Seidman, *et al.*

Defendants/Appellants.
_____/

Reply Brief of Appellants (Gossett Defendants)

On Appeal from the Iowa District Court in and for Polk County, Iowa
Consolidated Case Number: LACL114226
Judge Scott D. Rosenberg

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Statement of Issues Presented

Issue 1: The District Court erred in finding that it had jurisdiction over the Defendants.

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Meier v. Senecaut, 641 N.W.2d 532, 539 (Iowa 2002)

Power Equipment, Inc. v. Tschiggrie, 460 N.W.2d 861 (Iowa 1990)

Issue 3: The District Court deprived Appellants of their Due Process Rights under the U.S. and Iowa Constitutions by entering Final Judgments in 320 cases without permitting them to present a defense, without a trial, and without evidence (and not as a result of a motion for dismissal, summary judgment or for judgment on the pleadings).

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§ 621.12(2)(b), FLA. STAT.

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Worthington v. Kenkel, 684 N.W.2d 228 (Iowa 2004)

Argument

Issue 1: The District Court erred in finding it had jurisdiction over the Defendants.

A. How Issue Was Preserved for Appellate Review

PSFS 3 argues that Dr. Wineinger "never raised this issue" and instead, joined the other Gossett Defendants[1], "challenging only the assignment from NCMIC to PSFS 3." (Brief, p. 63.) The Gossett Defendants, including Dr. Wineinger, challenged the personal jurisdiction of the Iowa courts. (App. Vol. 5 pp. 49, 116, 205, and 532[2] ¶ 3.)

PSFS 3 wrongly alleged that Dr. Wineinger had submitted himself to the jurisdiction of the Iowa courts (App. Vol. 4 p. 285 ¶ 4) and attached a copy of

---

[1]PSFS 3 insists on labeling the Gossett Defendants "Lessees." Because the contracts sued upon were determined not to be leases or financing leases, applying this Court's opinion in *C & J Vantage Leasing, Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), the Gossett Defendants were not lessees, and thus, it is inappropriate for PSFS 3 to try to have this Court think of the Gossett Defendants as lessees.

[2]The undersigned discovered an error in the preparation of Vol. 5 of the Appendix: App. Vol. 5 p. 532 should have been page 1 of the motion to dismiss; instead, it is page 2 and page 1 is missing. This throws off the page numbering of Vol. 5 of the Table of Contents of the Appendix; but, because page 1 is not cited, it appears to be an easier solution to not correct the error and continue citing to the actual page number in Vol. 5 of the Appendix. The undersigned apologizes to this Court and counsel for not discovering this error before filing.

the Financing Agreement to the Petition (App. Vol. 4 pp. 293-94.) The Financing Agreement contradicts the allegation in the Petition, and renders the allegations void. *WINBCO Tank Co., Inc. v. Palmer & Cay of Minn., L.L.C.*, 435 F. Supp. 2d 945, 955 (S.D. Iowa 2006) (decided under comparable federal rule). Thus, PSFS 3 failed to allege this Court had jurisdiction over Dr. Wineinger, and because a judgment was entered against Dr. Wineinger without affording him a trial, PSFS 3 failed to carry its burden of proving that the Iowa court had jurisdiction over him. *Shams v. Hassan,* 829 N.W.2d 848, 853 (Iowa 2013) ("the plaintiff has the burden to establish jurisdiction may be had over the defendant").

Dr. Wineinger asserted lack of personal jurisdiction:

> 3. With respect to those allegations concern [sic] the personal jurisdiction of this court, Defendants affirmatively aver that the written contract speaks for itself, and denies that this court has personal jurisdiction over Defendants.

(App. Vol. 5 p. 532 ¶ 3.)

Dr. Wineinger also preserved error on this issue through each of the other filings identified in this section of the Initial Brief.

C. Contentions

1. Law of the Case

The sole basis alleged by PSFS 3 for the Iowa courts' personal jurisdiction over the Gossett Defendants was the contractual floating jurisdiction clause. (Paragraph 4 of all Petitions, *e.g.*, App. Vol. 2 p. 41 through Vol. 4 p. 295.) PSFS 3 and the Gossett Defendants fully litigated the enforceability of the clause in the Florida federal district court and before the Judicial Panel on Multi-District Litigation. The federal district court concluded:

> Plaintiffs who executed the PSFS Agreements [the Gossett and Charlip Defendants] have satisfied their burden of establishing this is a "rare" case where the Court should decline to enforce a mandatory forum selection clause because they have shown that a transfer would clearly contravene "the interest of justice." The *Blauzvern* and *Wigdor* Plaintiffs filed their action before the Agreements were assigned, and it would be inequitable to allow Defendants to shop the actions to another forum simply by assigning the Leases after the lawsuit is filed.

(App. Vol. 1 p. 286.)

This ruling became law of the case when the final judgments were affirmed by the Eleventh Circuit Court of Appeals. (App. Vol. 1 p. 1089.)

The finding of the Florida federal district court that the Defendants satisfied their burden of establishing that a transfer would clearly contravene "the interest of justice," is the same as the burden described in the seminal case of *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 10, 92 S.Ct. 1907, 1913

(1972), quoted in *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 315 (Iowa Crt. App. 2007): as being "shown by the resisting party to be 'unreasonable' under the circumstances." "[C]ontraven[ing] the 'interest of justice'" is "'unreasonable' under the circumstances."

Therefore, this issue has been resolved for the Defendants and is law of the case. It was not available to be revisited by the district court which erred in failing to apply the law of the case.

Once a Plaintiff properly invokes the jurisdiction of a court, Plaintiff's selection must be given deference, which is known as "plaintiff's venue privilege." *Atl. Marine Const. Co., Inc. v. U.S. Dist. Court for W. Dist. of Texas,* 571 U.S. 49, 63 (2013). Jurisdiction does not continue to be available in other jurisdictions:

> "The prevailing standard is that in the absence of compelling circumstances, the first-filed rule should apply." *U.S. Fire Ins. Co. v. Goodyear Tire & Rubber Co.,* 920 F.2d 487, 488–89 (8th Cir.1990)

Aqua-Care Mktg. LLC. v. Hydro Sys., Inc., 99 F. Supp. 3d 959, 963 (S.D. Iowa 2015).

All cases filed by NCMIC Finance Corp. ("NCMIC") before suit was filed by the Gossett Defendants in the USDC for the Southern District of Florida, erroneously claimed that the Defendants had consented to jurisdiction

in Iowa. The contracts attached to those petitions contradicted the allegation and rendered it void. The contracts revealed no basis for Iowa jurisdiction. The Gossett Defendants filed the Florida federal district court putative class action on behalf of all the Gossett Defendants prior to formation of PSFS 3 and assignment of the Financing Agreements to it. Thus, the Gossett Defendants first established personal jurisdiction in the Florida federal district court action and PSFS 3 needed to file compulsory counterclaims under FED. R. CIV. P. 13, but failed to do so.

2. Disingenuous Argument of PSFS 3 on Law of the Case

PSFS 3 makes a wildly disingenuous argument that applying law of the case on this issue should work in PSFS 3's favor. (Brief, p. 77.) The basis of the argument is a misrepresentation of the actions of the Florida federal district judge, whom PSFS 3 represented: "noted that [the Gossett Defendants] "'consent to personal jurisdiction and venue' in Iowa." (Brief, p. 77.)

The quoted language does not concern the Financing Agreements before this Court; it came from the 1-column formatted Financing Agreements, those entered into with Brican America, Inc., and assigned to NCMIC. The order actually says:

The Court will deny the motion to transfer. First, NCMIC incorrectly

> argues that the floating forum-selection clause in the Brican Agreements requires transfer of the actions in which Plaintiffs executed a Brican Agreement. The Brican Agreements only provide that Plaintiffs "consent to personal jurisdiction and venue" in Iowa, not that they must bring an action in Iowa. In other words, the forum-selection clauses in the Brican Agreements are "permissive," not "mandatory," *see Land-Cellular Corp. v. Zokaites*, 2006 WL 3039964, at *6 (S.D. Fla. Sep. 26, 2006) (clause stating that debtor "irrevocably submits and consents to the jurisdiction" of a Pennsylvania state court is permissive, not mandatory), and do not require Plaintiffs to file their suit in Iowa. ... As a result, Plaintiffs who executed Brican Agreements had a right to assert their claims in this venue, and Court will not transfer actions brought by Plaintiffs who executed those Agreements.

(App. Vol. 1 p. 284-85.)

"Brican Agreements" was a defined term in the order, defined as "Equipment Agreements in which Brican Inc. was identified as the lessor." (App. Vol. 1 p. 282.) They were distinguished in the order from the "PSFS Agreements" defined as "Agreements directly with PSFS [defined as NCMIC] where PSFS was identified as the lessor." (App. Vol. 1 p. 282-83.) The PSFS Agreements "were formatted in a 'three-column' style and contained a choice-of-law and forum-selection provision different than the provision in the Brican Agreements: ... ." (App. Vol. 1 p. 283.)

This appeal concerns only the 3-column contracts which the cited order defined as PSFS Agreements, not the Brican Agreements. Therefore, the language quoted by PSFS 3 does not address the Financing Agreements which

are the subject of this appeal.

3. Plaintiff Doing Business In Iowa

The argument that Defendants should have expected to be sued in Iowa because they were doing business with an Iowa corporation (Brief p. 67) is both wrong and irrelevant. The sole basis alleged by PSFS 3 for the Iowa courts' personal jurisdiction was the contractual forum selection clause. (Petitions ¶ 4.) Any other basis for jurisdiction which might have been raised was not and cannot be raised for the first time on appeal. *Smith v. J. C. Penney Co.,* 260 Iowa 573, 580, 149 N.W.2d 794, 799 (1967).

Any other basis is irrelevant. However, even if this Court were to venture outside the allegations (and this Court should not), the Court looks to where the Defendants were doing business—not where the Plaintiffs were doing business—when deciding if the Defendants, by doing business within the state, have submitted themselves to the courts' jurisdiction.

4. Forum Shopping

PSFS 3 argues that Defendants should have expected to be sued in Iowa because they were doing business with an Iowa company, and therefore, Defendants' forum shopping argument is "turned on its head." (Brief, p. 67.) Besides being nonsensical, that was not the advice given by PSFS 3's lawyers

as they advised NCMIC to form an Iowa corporation and assign the contracts to the new company. There was no discussion of alternative grounds for personal jurisdiction, just the contractual clause:

> The governing law, jurisdiction and venue paragraph of the three column format leases to which PSFS [NCMIC] is the original lessor is somewhat unclear as to whether jurisdiction and venue is proper in the home state and county of the PSFS [NCMIC]. I recommend that all these leases be assigned to another Iowa corporation for the following reasons:
>
> (1) The above mentioned paragraph is very clear that jurisdiction and venue is proper in the home state and county of any assignee. Thus if these leases are assigned to an Iowa corporation located in Polk County we have a lock on jurisdiction and venue here in Polk County.

(App. Vol. 7 p. 121 second ¶.)

If they could have sued in Iowa anyway, why bother with this? Why put all of their jurisdictional eggs in the one basket of the contractual clause rather than alleging Iowa jurisdiction because the Defendants were doing business with an Iowa corporation? Because, they knew then, and know now, that the location of Plaintiff's business is not the test for personal jurisdiction.

If NCMIC was not forum shopping, then why this:

> I recommend that all these leases be assigned to another Iowa corporation for the following reasons:
>
> * * *

(3) The Polk County, Iowa courts have handled many leasing cases and a body of law has been developed over the last five years which upholds these leases. If PSFS [NCMIC] or any assignee had to litigate these leases in jurisdiction all over the United States there is an increased chance of inconsistent ***or adverse verdicts***.

(App. Vol. 7 p. 121 ¶(3); emphasis added.)

So, the "nefarious[] 'forum shopping'" (Brief, p. 67) was real and purposeful. It also turned out to be effective—over 300 final judgments were entered without a trial.

5. If No Iowa Jurisdiction, No Claims Remain

PSFS 3 suggests to this Court that if this Court finds that the Iowa courts were without personal jurisdiction over the Defendants, then PSFS 3 will have to start over, suing in dozens of other fora. (Brief, p. 77.) Unfortunately for PSFS 3, it is wrong—if this Court finds personal jurisdiction lacking, then the suits filed by PSFS 3 were void. *Burnham v. Superior Court of California, County of Marin,* 495 U.S. 604, 608–09 (1990):

> The proposition that the judgment of a court lacking jurisdiction is void traces back to the English Year Books, *see Bowser v. Collins*, Y.B.Mich. 22 Edw. IV, f. 30, pl. 11, 145 Eng.Rep. 97 (Ex. Ch. 1482), and was made settled law by Lord Coke in *Case of the Marshalsea*, 10 Coke Rep. 68b, 77a, 77 Eng.Rep. 1027, 1041 (K.B. 1612). Traditionally that proposition was embodied in the phrase *coram non judice*, "before a person not a judge"—meaning, in effect, that the proceeding in question

> was not a judicial proceeding because lawful judicial authority was not present, and could therefore not yield a judgment. American courts invalidated, or denied recognition to, judgments that violated this common-law principle long before the Fourteenth Amendment was adopted. *See, e.g., Grumon v. Raymond,* 1 Conn. 40 (1814); *Picquet v. Swan,* 19 F.Cas. 609 (No. 11,134) (CC Mass.1828); *Dunn v. Dunn,* 4 Paige 425 (N.Y.Ch. 1834); *Evans v. Instine*, 7 Ohio 273 (1835); *Steel v. Smith,* 7 Watts & Serg. 447 (Pa.1844); *Boswell's Lessee v. Otis,* 9 How. 336, 350, 13 L.Ed. 164 (1850). In *Pennoyer v. Neff,* 95 U.S. 714, 732, 24 L.Ed. 565 (1878), we announced that the judgment of a court lacking personal jurisdiction violated the Due Process Clause of the Fourteenth Amendment as well.

See also Davis v. Rudolph, 242 Iowa 589, 599, 45 N.W.2d 886, 892 (1951).

> A void judgment, as opposed to an erroneous one, is one which from its inception was legally ineffective. *See Williams v. North Carolina,* 325 U.S. 226, 65 S.Ct. 1092, 89 L.Ed. 1577 (1945); *Jordan v. Gilligan,* 500 F.2d 701, 710 (6th Cir. 1974), *cert. denied,* 421 U.S. 991, 95 S.Ct. 1996, 44 L.Ed.2d 481 (1975); *Lubben v. Selective Service System,* 453 F.2d at 649; 7 Moore's, *supra* P 60.25(2).

Kansas City S. Ry. Co. v. Great Lakes Carbon Corp., 624 F.2d 822, 825 (8th Cir. 1980).

A suit filed in a court lacking in jurisdiction does not toll the statute of limitations. *Burkhardt v. Bates,* 191 F. Supp. 149, 153 (N.D. Iowa 1961), *aff'd*, 296 F.2d 315 (8th Cir. 1961).

The statute has run. Further, PSFS 3 had the opportunity (and requirement) to file mandatory counterclaims in the Florida federal district court action, and failed to do so. In the Eleventh Circuit, counterclaims are still

mandatory in a class action suit. *See Thomas v. Blue Cross & Blue Shield Ass'n,* 333 Fed. Appx. 414, 422 (11th Cir. 2009), followed by *Saccoccio v. JPMorgan Chase Bank, N.A.,* 13-21107-CIV, 2015 WL 3822315, at *4 (S.D. Fla. June 9, 2015), among others. At the insistence of PSFS 3, class certification was denied so the action proceeded as a mass action. Mandatory counterclaims to enforce the Financing Agreements were not filed by PSFS 3. When the Eleventh Circuit affirmed the judgments, the claims which could have been brought in those mandatory counterclaims were lost forever.

PSFS 3 attempted to bring counterclaims on other issues against over 250 of the Gossett Defendants in the Florida federal district court action—based on those Defendants having accepted payments for referrals of colleagues to Brican America. PSFS 3 could never state a valid claim for relief and after four attempts, the court dismissed the attempted claims with prejudice. (App. Vol. 1 p. 948.)

There are no more claims for PSFS 3 to pursue. A finding of lack of personal jurisdiction of the Iowa courts brings this 10-year odyssey to an end.

6. Sham Transaction not Sham Corporation, Plus Sham Argument

PSFS 3 mischaracterizes the argument of the Gossett Defendants—that

the assignment to PSFS 3 from NCMIC was as sham—by asserting that Defendants argue that PSFS 3 is a sham. It is the transaction, not the corporation, which Defendants argue is a sham.

The argument that having $2.5 million in the bank on the date of the trials is evidence that PSFS 3 was properly capitalized is misplaced and most likely the result of manipulation of accounts rather than capitalization. (Brief, p. 70, fn. 26.) There was no evidence of the source and character of these funds, and thus, no evidence these funds represented capital, whether paid-in capital or retained earnings.

As detailed in the Initial Brief, the only business of PSFS 3 was to serve as the assignee of the Financing Agreements. The money paid on the Financing Agreements assigned to PSFS 3 was collected and deposited into the bank account of NCMIC. (I.B. pp. 23-24.) Once per month, the amount collected would be transferred to the account of PSFS 3 by NCMIC and immediately transferred out of the PSFS 3 account, back into the NCMIC account. The accumulation of $2.5 million in the PSFS 3 account only meant that, with the trials approaching, both NCMIC and PSFS 3 left money in the PSFS 3 account until after the trials.

Further, proper capitalization of PSFS 3 is determined at the time of the

assignment, not the time of trial.

7. Piercing the Corporate Veil

There is no attempt, nor any argument, of piercing the corporate veil in the Initial Brief. The only reference to piercing the corporate veil was part of the quotation from 1 FLETCHER CYC. CORP. § 41.33 about inadequate capitalization.

The Gossett Defendants seek a reversal of the final judgments with directions to dismiss the petitions upon remand.

Issue 2: The District Court erred in finding as a matter of law that the Financing Agreements (entitled "Equipment Lease Application and Agreement") were not Credit Agreements as defined in IOWA CODE § 535.17; that the original principal amount of the Credit Agreement was not a material term under IOWA CODE § 535.17; and, that the rate of interest of the Credit Agreement, which could not otherwise be calculated, was not a material term under IOWA CODE § 535.17.

A. How Issue Was Preserved for Appellate Review

PSFS 3 confuses law of the case with preservation of error. PSFS 3 argues that the Gossett Defendants failed to preserve error because the issue was resolved in the Florida federal district court action and affirmed on appeal; thus, law of the case applies. (Brief pp. 33-34.) The Gossett Defendants have preserved error as they described on page 74 of their initial brief. *Meier v.*

Senecaut, 641 N.W.2d 532, 539 (Iowa 2002) ("There is no procedural rule solely dedicated to the preservation of error doctrine, and a party may use any means to request the court to make a ruling on an issue.")

C. Contentions

1. Interest Rate is a material term

In *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d 65 (Iowa 2011), this Court was called upon to determine what was meant by the legislature which required credit agreements to include "all of the material terms." IOWA CODE § 535.17(1). This Court noted that "[t]he agreement laid out the subject matter, ***price***, payment terms, and duration," and determined that the statute did not require the interest rate to be listed separately from the "total payment required under the agreement." *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d at 82. (Emphasis added.)

PSFS 3 asks this Court define "price" as used above to be the "total payment required under the agreement." But if this Court so holds, then "price" is not necessary because with payment terms ($x/mo.) times the duration, you would have the total payment required under the agreement. If it is not so defined, then clearly the price paid for the goods is not disclosed and thus the price paid for the borrowed money cannot be determined. The contract violates

§ 535.17, and cannot be enforced.

In analyzing whether § 535.17 requires the disclosure of interest rates, this Court contrasted the language of § 535.17 (which requires disclosure of "all of the material terms") with that of 15 U.S.C. § 1632 (2006) which, this Court wrote, "requir[es] ... disclosure of interest rates in the agreement." *C & J Vantage Leasing Co. v. Wolfe*, 795 N.W.2d at 82. In actuality, § 1632 shows just how important Congress believed the disclosure of interest rates to be. The statute does not just require the disclosure of the interest rate, it mandates that the disclosure be "more conspicuous[] than other terms, data, or information provided in connection with a transaction, ..." 15 U.S.C. § 1632(a). The Gossett Defendants assert that such is another example of the importance of the interest rate as a "material term" in a financial transaction.

The Gossett Defendants have found no other court which has held that the interest rate in a financial transaction is not a material term.

2. Rate of Interest Must be Disclosed as a Material Term

The Gossett Defendants suggest that, with the interest rate being a "material term," Iowa's usury statute is implicated. Defendants acknowledge that the Court of Appeals has opined that a particular rate of interest need not be disclosed to satisfy IOWA CODE § 535.2, which is different that § 535.17.

Frontier Leasing Corp. v. Waterford Golf Associates, L.L.C., 791 N.W.2d 710 (Iowa Ct. App. 2010) ("Thus, it is sufficient that the due dates and amounts of the payments were spelled out in writing, and that Waterford agreed to them.") The Gossett Defendants respectfully suggest that the opinion is not supported by the statute, which provides:

> 2. a. The following persons ***may agree in writing to pay any rate of interest***, and a person so agreeing in writing shall not plead or interpose the claim or defense of usury in any action or proceeding, and the person agreeing to receive the interest is not subject to any penalty or forfeiture for agreeing to receive or for receiving the interest:
>
> (5) A person borrowing money or obtaining credit for business or agricultural purposes, ...

IOWA CODE § 535.2.

Similar statutes have been interpreted as requiring the disclosure of the rate of interest:

> An excessive interest charge is "agreed upon in writing" only if the debtor consents in writing to the charge.

Albee v. Wolfeboro R. Co., Inc., 126 N.H. 176, 180, 489 A.2d 148, 151 (1985).

> The fact remains that there is no evidence of any *writing* which was *signed* by the debtor or its agents *consenting* to an interest rate in excess of 10 percent with regard to this transaction.

In re Bradford Realty, Inc., 55 B.R. 218, 220 (Bankr. D.N.H. 1985)(emphasis in original).

3. Forfeiture of Interest for Violation of Statute

PSFS 3 goes to great lengths arguing the application of an inapplicable statute to save interest charged in violation of § 535.2 and ignores the direct application of IOWA CODE § 535.5. (Brief, pp. 44-46.) *Power Equipment, Inc. v. Tschiggrie*, 460 N.W.2d 861 (Iowa 1990) was decided under IOWA CODE § 535.11, which concerns finance charges on accounts receivable, not interest on written contracts. This Court specifically stated:

> If the trial court's findings on remand place the case under section 535.11, rather than section 535.2(2)(a)(5), and the court further finds that a valid section 535.11(2)(b) notice has been established, plaintiff is entitled to recover a finance charge consistent with the provisions contained in that notice but not to exceed the maximum amount permitted under section 535.11(3) or (4), whichever is deemed applicable based on the trial court's supplemental findings. The fact that the notice of finance charge on a particular invoice may exceed the maximum amount allowable under the latter statutes shall not work a forfeiture under section 535.5. Such forfeiture is only applicable where the excessive finance charge "has been contracted for." A negative finding by the court under section 535.2(2)(a)(5) (which is required to trigger the applicability of section 535.11) serves to negate that requirement.
>
> As to transactions, if any, for which the trial court finds that there was neither a written agreement under section 535.2(2)(a)(5) nor a valid notice under section 535.11(2)(b), the court shall limit the recovery of a finance charge on those transactions to interest on the aggregate of such items at the rate and for the time provided in section 535.2(1)(f).

Power Equip., Inc. v. Tschiggfrie, 460 N.W.2d 861, 865 (Iowa 1990).

The case, and argument made by PSFS 3, are inapplicable to our facts. Rather, § 535.5 (entitled "Penalty for Usury") is invoked which provides for a forfeiture of 8% per annum on the unpaid principal balance (a figure incapable of determination because of failing to disclose the beginning principal balance and annual interest rate) which is escheated to the state. Additionally, § 535.5 provides for a forfeiture of costs.

D. Conclusion

The Financing Agreements other than the Wineinger Contract violate the Iowa Statute of Frauds with the result being they are unenforceable. They also violate the Iowa Usury statute. This Court should reverse the final judgments and remand them to the trial court with instructions to dismiss the petitions for failure to prove damages, for violation of the Iowa Statue of Frauds, and for violation of the Iowa Usury statute.

Issue 3: The District Court deprived Appellants of their Due Process Rights under the U.S. and Iowa Constitutions by entering Final Judgments without permitting them to present a defense, without a trial, and without evidence (and not as a result of a motion for dismissal, summary judgment or judgment on the pleadings).

A. How Issue Was Preserved for Appellate Review

PSFS 3 asserts that the 73 Gossett Defendants against whom judgments

were entered although those 73 Gossett Defendants were not parties to the underlying contracts did not preserve error, claiming this issue was not raised below. (Brief, p. 46.) That is incorrect. Each of the 73 Gossett Defendants answered the petition in the same fashion:

> 5. Each Defendant whose name appears on the contracts attached to the various complaints as the "Lessee" admits that it entered into a written contract attached to the petition, denies that it is a finance lease agreement, and is without knowledge, and therefore, denies, the remaining allegations of the paragraph alleging the establishment of the written contractual arrangement.

(App. Vol. p. 532 ¶ 5.)

This answer admits that the name appearing on the contract attached to the petition is a party to the contract and denies that any entity joined as a party whose name does not appear on the contract is properly a party.

Using the petition against William D. Baxter, DMD, PA, and William D. Baxter, Individually, as an example, the petition alleged:

> 7. On or about October 1, 2008, Defendant William D. Baxter, DMD, PA, entered into a written finance lease agreement with the Plaintiff's assignor. ... (See Exhibit 1).
>
> 8. Defendant, William D. Baxter, individually, entered into a written continuing personal guaranty on the above lease with the Plaintiff's assignor.

(App. Vol. 2 p. 115 ¶¶ 7-8.)

"P.A." or "PA" designates a professional association in Florida, a type of a corporation. § 621.12(2)(b), FLA. STAT. An example of a corporate signature is "a corporate signature block identifying the originating lender ("Wells Fargo Bank, N.A.") and the person signing on its behalf ("By Joan M. Mills, Vice President")." *Rincon v. HSBC Bank USA, Nat. Ass'n,* 196 So. 3d 417, 418 (Fla. 5th DCA 2016).

Exhibit 1 attached to the petition says "Legal Name of Lessee: William D. Baxter, D.M.D." (App. Vol. 2 p. 118.) The signature on the contract is a personal signature—there is no office or other authority indicated to bind a corporation. (App. Vol. 2 p. 119.) In the pre-printed form, there is a blank for the printing of the name of the person who signed and the ***title***. (App. Vol. 2 p. 119.) However, no title is filled in.

PSFS 3 had to prove it's allegations, including the allegation that William D. Baxter, DMD, PA, was a party to the contract, but was never required to do so—a final judgment was entered against William D. Baxter, DMD, PA, (and 72 others similarly) without a trial. (App. Vol. 8 p. 192.)

PSFS 3 attempts to dodge the issue now by asserting that William D. Baxter, DMD, PA, is a misnomer for William D. Baxter, DMD. (Brief, pp. 46-47.) That is not true. In Florida, William D. Baxter, DMD, PA is a corporate

entity whose identity is separate from that of Dr. Baxter.

> Under our rules, the caption of an original notice must name the parties, and the original notice must be 'directed to the defendant.'... . Where the real defendant has been served, some variation in the name or error in an initial is not fatal. *Webb v. Ferkins*, 227 Iowa 1157, 290 N.W. 112 ('Dean Ferkins' instead of 'Dean Firkins'). ...
>
> * * *
>
> On the other hand, where the misnomer is more substantial, the name variation is fatal. *Geneva v. Thompson*, 200 Iowa 1173, 206 N.W. 132 ('Frank Genero' instead of 'Frank Geneva'). This is true as to corporations.

Hickman v. Hygrade Packing Co., 185 N.W.2d 801, 802-03 (Iowa 1971).

C. Contentions

1. Contract Damages Were Most Definitely Disputed; That is Why This Litigation Exists

This Court has promulgated rules of procedure whose purposes include "simplifying the proceedings and promoting the speedy determination of litigation upon its merits." IOWA CODE § 602.4201(1). The state legislature has created a detailed path for promulgation and passage of rules. IOWA CODE § 602.4202. Courts require, as this Court should require, compliance with those rules because, as one Florida intermediate appellate court put it:

> We are particularly loath to overlook the defective motion, because so much effort by members of the Bar and the court goes into the adoption of the Rules of Civil Procedure that it is an anathema, in light of such

> effort, not to require compliance with them by the remaining members of the Bar.

Spinner by & through Spinner v. Wainer, 430 So. 2d 595, 596 (Fla. 4th DCA 1983).

Under its rule making authority granted to it by the state legislature, and in exercise of its inherent power to control the court's docket, this Court adopted a very detailed procedure to gain a summary judgment. IOWA R. CIV. P. 1.981. PSFS 3 ignored the requirements of that rule and filed what it argues should be treated as something akin to a motion for summary judgment. (Brief, pp. 32-33.)

This Court has promulgated no rule for filing a motion which is akin to a motion for summary judgment—it has specific requirements for a motion for summary judgment. Whenever PSFS 3 filed a motion for summary judgment which complied with the rule, Defendants followed the rule to oppose the motion. (App. Vol. 6 p. 114-621.) But there is no rule for Defendants to follow in responding to something akin to, but assuredly not, a motion for summary judgment.

Despite the lack of any such rule, PSFS 3 wants this Court to hold the Gossett Defendants responsible for (1) not divining what procedure this Court

would adopt if it adopted a rule for motions akin to a motion for summary judgment, and (2) failing to respond to filing of an affidavit in support of a motion akin to a motion for summary judgment. When this Court adopts rules, it can expect that the Gossett Defendants will comply with them; so too should this Court expect PSFS 3 to comply.

Because the rules promulgated by this Court are designed to simplify the proceedings and promote the speedy determination of litigation upon its merits, and not serve as a trap for the unwary, the Gossett Defendants are justified in relying on those rules and not responding to an unauthorized filing.

Imagine if the Gossett Defendants had filed *any* response to the unauthorized motion akin to a motion for summary judgment, and the documents filed in support thereof, including the affidavit concerning monthly payments. PSFS 3 would be arguing that the Gossett Defendants waived any deficiency in the procedure used by PSFS 3 and participated in the prosecution of a motion akin to a motion for summary judgment. *See In re Custody of C.C.M.,* 202 P.3d 971, 974 (Wash. Ct. App. 2009) cited with approval in *In re L.B.-A.D.*, 801 N.W.2d 628 (Iowa Ct. App. 2011).

The Gossett Defendants refused to participate in a rope-a-dope maneuver.

2. No Ruling on Motion to Enforce; No Opportunity to Respond to Plaintiff's Submissions

At the hearing on the motion to enforce the stipulation, the trial court did not rule but directed Plaintiff to send him proposed final judgments and he would give the Defendants an opportunity to respond. (App. Vol. 8 p. 141:16-18) ("I won't rule on the final order judgment until I see what you present and give the defendants an opportunity to respond.") No such opportunity was ever given to Defendants; rather, the district court received PSFS 3's submission and entered them as final judgments. (App. Vol. 8 p. 144 to Vol. 10 p. 194.)

3. Affidavits are Not Evidence; They are Hearsay

> An affidavit is not evidence, *Vendetti v. United States,* 9 Cir., 45 F.2d 543; *Vonherberg v. City of Seattle*, D.C., 20 F.2d 247; *Automobile Sales Co. v. Bowles,* D.C., 58 F.Supp. 469, and *McClure v. United States*, 48 F.Supp. 531, 98 Ct.Cl. 381, and it may not be used as evidence in this proceeding to satisfy the mandate that the Court 'receive evidence on any issue of fact.'

United States v. Warrington, 17 F.R.D. 25, 29 (N.D. Cal. 1955).

> Under rule 801(c) "hearsay" is a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted. Testimony at trial which only reflects what the witness herself observed, thought, or stated is not considered hearsay. *State v. Mattingly,* 220 N.W.2d 865, 866 (Iowa 1974). Obviously, however, Fern's out-of-court statement reflecting her observations, thoughts, or statements and offer to prove the truth of the

matter asserted, should be considered hearsay.

> The Harveys do not claim the affidavit comes within any exceptions to the hearsay rule. Therefore, we affirm the district court's ruling finding the affidavit was not admissible into evidence.

Harvey v. Platter, 495 N.W.2d 350, 353 (Iowa Ct. App. 1992).

The affidavit relied on by the district court for the entry of the final judgments without a trial was not evidence and should not have been used by the court.

4. Mathematical Formula

PSFS 3 wrongly asserts that, after the bellwether trials, the district court "adopted the mathematical formula proposed by PSFS 3, ..." (Brief, p. 51.) PSFS 3 had argued for the entry of any of three interpretations given to the legal contract (the Financing Agreements) by a non-lawyer employee of NCMIC, Tamara Lynn Frischmeyer. (App. Vol. 6 pp. 475:18 to 477:2; 520:9 to 522:2; App. Vol. 7 pp. 456-61.)

But PSFS 3's gratuitous statement misses the point—even with the correct mathematical formula, the formula begins with a figure which is not common among the Defendants: the unpaid principal balance of each contract. Further, PSFS 3 had to prove just whom was responsible for payment of the damages, and we see that in 73 of the Gossett Defendants' cases, PSFS 3

caused final judgments to be entered against entities not contractually obligated for those contract payments.

PSFS 3's brief is a campaign of deflection—forget about the fact that PSFS 3 filed a motion akin to, but not, a motion for summary judgment granted by the district court by entering final judgments without a trial—look at the fact that the Defendants (who were never afforded the opportunity the trial court said they would have to respond once the district court determined what it would do with the motion) never filed a response to the uncross-examined affidavit filed with the unauthorized motion. Given the history of Defendants' actions throughout this 10-year plus case, it can be safely assumed had PSFS 3 complied with IOWA R. CIV. P. 1.981, Defendants would have filed opposing documents.

The Gossett Defendants addressed this issue in the motions to reconsider, enlarge, or modify filed after serial entries of the final judgments. (App. Vol. 10 pp. 197, 263, 372, 428, and 487.) All of the motions were denied by the district court. (App. Vol. 10 pp. 254, 622.)

This Court should reverse the final judgments.

Issue 4: The District Court erred in awarding entitlement to attorneys' fees to PSFS 3 without evidence that PSFS 3 was obligated to pay any attorneys' fees (*i.e.*, had "incurred" those fees).

C. Contentions

There are separate, and separately appealable, issues when reviewing an award of attorneys' fees: the first is entitlement, and the second is amount.

> If a factual basis for an award of attorney fees exists and is supported by substantial evidence, we then examine the trial court's decision to award or not award attorney fees for an abuse of discretion. *See Davis–Eisenhart,* 539 N.W.2d at 143 (reviewing decision to deny attorney fees in appraisal action for abuse of discretion); *cf. AFSCME/IOWA Council 61 v. State*, 537 N.W.2d 712, 714 (Iowa 1995) (reviewing trial court's decision denying attorney fees under common law rule for abuse of discretion). The amount of any award is also reviewed for an abuse of discretion. *Cf. Vaughan v. Must, Inc.*, 542 N.W.2d 533, 541 (Iowa 1996) (reviewing amount of attorney fee award under Age Discrimination in Employment Act for abuse of discretion).

Sec. State Bank, Hartley, Iowa v. Ziegeldorf, 554 N.W.2d 884, 893–94 (Iowa 1996).

Defendants filed a counterclaim for declaratory relief addressing attorneys' fees. (App. Vol. 6 pp. 78-81.) The issue was expressly tried by the parties. (App. Vol. 6 pp. 448:11-20; App. Vol. 7 pp. 459-60; App. Vol. 7 pp. 499-504; App. Vol. 7 pp. 543, 562, 579; App. Vol. 7 p. 608.)

The District Court ignored this counterclaim. (App. Vol. 7 p. 624.)

Instead, in final judgments from the cases actually tried, the District Court "awarded judgment ... pursuant to the terms of the written contracts and Iowa Code Section 625.22, attorney's fees related to the Defendants' breach of contract" to Plaintiff. (App. Vol. 8 pp. 42 and 45.) The final judgment continued by providing that Plaintiff would have 14 days to file "an Application for Attorney Fees."

The final judgment apparently denied the counterclaim of the Gossett Defendants, awarded PSFS 3 entitlement to fees, and ordered that Plaintiff apply for the amount of fees within 14 days.

In each of the final judgments entered without a trial, the court awarded "court costs" to PSFS 3. (App. Vol. 8 pp. 144 to App. Vol. 10 pp. 194, last two words on page 2 of each final judgment.) Contractual attorneys' fees are awarded as part of the court costs:

> When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs a reasonable attorney fee to be determined by the court.

IOWA CODE § 625.22.

Therefore, the award of court costs to Plaintiff can only be understood to have awarded entitlement to attorneys' fees. A final judgment must be appealed within 30 days of entry of the final judgment. This is unlike an

interlocutory order awarding costs, which is not directly appealable, and is appealable only after entry of a final judgment.

> The overwhelming weight of authority forbids the entertainment of appeals from *interlocutory judgments* for costs, relegating these for review upon appeal from final judgment.

Keller v. Harrison, 129 N.W. 57, 59 (Iowa 1910)(emphasis added).

Defendants have appealed the final judgment and have addressed entitlement to attorneys' fees found in the final judgment. The authority cited by PSFS 3 does not assist this Court in resolving this issue. In *Worthington v. Kenkel*, 684 N.W.2d 228 (Iowa 2004), this Court determined that the issue of attorneys' fees (entitlement to which had not been awarded to anybody) was not ripe because the district court had made no finding that a person violated the retaliatory discharge provision. *State v. Bullock*, 638 N.W.2d 728 (Iowa 2002) addresses ripeness for review in a general fashion and does not involve attorneys' fees.

Other states have held that a final judgment which includes an award to entitlement to, but not amount of, attorneys' fees is not a final judgment, and is not therefore appealable, because judicial labor has not come to an end.

> "An order is considered final if it 'disposes of the cause on its merits leaving no questions open for judicial determination except for the execution or enforcement of the decree if necessary.' " *Nero v. Cont'l*

> *Country Club R.O., Inc.,* 979 So.2d 263, 266 (Fla. 5th DCA 2007) (quoting *Welch v. Resolution Tr. Corp.,* 590 So.2d 1098, 1099 (Fla. 5th DCA 1991)).

4040 IBIS Circle, LLC v. JPMorgan Chase Bank, 193 So. 3d 957, 959–60 (Fla. 4th DCA 2016).

> We are not dissuaded from this view by the fact that the order determining Mills's entitlement to attorney's fees was included in the final judgment on damages. At least in regard to attorney's fees, the order was non-final. An award of attorneys' fees does not become final, and, therefore, appealable until the amount is set by the trial court.

Mills v. Martinez, 909 So. 2d 340, 342 (Fla. 5th DCA 2005).

This court has held that the test of finality is:

> Moreover, the test of finality is whether the determination is dispositive of the case, and the intention of the trial court is relevant on that issue.

Loudon v. Hill, 286 N.W.2d 189, 191 (Iowa 1979).

From the language of the final judgment, it is conceivable that the judge did not intend to dispose of the award of costs portion of the final judgment because those costs would have to be set by the judge. If that is the interpretation made by this Court, then the award of costs is not a final judgment and is not presently appealable. If this Court determines that the award of costs is a final award, then this portion of the final judgment is appealable.

The final judgment awarding entitlement to attorneys' fees must be reversed.

Conclusion

The final judgments under review were entered by the trial court without personal jurisdiction over the Defendants, and thus, must be reversed with instructions to dismiss those actions upon remand.

Incorporation of Arguments of Charlip Defendants

The Gossett Defendants incorporate by reference the arguments made in the proof brief filed by the Charlip Defendants.

Certificate of Compliance with Typeface Requirements and Type-Volume Limitation

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(1) or (2) because: [X] the proof reply brief was prepared in a proportionally spaced typeface using Times New Roman in 14 pt. and contained 6816 words, excluding the parts of the brief exempted by IOWA R. APP. P. 6.903(1)(g)(1); while this final reply brief was prepared in a proportionally spaced typeface using Times New Roman in 14 pt. and contained 6993 words, excluding the parts of the brief

exempted by IOWA R. APP. P. 6.903(1)(g)(1).

Certificate of Service

I hereby certify that on July 21, 2020, I electronically filed the foregoing with the Clerk of the Court using the EDMS system which will send notification of such filing to the following:

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