

IN THE SUPREME COURT OF IOWA

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NO. 21-0227

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TODD RAND,  
PLAINTIFF-APPELLANT,

vs.

SECURITY NATIONAL CORPORATION d/b/a  
SECURITY NATIONAL BANK, an Iowa Corporation,  
DEFENDANTS-APPELLEES,

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APPEAL FROM THE IOWA DISTRICT COURT IN AND FOR  
WOODBURY COUNTY  
Case No. LACV182837  
THE HONORABLE STEVEN J. ANDREASEN

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**PLAINTIFF-APPELLANT'S FINAL BRIEF**

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## STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

### ROUTING STATEMENT

#### Statutes

Iowa Rule of Appellate Procedure 6.1101(3).

#### **I. STANDARD OF REVIEW AND PRESERVATION OF ERROR, AND INTRODUCTION TO RAND'S ARGUMENTS ON APPEAL.**

*Crippen v. City of Cedar Rapids*, 618 N.W.2d 562 (Iowa 2000)

*Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234 (Iowa 2006)

*Griglione v. Martin*, 525 N.W.2d 810 (Iowa 1994)

*Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352 (Iowa 2000)

*McIlravy v. North River Ins. Co.*, 653 N.W.2d 323 (Iowa 2002)

*Sweeney v. City of Bettendorf*, 762 N.W.2d 873 (Iowa 2009)

#### **II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AGAINST PLAINTIFF RAND'S CLAIM FOR BREACH OF FIDUCIARY DUTY.**

*Cowan v. Flannery*, 461 N.W.2d 155 (Iowa 1990)

*Davis v. Travelers Insurance Co.*, 196 N.W.2d 526 (Iowa 1972)

*Estate of Randeris v. Randeris*, 523 N.W.2d 600 (Iowa App. 1994)

*Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir. 1962)

*Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836 (1985)

*Hayes v. Hayes*, 48 N.H. 219 (1868)

*Heacock v. Heacock*, 402 Mass. 21, 520 N.E.2d 151 (Mass.1988)

*In re Estate of Boyd*, 634 N.W.2d 630 (Iowa 2001)

*In re Estate of Pence*, 511 N.W.2d 651 (Iowa Ct.App.1993)

*In re Petition of Cigna Healthcare*, 146 N.H. 683, 777 A.2d 884 (2001)

*In re Smith's Estate*, 240 Iowa 499, 36 N.W.2d 815 (1949)

*Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986)

*Matter of Estate of Lamb*, 584 N.W.2d 719 (Iowa Ct.App. 1998)

*Matter of Estate of Morgan*, 310 Ark. 220, 833 S.W.2d 776 (1992)

*Matter of Guardianship of Matejski*, 419 N.W.2d 576 (Iowa 1988)

*Matter of Young's Estate*, 273 N.W.2d 388 (Iowa 1978)

*Rogers v. Rogers*, 171 N.H. 738, 203 A.3d 85 (2019)

*Roll v. Edwards*, 2004-Ohio-767, 156 Ohio App. 3d 227, 805 N.E.2d 162 (2004)

*Sabin v. Ackerman*, 846 N.W.2d 835 (Iowa 2014)

*Schmitz v. Crotty*, 528 N.W.2d 112 (Iowa 1995)

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

*Siegemund v. Shapland*, 247 F. Supp. 2d 1 (D. Me. 2003)

*St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338 (Iowa 2013)

*Stauffer v. Nicholson*, 438 S.W.3d 205 (Tex. App. 2014)

*Wendland v. Sparks*, 574 N.W.2d 327 (Iowa 1998)

**Statutes**

Iowa Code Chapter 633

Iowa Code Chapter 633A

Iowa Code Chapter 633.10

**Other**

2 Iowa Practice Series § 21:4: Jurisdiction and Venue

Iowa Rules of Professional Conduct, Rule 31:1.1

**III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AND AGAINST PLAINTIFF RAND AS TO HIS CLAIM FOR NEGLIGENT MISREPRESENTATION.**

*Bagelmann v. First Nat. Bank*, 823 N.W.2d 18 (Iowa 2012)

*Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986)

*Matter of Simon's Estate*, 288 N.W.2d 549 (Iowa 1980)

*Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91 (Iowa 2012)

**Statutes**

Iowa Code Section 633.197

**Other**

Restatement (Second) of Torts § 552 (1977)

**IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AND AGAINST PLAINTIFF RAND AS TO HIS CLAIM OF FRAUD.**

*Beeck v. AquaslideN'Dive Corp.*, 350 N.W.2d 149 (Iowa 1984)

*Cornell v. Wunschel*, 408 N.W.2d 369 (Iowa 1987)

*Garren v. First Realty Ltd.*, 481 N.W.2d 335 (Iowa 1992)

*McGough v. Gabus*, 526 N.W.2d 328 (Iowa 1995)

**V. PLAINTIFF'S CLAIMS FOR DAMAGES, INCLUDING EMOTIONAL DISTRESS DAMAGES, ATTORNEYS FEES, AND PUNITIVE DAMAGES SHOULD PROCEED TO TRIAL.**

*Blong v. Snyder*, 361 N.W.2d 312 (Iowa Ct.App. 1984)

*Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525 (Iowa 2007)

*Clark v. Estate of Rice ex rel Rice*, 653 N.W.2d 166 (Iowa 2002)

*Econ. Roofing & Insulating Co. v. Zumaris*, 538 N.W.2d 641 (Iowa 1995)

*Hockenberg Equip. Co. v. Hockenberg's Equip. & Supply Co. of Des Moines*, 510 N.W.2d 153 (Iowa 1993)

*Hoepfner v. Holladay*, 741 N.W.2d 823 (Iowa Ct. App. 2007)

*Kline v. Keystar One, L.L.C.*, No. 99-1649, 2002 WL 681237 (Iowa Ct. App. Apr. 24, 2002) [Unpublished Opinion]

*Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76 (Iowa 1984)

*Mills v. Guthrie Cnty. Rural Elec. Coop. Ass'n*, 454 N.W.2d 846 (Iowa 1990)

*Miranda v. Said*, 836 N.W.2d 8, (Iowa 2013)

*Oswald v. LeGrand*, 453 N.W.2d 634 (Iowa 1990)

*Suss v. Schammel*, 375 N.W.2d 252 (Iowa 1985)

*Williams v. Van Sickel*, 659 N.W.2d 572 (Iowa 2003)

**Statutes**

Iowa Code Section 668A.1(1)(a)

## **STATEMENT OF THE ISSUES PRESENTED FOR REVIEW**

### **ROUTING STATEMENT**

The primary issues in this case involve substantial questions of public importance and of enunciating legal principles relating to the jurisdiction of Probate Courts and liability of fiduciaries to Estate beneficiaries. Therefore, the Iowa Supreme Court should retain the case pursuant to Iowa Rule of Appellate Procedure 6.1101(2).

### **STATEMENT OF THE CASE**

#### **Nature of the Case**

Plaintiff-Appellant Todd Rand (hereinafter referred to as “Plaintiff” or “Rand”) appeals from the dismissal of his causes of action against Defendant-Appellee Security National Corporation d/b/a Security National Bank (hereinafter “Defendant” or “SNB”) for Breach of Fiduciary Duty, Negligent Misrepresentation, Fraud, and an Equitable Claim for Attorney Fees. Said claims were dismissed by the District Court upon review of Defendant’s Motion for Summary Judgment.

#### **Summary of the Prior Proceedings**

On September 18, 2018, Plaintiff filed a Petition and Jury Demand in the Iowa District Court for Woodbury County which asserted several causes of action against SNB in connection with fees charged in *In the Matter of the*

*Estate of Roger E. Rand*, Woodbury Co. ESPR054359, wherein SNB was the Personal Representative. (Petition and Jury Demand; App. 1-21). In Count I (Breach of Fiduciary Duty), Plaintiff alleged that SNB negligently or intentionally misrepresented to Plaintiff (a beneficiary of the Estate), *inter alia*, that SNB's fees and the fees charged by the Crary Law Firm would necessarily be, due to the terms of the Code of Iowa, a percentage of the value of the Estate. Moreover, it was alleged that SNB did not fully disclose the "sweetheart deal" they had with the Crary Law Firm, whereby in return for Crary's referral of SNB to be the Personal Representative, SNB would agree to pay Crary the maximum statutory fee Crary could claim under the Iowa Code. Plaintiff alleged these breaches (a) foreclosed Plaintiff from bargaining for better, more competitive fees; (b) seeking a different Personal Representative who would charge a smaller or different more acceptable fee; (c) caused Plaintiff to have to hire a lawyer to challenge SNB's attorney fee application; (d) put Plaintiff in the unnecessary and unfair position of being adversarial with the Personal Representative; (e) exposed Plaintiff and the Estate to the substantial risk of excessive fees and an unreasonable diminution in value.

In Count II (Negligent Representation by Security National Bank Who Provided Financial Information to Todd Rand and the Other

Beneficiaries of the Rand Estate), Plaintiff alleged that SNB misrepresented information about their fees, and sought compensatory and punitive damages. Count III (Fraud) alleged that SNB, by their misrepresentations, defrauded Plaintiff for their own personal gain, and sought compensatory and punitive damages as a result. Count IV (Equitable Claim for Common Law Attorney Fees) alleged that SNB's conduct exceeded the standard of willful and wanton disregard for the rights of another required for punitive damages and rose to the level of oppression or connivance to harass or injure another, thus entitling Plaintiff to attorney fees. Defendant SNB filed an Answer and Affirmative Defenses with the Court on October 24, 2018. (Answer and Affirmative Defenses; App. 22-27).

Following discovery, Defendant SNB filed a Motion for Summary Judgment on December 12, 2019. (Motion for Summary Judgment; Brief in Support of Defendant's Motion for Summary Judgment; and Statement of Undisputed Facts; App. 28-167). Plaintiff Rand filed a Resistance to Defendant's Motion for Summary Judgment on January 20, 2020. (Plaintiff's Brief in Support of Resistance to Defendant's Motion for Summary Judgment; Plaintiff's Statement of Disputed Facts; and Plaintiff's Exhibits in Support of Resistance; App. 168-498). Defendant SNB filed a



Reply Brief on January 27, 2020 (App. 499-507) and Plaintiff filed a Sur-Reply Brief on January 30, 2020 (App. 508-511).

The matter was submitted to the District Court, and on January 26, 2021, the Court entered a Ruling and Order Re: Motion for Summary Judgment which dismissed all of Plaintiff's claims. (App. 512-551). An Order was granted on February 7, 2021, granting Defendant SNB's Rule 1.904(3) Motion or Request for an Order Nunc Pro Tunc. (App. 522). Plaintiff Rand filed a timely Notice of Appeal on February 19, 2021.

### **STATEMENT OF FACTS**

Plaintiff Rand is the son of Roger Rand, who died on August 29, 2016. (Petition and Jury Demand at ¶4, App. 1; Petition for Probate of Will and Codicil and Appointment of Personal Representative, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, App. 30-31; Last Will and Testament of Roger E. Rand, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, at Article II, App. 33). Roger Rand's four children, plus his girlfriend Constance Anderson, were the five listed beneficiaries set forth in Roger Rand's will, executed in January 2005. (Last Will and Testament of Roger E. Rand, Article II-V, VII-VIII, App. 33-34, 35-40; First Codicil to Last Will and Testament of Roger E. Rand, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, at 1-2,

App. 47-48). His will was drafted by the law firm of Crary Huff Ringgenberg, Hartnett & Storm, P.C. (hereinafter “Crary”), and it designated Defendant SNB as the Personal Representative of his Estate. (Last Will and Testament of Roger E. Rand, Article XVI; App. 44-45). Roger Rand’s Iowa gross estate value is \$19,733,127.40. (Judge Deck Order, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, p. 9; App. 358).

After Roger Rand’s death on August 29, 2016, Larry Storm of the Crary Firm, who had drafted his will, contacted SNB and notified them that they had been designated as the Personal Representative of the Estate. (Rand 5/8/19 depo. pp. 78:5-80:3; 82:17-84:25, App. 434-435; Gagnon 5/7/19 depo. pp. 42:20-43:3, App. 55). Plaintiff Rand met with employees of Defendant SNB on August 30, 2016. (Gagnon 5/7/19 depo. pp. 41:4-52:25, App. 54-56). The will was then admitted to probate. (Order Admitting Will and Codicil to Probate and Appointment Personal Representative, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359; App. 63-64). SNB hired Larry Storm of the Crary firm as the attorney for SNB without seeking a competitive quote but rather agreed to their fee of the maximum statutory rate. (Gagnon depo. pp. 11-13; 121:16-125:6, App. 456, 462-463; *see also* 9/14/16 letter from Larry Storm to Tammi Gagnon and SNB’s acknowledgement and consent to Crary’s fee

terms; Exhibit B to Plaintiff's Resistance to Defendant's Motion for Summary Judgment, App. 240-242.)

SNB is a bank with attorneys in the trust department, while Plaintiff Rand was reliant on the bank as an individual small farmer, who for many years drove a truck and was without a college degree. (Twidwell 5/8/19 depo. pp. 4:10-9:6, App. 484-485; Rand 5/8/19 depo. pp. 5:3-6:11; 10:1-10; 14:15-16:9; 16:25-17:18, App. 428-431). SNB was under a duty to give accurate and true advice to Plaintiff Rand on the subject of Estate fees in the course of their advising Plaintiff on that topic in their "Estate Administration Overview" which SNB sent to Plaintiff in their letter dated September 20, 2016. (Exhibit G in support of Plaintiff's Resistance to Defendant's Motion for Summary Judgment, 9/20/16 letter from Tammi Gagnon, App. 421-424). The September 20, 2016 letter from Gagnon of SNB was sent to each beneficiary, and Plaintiff Rand read it shortly thereafter. (Petition and Jury Demand, App. 1-10; Rand 5/8/19 depo. pp. 103:6-104:10, App. 61).

The September 2016 letter announced that SNB was the executor of the Estate and scheduled a meeting at the bank with Roger Rand's children. SNB enclosed in the letter a document they drafted titled "Estate Administration Overview" (Petition and Jury Demand, page 3, App. 19; Gagnon 5/7/19 depo. pp. 35:8-37:15, App. 457). Plaintiff Rand claims that

it was in this enclosure that SNB made its untrue representation to Plaintiff Rand and the other beneficiaries that estate attorney fees are a percentage of the gross estate. In this letter, SNB stated:

Enclosed for your information is an Estate Administration Overview that describes for you in general terms the steps involved in the administration of an estate. Please feel free to call me at [phone number] with any questions you may have.

Iowa law under the supervision of the District Court authorizes the compensation of the executor and attorney handling the estate. The fees are based on the appraised value of the estate reported for inheritance tax purposes whether taxable or not. The appraised value is taken as of the date of death. The fees are computed as follows:

6% of the first	\$1,000.00
4% of the next	\$4000.00
2% of the remaining value	

One-half of these fees may be paid at the time the inheritance tax return is prepared and one-half when the estate is closed.

(Gagnon 5/7/19 depo. pp. 38:24-39:6, App. 458.)

Marilyn Hagberg of SNB testified regarding SNB's pattern and practice:

Q: So my question is: Why didn't Security Bank tell beneficiaries or potential beneficiaries that the bank could also charge an authorized fee of an hourly?

A. Because the Bank didn't have the practice of charging hour fees in estates and didn't intend to charge fees in that way.

Q. And why didn't the— this language then inform the beneficiary that the attorney's fee could be an hourly and not necessarily the schedule as set out here; the percentage schedule?

A. For a similar reason; in that we understood the attorney intended to charge the statutory maximum as well.

(Hagberg 5/7/19 depo. pp. 16:19-17:9. App. 494). Hagberg drafted the pertinent "Estate Administration Overview" which Plaintiff Rand claims is misleading. (Gagnon 5/7/19 depo. pp. 71:1-12; App. 460). Plaintiff relied on the information SNB sent to him in their September 20, 2016 letter. (Rand 10/15/19 depo. pp. 38:10-39:20, App. 441).

Plaintiff Rand claims that SNB misled him to believe that Iowa law only allowed the statutory maximum percentage fee on Roger Rand's \$20,000,000 estate. (Plaintiff's Petition, Count I, paragraphs 14, 26, 27, 28, 31, 33, App. 2, 4-5). In doing so, Plaintiff Rand claims that SNB foreclosed an intelligent, knowing decision by Plaintiff to search elsewhere for a different, more competitive personal representative to administer his father's large estate. (See the testimony of retired District Court Judge Edward Jacobson regarding estate fees found in Plaintiff's Designation of Expert Witnesses filed on July 26, 2019, App. 374-386).

The Probate Court has the power to appoint someone other than who

the decedent named – a fact which SNB admitted in their testimony:

Q. So just because the bank is named as the executor doesn't mean the bank is necessarily going to accept the appointment?

A. Correct.

Q. And if somebody chooses, for example, an heir or an attorney for the estate requests that somebody else become the executor, the bank sometimes will defer to that wish.

A. After consideration.

Q. Are you aware of the fact that if somebody appoints Security Bank in the Will to be the executor, that that wish can be overridden by the court if somebody petitions to have another executor appointed?

A. Yes.

(Sitzmann 5/8/19 depo. pp. 25:18-26:9, App 474-475).

During a meeting at the bank with the beneficiaries on October 24, 2016, Gagnon and Hagberg told Plaintiff Rand then that it was their fiduciary duty to take care of him, and he did not need to hire an attorney. (Rand 5/8/19 depo. pp. 36:4-37:6; 124:22-125:7, App. 432, 437). SNB was in the business of being a fiduciary in probate matters. (Twidwell 5/8/19 depo. pp. 4:10-22; 8:11-9:6; 29:20; App. 484-485, 487. Hagberg 5/7/19 depo. pp. 4:9-7:19; 65:4-8, App. 492-493, 495. Sitzmann 5/8/19 depo. pp. 4:11-6:24; 11:19-12:8; 79:21-81:6; 119:1-120:17, App. 471-473, 479-480).

However, during discovery in the present proceedings, Storm and Gagnon (both experienced probate lawyers) denied their knowledge of the existence of a fiduciary duty to the beneficiaries of the Roger Rand Estate. (Larry Storm 1/4/17 depo. pp. 4:9-20; 10:14-25; 30:5-31:25, App. 466-468; Gagnon 1/4/17 depo. pp. 4:7-5:18; 16 :13-17, App. 15-16; Gagnon 5/7/19 depo. pp. 5:11-13:1, App. 454-456).

SNB's Wealth Management division, which did the probate work, was comprised mostly of very experienced and knowledgeable people, including lawyers who held themselves out as such, who carefully operated by committee and policy - the committee designed the form, which Plaintiff Rand claims were misleading, and the committee used the same misleading forms for many years and routinely sent them to all beneficiaries. (See Twidwell 5/8/19 depo. pp. 4:11-15; 6:17-9:6; 8:16-21; 12:8-20; 76:1-78:9, App. 484-486, 488; Sitzmann 5/8/19 depo. pp. 4:11-12:13; 5:14-24; 62:15-72:4; 121:6-21, App. 471-473, 476-478, 480; Hagberg 5/7/19 depo. pp. 4:9-7:19; App. 492-493; Gagnon 5/7/19 depo. pp. 5:11-13:1; 69:17-70:21; 71:1-72:13; 73:13-74:24; 75:23-77:14, App. 454-456, 459-461).

SNB advised Rand that they did not need a lawyer and misrepresented to him that the maximum fee they were charging was required by the probate code. (See Rand 5/8/19 depo. pp. 124:22-125:7, App. 437). SNB told Rand

to place his trust and confidence in them, and he did. (Rand 5/8/19 depo. pp. 48-23; 49:12; 124:22-125:7; App. 433, 437). Plaintiff Rand's testimony is that he was therefore misled and foreclosed from making a reasonable decision. (Rand 10/15/19 depo. pp. 88:5-89:19, App. 443).

In February of 2017, Plaintiff Rand employed the undersigned attorney, Stanley Munger as his personal attorney, and on February 9, 2017, attorney Munger sent a letter to the Crary law firm inquiring about their fees, as well as Defendant SNB's fees. (Letter from Stanley Munger to Larry Storm, February 9, 2017, App. 65). On February 16, 2017, Larry Storm of the Crary firm replied by letter and informed attorney Munger that "the Personal Representative will be filing an Application for Fees for ordinary services for the Personal Representative at some time in the future requesting that the Court allow reasonable fees in accordance with the Iowa statutes and probate code." (2/16/17 Storm letter, App. 66-67).

On October 23, 2017, Defendant SNB filed an Application for Fees for the Personal Representative's ordinary services and for the Attorney's ordinary and extraordinary services. (Application for Order Fixing Fees for Ordinary Services and Application for Interim Order Fixing Fees for Extraordinary Services, October 23, 2017, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, App. 68-71).



Plaintiff Rand at first concluded from SNB's October 23, 2017 Fee Application that the Bank was requesting fees of a "hundred and some-odd thousand dollars". This seemed reasonable to Todd based on the work he thought SNB had done. (Rand 10/15/19 depo pp. 82:2-83:14, App. 443). Upon notice of the hearing, Plaintiff believed this was an urgent matter and he should talk to a lawyer about whether he should attend. The lawyer he consulted, the undersigned, could not understand from SNB's fee application how much money SNB was asking for and so he called Larry Storm, which led to Todd's discovery that saved the estate between \$400,000 and \$500,000. (Rand 5/8/19 depo. pp. 116:22-118:22; App. 436; Rand 10/15/19 depo pp. 82:2-83:14, App. 442). Plaintiff, through attorney Stan Munger, filed a Resistance and Objection. (Beneficiary Todd R. Rand's Resistance and Objection to Application for Order Fixing Fees for Ordinary Services and Application for Interim Order Fixing Fees for Extraordinary Services, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359; App. 72-89).

Judge Deck heard testimony regarding application for fees, and Plaintiff Rand's objections, on January 30, May 24, and May 25, 2018. (Order August 24, 2018, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, App. 90-112). By order of August 24, 2018,

the Crary Law Firm was awarded \$205,000 for ordinary services and \$107,000 for extraordinary services. (Order p. 22, App. 371). Defendant SNB was awarded \$160,000 for ordinary services. *Id.* Defendant filed but then withdrew a Notice of Appeal from this Order. (Notice of Appeal, September 21, 2018, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359; App. 113-114; Procedendo, October 26, 2018, *In the Matter of the Estate of Roger E. Rand*, Woodbury Co. ESPR054359, App. 115-117).

Plaintiff Rand then filed his Petition and Jury Demand in this case on September 18, 2018. (App. 1-21). In his answers to interrogatories, Plaintiff Rand set forth the following claims for damages based on attorney fees he had to pay to contest SNB and Crary's fees, emotional distress and punitive damages. (Plaintiff's Second Supplemental Answers to Defendant's Interrogatories No. 8, at Interrogatory 10, App. 122-123).

Additional facts will be set forth below in the Argument section as needed.

## **ARGUMENT**

### **I. STANDARD OF REVIEW AND PRESERVATION OF ERROR.**

#### **A. STANDARD OF REVIEW.**

When Iowa appellate courts review orders from a district court granting summary judgment, the review is for correction of errors at law. *Green v. Racing Ass'n of Cent. Iowa*, 713 N.W.2d 234, 238 (Iowa 2006). Summary judgment is appropriate only where there is no genuine issue of material fact in dispute. *Sweeney v. City of Bettendorf*, 762 N.W.2d 873, 877 (Iowa 2009). If reasonable minds can differ on how a material factual issue should be resolved, summary judgment should not be granted. *Id.*

Courts review motions for summary judgment in the light most favorable to the non-moving party. *See Keokuk Junction Ry. Co. v. IES Indus., Inc.*, 618 N.W.2d 352, 355 (Iowa 2000). Courts are also required to indulge every legitimate inference that the evidence will bear to determine whether a question of fact exists. *Crippen v. City of Cedar Rapids*, 618 N.W.2d 562, 565 (Iowa 2000). An inference is legitimate if it is “rational, reasonable, and otherwise permissible under the governing substantive law.” *McIlravy v. North River Ins. Co.*, 653 N.W.2d 323, 328 (Iowa 2002). An inference is not legitimate if it is based on speculation or conjecture. *Id.* If reasonable minds may differ on the resolution of an issue, a genuine issue of material fact exists. *Id.* When the evidentiary matter tendered in support of the motion does not affirmatively establish uncontroverted facts that sustain the moving party's right to judgment, summary judgment must be denied,

even if no opposing evidentiary matter is presented. *Griglione v. Martin*, 525 N.W.2d 810, 813 (Iowa 1994).

**B. PRESERVATION OF ERROR.**

Rand preserved error as to these issues by filing a Resistance to Defendant's Motion for Summary Judgment, wherein he set forth the facts and legal arguments set forth below in opposition to the Defendant's Motion. (App. 72-89).

**II. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AGAINST PLAINTIFF RAND'S CLAIM FOR BREACH OF FIDUCIARY DUTY.**

**A. INTRODUCTION.**

At page 8 of its Ruling and Order Re: Motion for Summary Judgment, the District Court stated:

For purpose of the Motion for Summary Judgment and viewing the record in a light most favorable to Plaintiff, the Court concludes that a reasonable jury could find that Defendant, at least initially, misrepresented Iowa law in regard to executor and attorney fees when it sent the initial letter indicating that fees were based on the percentages, as opposed to the "maximum" fees being computed by such percentages. A reasonable jury or fact finder could also find that Defendant did not advise Plaintiff that he could seek appointment of a different person or entity to serve as executor; that he could negotiate a different fee for executor and/or the estate attorneys; and/or that Defendant, as executor, could retain a different attorney to represent the Estate.

(Ruling, p. 8, App. 519). These findings should have led to a conclusion that Plaintiff Rand's claim against Defendant SNB for breach of fiduciary duty could proceed to trial. Misrepresentation and omissions by banks serving in a fiduciary capacity which cause damages should lead to a cause of action in the State of Iowa. However, the District Court erroneously proceeded to grant Defendant's Motion for Summary Judgment.

**B. THE DISTRICT COURT ERRED IN FINDING THAT PLAINTIFF IS PRECLUDED FROM FILING A CLAIM FOR BREACH OF FIDUCIARY DUTY OUTSIDE OF THE PROBATE COURT.**

The first reason as to why the District Court granted summary judgment, despite finding that a reasonable jury could believe that Defendant SNB had misrepresented facts to the Plaintiff, is as follows:

The Court concludes under the record presented as part of the Motion for Summary Judgment that Plaintiff is precluded from filing a separate breach of fiduciary duty cause of action against Defendant as a separate action at law outside of the Probate Court and Estate proceedings.

(Ruling, p. 9, App. 520). This finding is erroneous and must be reversed on appeal.

Plaintiff Rand's claims are not brought under the probate code - they are brought at law, under the general jurisdiction of the District Court. *See Matter of Estate of Lamb*, 584 N.W.2d 719, 723 (Iowa Ct.App. 1998) citing

*Estate of Randeris v. Randeris*, 523 N.W.2d 600, 604 (Iowa App.1994); *Matter of Guardianship of Matejski*, 419 N.W.2d 576, 578 (Iowa 1988); *Davis v. Travelers Insurance Co.*, 196 N.W.2d 526, 528–29 (Iowa 1972). (Matters not essential to or related to rights derived from an interest in a decedent’s estate are not rights, duties and remedies in the probate code and the probate code does not have jurisdiction.) *See generally* 2 Iowa Practice Series § 21:4: Jurisdiction and Venue. Plaintiff’s tort claims against SNB are matters that are not essential to or related to the rights derived from an interest in a decedent’s estate. *See Matter of Young’s Estate*, 273 N.W.2d 388 (Iowa 1978) (The district court’s probate jurisdiction does not include disputes over matters unrelated or nonessential to the administration of a decedent’s estate). *Matter of Estate of Lamb*, 584 N.W.2d 719 (Iowa Ct. App.1998).

Iowa’s probate code does not grant to the Iowa Probate Court jurisdiction of matters that are in tort:

In addition to the jurisdiction granted the district court under the trust code, chapter 633A, or elsewhere, the district court sitting in probate shall have jurisdiction of:

1. *Estates of decedents and absentees*. The probate and contest of wills; the appointment of personal representatives; the granting of letters testamentary and of administration, settlement and distribution of estates of decedents and absentees, whether such estates consist of real or personal property or both.
2. *Construction of wills*. ...

3. *Conservatorships and guardianships.* ...
4. *Trusts and trustees.* ...
5. *Actions for Accounting.* ...

Iowa Code § 633.10. Therefore, a breach of fiduciary duty by a bank does not fall within those narrow parameters of a Probate Court's jurisdiction.

This conclusion is in accord with holdings from other states. *See e.g.: Matter of Estate of Morgan*, 310 Ark. 220, 223, 833 S.W.2d 776, 778 (1992) (“In a recent case we ruled on this question and held that probate court had no jurisdiction over torts.”) *Roll v. Edwards*, 2004-Ohio-767, ¶ 24, 156 Ohio App. 3d 227, 235, 805 N.E.2d 162, 168 (2004) (“While the will contest and the tort claim both require proof of undue influence, the tort claim requires proof of elements that are not relevant or necessary to the probate court's resolution of the will contest. For this reason, we find that the probate court does not have plenary jurisdiction over Earl and Robert's claim for intentional interference with expectancy of inheritance. Because the tort claim is not cognizable in the probate court, we find that the probate court properly dismissed it.”) *Stauffer v. Nicholson*, 438 S.W.3d 205 (Tex. App. 2014) (“Beneficiary's general tort claims against successor trustee in his individual capacity, which sought damages from successor trustee individually to beneficiary personally or other remedies for beneficiary, were not claims against a trustee and did not involve an inter

vivos trust, and thus probate court lacked subject matter jurisdiction over those claims, where there was no support in pleadings or record that claims would affect the trust.”) *Siegemund v. Shapland*, 247 F. Supp. 2d 1, 9–10 (D. Me. 2003) (“In my original decision I observed that the Massachusetts Supreme Court had made clear that tort damages cannot be recovered in probate proceedings. *See, e.g., Heacock v. Heacock*, 402 Mass. 21, 520 N.E.2d 151, 153 (Mass.1988) (“[T]he Probate Court does not have jurisdiction to hear tort actions and award damages.”) See also the following analysis from the New Hampshire Supreme Court in: *Rogers v. Rogers*, 171 N.H. 738, 744–45, 203 A.3d 85, 91 (2019) (“The legislature is presumed to know the narrow construction that we have previously applied to statutes conferring jurisdiction on the probate court. *In re Petition of Cigna Healthcare*, 146 N.H. 683, 777 A.2d 884 (2001). If legislators intended to grant to the probate court exclusive jurisdiction over all common law tort claims that “relate,” in any sense, to an estate, “ ‘they would not, we think, have left their intention to be inferred from a single doubtful expression ... but would have conferred the authority in plain and explicit terms.’ ” *Id.* (quoting *Hayes*, 48 N.H. at 230)).

An Iowa example of a case where a tort action for breach of fiduciary duty and fraud was brought at law against a bank separate from a probate



action is *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986). The District Court found that *Kurth* “has no application to the within matter” (Ruling, p. 8, App. 519) because it was a fiduciary duty claim not otherwise covered by statute, whereas Plaintiff’s claims in the instant matter are allegedly covered by Chapter 633. This is the proverbial distinction without a difference. The District Court does not cite any provision in Chapter 633 which states tort claims for breach of fiduciary duty fall within the exclusive jurisdiction of the Probate Court. The District Court even notes that “Iowa Code Chapter 633 does not specifically state that the Probate Court has exclusive jurisdiction for breach of fiduciary damage claims or that Chapter 633 is the exclusive means of pursuing a fiduciary duty claim.” (Ruling, p. 10, App. 521). Despite that finding, the District Court proceeded to find that legislative intent supported its interpretation that Plaintiff’s claim cannot be brought outside of the Probate Court.

The linchpin of the District Court’s finding is that the “claims are related and essential to the administration of the estate, subject to the jurisdiction of the Probate Court.” (Ruling, p. 11, App. 522). The problem with this finding is that it ignores the fact that Plaintiff Rand was personally damaged by Defendant SNB’s actions. (Plaintiff’s Second Supplemental Answers to Defendant’s Interrogatories No. 8, at Interrogatory 10, App. 122-

123). For example, Rand spent his own money to contest the excessive fees being charged. Redress for those damages is a separate tort claim, not essential to the administration of the Estate, because the Estate did not incur those attorney's fees.

Moreover, it should be noted that there are several lawsuits outside the Probate Court that have been ongoing but not brought within the Roger Rand Estate. (See SNB Seventh Interlocutory Report, App. 387-420). This is evidence of how the Probate Court does not have exclusive jurisdiction of everything somehow related to the Estate, but only claims that are "essential to the administration of the Estate" – which again is not the case here because the damages incurred were to Plaintiff Rand personally.

Accordingly, the District Court erred in finding that a common law action in tort for breach of fiduciary duty cannot be brought outside of Probate Court.

**C. PLAINTIFF'S CAUSE OF ACTION FOR BREACH OF FIDUCIARY DUTY IS RECOGNIZED UNDER IOWA LAW.**

The District Court correctly found that "a fiduciary relationship existed between Defendant and Plaintiff" (Ruling p. 14, App. 525).

However, the District Court erroneously proceeded to find that the

allegations made by Plaintiff did not involve a breach of fiduciary duties owed by the Defendant. (Ruling, pp. 14-16, App. 525-527).

Under well-established Iowa law, SNB as a Personal Representative, owes a fiduciary duty to beneficiaries of the estates it administers. *In re Estate of Boyd*, 634 N.W.2d 630, 639 (Iowa 2001) (“We start with the general principle that the personal representative of an estate “is a trustee acting in a fiduciary relation” between creditors of an estate and devisees, legatees, and distributees of the estate. *In re Smith's Estate*, 240 Iowa 499, 518, 36 N.W.2d 815, 826 (1949). As an “impartial trustee,” it is the duty of the personal representative to preserve the assets of the estate for the benefit of creditors and beneficiaries. *Id.*; accord *In re Estate of Pence*, 511 N.W.2d 651, 652 (Iowa Ct.App.1993).”)

Iowa Uniform Civil Jury Instructions 3200.1, 3200.2, and 3200.3 set forth Iowa law pertaining to a fiduciaries’ obligations, and reveal that Plaintiff’s cause of action is recognized under Iowa law, or at the very least it is a fact question whether a fiduciary relationship exists under Iowa law. Instruction 3200.3 unequivocally states that a fiduciary has a duty to disclose all material facts to permit the other party to make an intelligent, knowing decision in such dealings:

A fiduciary has a duty to disclose all material facts in dealing with the other party to permit the other party to make an

intelligent, knowing decision in such dealings. A fact is material if a reasonable person would consider it to be important in making a decision. A failure to perform the duty is a breach of fiduciary duty.

Plaintiff Rand claims that SNB misled him to believe that the Iowa law only allowed the statutory maximum percentage fee on Roger Rand's \$20,000,000 estate. and that Plaintiff had no options available to otherwise pay a personal representative which was grossly dishonest. (*See e.g.* Plaintiff's Petition, Count I, paragraphs 14, 26, 27, 28, 31, 33, App. 2, 4-5) SNB withheld the material fact that the statutory maximum was just that, a maximum fee, not a legislative or court mandated fee that they represented to Plaintiff that it was. SNB foreclosed an intelligent, knowing decision by Plaintiff to search elsewhere for a different, more competitive personal representative to administer his father's large estate. (See the testimony attached to Plaintiff's Designation of Expert Witnesses filed on July 26, 2019, App. 376-386). That is, of course, exactly why SNB made the misrepresentation, to foreclose competition.

The District Court found that SNB had no fiduciary obligation to disclose any of these things to the Plaintiff, which ignores the fact that these are material facts relevant to SNB's fiduciary obligations. A fact is material if a reasonable person would consider it to be important in making a decision, and a failure to the duty to disclose material facts is a breach of

fiduciary duty. Plaintiff Rand's testimony that he was misled and foreclosed from making a reasonable decision is testimony representative of a reasonable person and it forecloses summary judgment. (See Rand 10/15/19 depo. pp. 88:5-89:19, App. 443).

Using the analysis of Instruction 3200.2, SNB had a fiduciary relationship with Plaintiff. SNB was the Personal Representative of his father's estate and they told him to place his trust and confidence in them, and he did. (Rand 5/8/19 depo. pp. 48:23; 49:12; 124:22-125:7, App. 433, 437). SNB accordingly had the duty to act for, or give advice to, Plaintiff on the matter of the administration of his father's estate. Confidence is placed on one side, and domination and influence resulted on the other, as SNB and Rand were not in equal power positions. SNB was in the powerful position of a bank with lawyers and huge resources, while Rand, being in the position of an individual small farmer who for many years drove truck and was without a college degree was reliant on the Bank. (Twidwell 5/8/19 depo. pp. 4:10-9:6, App. 484-485; Rand 5/8/19 depo. pp. 5:3-6:11; 10:1-10; 14:15-16:9; 16:25-17:18, App. 428-431). In addition, SNB was under a duty to give accurate and true advice to Plaintiff on the subject of Estate fees in the course of their advising Plaintiff on that topic in their Estate Administration Overview SNB sent to Plaintiff in their letter dated September 20, 2016

which Tammi Gagnon signed as Wealth Management Advisor, JD, CTFA.  
(See 9/20/16 letter from Tammi Gagnon, App. 17-21).

When taken to its logical conclusion, the District Court's decision effectively means that banks such as SNB could intentionally mislead Plaintiff about what the law in the state of Iowa is about how probate fees are charged and why they must charge a percentage of an almost \$20,000,000 estate rather than a negotiated or lesser fee. This cannot be the law in the State of Iowa.

**D. THE DISTRICT COURT ERRED IN FAILING TO FIND THAT GENUINE ISSUES OF MATERIAL FACT PREVENTED SUMMARY JUDGMENT AS TO PLAINTIFF RAND'S BREACH OF FIDUCIARY DUTY.**

In Count I, Plaintiff made the following allegations that SNB breached its fiduciary duties to Plaintiff:

(1) SNB did not fully and accurately notify the beneficiaries that its fees could be based on something other than the statutory maximum percentage of the Estates gross value (Petition and Jury Demand, paragraphs 12, 14, 15, 18, 25, App. 2-4).

(2) SNB was dishonest with Plaintiff and did negligently or intentionally misrepresent to Todd Rand and the other beneficiaries in their September 20, 2016 letter that their fee would necessarily, by the terms of the Code of Iowa, be a percentage of the value of the Estate when in fact that was the maximum fee they could charge (Petition and Jury Demand paragraphs 13, 27, and 28, App. 2, 4).

(3) SNB had a pattern and practice of entering into "sweetheart deals" with attorneys it hires to represent them as the Personal Representative and not fully and accurately disclosing them to

beneficiaries. A sweetheart deal meaning that SNB often hires attorneys who allow and promote SNB in charging the Iowa maximum statutory probate fee with the implicit agreement or understanding the attorney will not disclose to the beneficiaries that the Bank is misrepresenting to the beneficiaries that personal representative's fees in Iowa are always a percentage of the value of the estates. It also means that SNB doesn't bargain in good faith with the attorney to charge a competitive fee less than the statutory maximum with the result that both the bank and attorney are paid higher fees (Petition and Jury Demand paragraphs 19, 20, 21, and 22, App. 3).

(4) SNB had a duty as a fiduciary to Roger Rand's beneficiaries to challenge the Crary Law Firm's fee application requesting the statutory maximum fee, rather than to join in with it (Petition and Jury Demand paragraph 23, App. 3).

(5) The bank had a duty to disclose to Plaintiff that potentially he could hire a Personal Representative for a fixed fee, an hourly fee or some other more competitive fee and that Iowa does not require the statutory maximum be paid to SNB (Petition and Jury Demand paragraphs 31 and 32, App. 4).

(6) SNB violated its fiduciary duty by failing to give Todd Rand fair and reasonable notice of their fee application or Crary's fee application, and by denying or equivocating to Plaintiff that they owed him a fiduciary duty, in furtherance of their conspiracy with Crary to defraud Plaintiff (Petition and Jury Demand paragraph 34(o) and (p), App. 6).

Paragraph 34 of the Petition and Jury Demand states:

34. Todd Rand, the other beneficiaries, and the Estate were damaged in the following ways including, but not limited to:
- a. They were foreclosed from bargaining with Security National Bank for a better, more competitive fee agreement.

- b. They were foreclosed from seeking another Personal Representative who would charge a smaller fee or a different fee that was more acceptable.
- c. They were put in a position by Security National Bank of having to challenge the Bank's fee application and in doing so, having to pay an attorney to do so.
- d. Todd Rand and the beneficiaries were put in the unnecessary and unfair position of being in an adversarial position with the personal representative.
- e. Security National Bank put Todd Rand and other beneficiaries in a position where they cannot trust the Bank and are forced to hire and spend money on attorneys to protect themselves from what the beneficiaries, including Todd Rand, perceive is the Bank's greed and dishonesty.
- f. Security National Bank exposed Todd Rand and other beneficiaries and the Estate to the substantial risk of excessive fees and an unreasonable diminution in value.
- g. Security National Bank negligently or intentionally mislead the beneficiaries, including Todd Rand, by telling them that the attorney that the Estate hired would have to be paid a percentage of the value of the Estate. In fact, this is a misrepresentation because this is the statutory maximum not a mandatory attorney fee as represented by Security National Bank.
- h. Security National Bank negligently or intentionally mislead the beneficiaries, including Todd Rand, by not telling them that the attorney for the Estate did not have to charge the maximum statutory fee.
- i. Security National Bank should have hired the Estate's Personal Representative's attorney at a competitive rate and negotiated on behalf of the beneficiaries for a competitive rate rather than conspiring



with the Crary Law Firm to fleece the Estate and the beneficiaries by charging them the maximum that could be charged under Iowa law and withholding that information from the beneficiaries. Security National Bank intentionally or negligently did this.

j. Todd Rand and the beneficiaries have been damaged by Security National Bank breaching its fiduciary duties to them intentionally and recklessly as well as negligently.

k. Todd Rand is damaged by Security National Bank's misrepresentations identified herein and by their failure to disclose to him their breach of fiduciary duties.

l. Todd Rand, as a beneficiary, is entitled to not only compensatory damages but to punitive damages as a result of the negligent, intentional, legally malicious and grossly reckless misconduct of Security National Bank in intentionally or negligently misrepresenting their and the Personal Representative's attorney fees that were relied on by Todd Rand and the other beneficiaries.

m. The Security National Bank has engaged in the practice of negligently and intentionally misrepresenting to beneficiaries probate fees and how they are determined in Iowa approximately 30 years.

n. Their practice of misrepresenting those fees for approximately 30 years is grossly intentional and malicious.

o. In furtherance of its breach of fiduciary duty and intention to be paid fees that were excessive, Security National Bank did not give Plaintiff reasonable and fair notice of their fee application or Crary Law Firm's fee application, which damaged Plaintiff and the other beneficiaries.

p. Both Security National Bank and Crary Law Firm, who Security National Bank hired as the attorney for the Personal Representative, denied or equivocated to Plaintiff that they owed Plaintiff, as a beneficiary, a fiduciary duty. This was in furtherance of their conspiracy to defraud Plaintiff and the other beneficiaries.

(Petition and Jury Demand pp. 5-6, App. 5-6).

Each claim is relevant and should have been considered by the District Court in evaluating Plaintiff's compensatory damage claims – for example, his claims for emotional distress for being put in those positions (foreclosed from bargaining for a competitive attorney fee, being in an unnecessarily adversarial position and exposed to a substantial risk of excessive fees and an unreasonable diminution in estate value) due to SNB's breach of their fiduciary duties to Plaintiff. They are also factors in Plaintiff's claim for compensatory damages because he never should have had to hire and pay an attorney \$22,874.68 to protect himself and the estate from SNB's and Crary's unreasonable, excessive fee application which was occasioned by SNB's breach of fiduciary duty. Likewise, Plaintiff Rand should not have been put in an adversarial position with the bank because of their breach of fiduciary duty. Defendant SNB told Plaintiff Rand that they had a duty to take care of him, and therefore he did not need to hire an attorney, during the meeting at SNB's Wealth Management office on

October 24, 2016 (Rand 5/8/19 depo. pp. 36:4-37:6; 124:22-125:7, App. 432, 437), but their misrepresentations and actions caused such an adversarial relationship to develop.

It is undisputed that Roger Rand's selection of SNB to be appointed as Personal Representative was not immutable. The Probate Court has the power to appoint someone other than who the decedent named, which SNB admitted to in their testimony:

Q. So just because the bank is named as the executor doesn't mean the bank is necessarily going to accept the appointment?

A. Correct.

Q. And if somebody chooses, for example, an heir or an attorney for the estate requests that somebody else become the executor, the bank sometimes will defer to that wish.

A. After consideration.

Q. Are you aware of the fact that if somebody appoints Security Bank in the Will to be the executor, that that wish can be overridden by the court if somebody petitions to have another executor appointed?

A. Yes.

(Sitzmann 5/8/19 depo. pp. 25:18-26:9, App. 474-475). SNB's failure to advise Plaintiff Rand accordingly should be deemed actionable under Iowa law.

It is Plaintiff Rand's position that he would have saved even more money had he been given the opportunity to contract for a competitive rate with SNB or someone else and he would not have had to hire an attorney to protect himself and the Estate from SNB's overreaching to challenge SNB and Crary and get the favorable ruling. The lost opportunity to contract is a viable claim in Iowa. *Wendland v. Sparks*, 574 N.W.2d 327, 332 (Iowa 1998) ("The loss-of-chance claim has also been recognized in cases that did not involve medical malpractice at all. See, e.g., *Gardner v. National Bulk Carriers, Inc.*, 310 F.2d 284 (4th Cir.1962) (sailor lost at sea; loss of slight chance to survive in sea recognized); *Hake v. Manchester Township*, 98 N.J. 302, 486 A.2d 836 (1985) (prisoner suicide; failure to render prompt care denied chance of survival). We reject the defendants' argument that a loss-of-chance claim is limited to medical-diagnosis cases and conclude it is applicable to the facts of this case.") Additionally, Plaintiff Rand would not have suffered the emotional distress damages he is claiming, would not have incurred the costs to contest the fees, and would not have to file this suit accordingly. None of these damages were mitigated by the Probate Court's order fixing fees that were approximately \$500,000 less than what SNB and Crary asked for. In any case, even if Plaintiff only had nominal damages, he

would still be entitled to that finding and for the jury to consider punitive damages. See *Cowan v. Flannery*, 461 N.W.2d 155, 159 (Iowa 1990).

As noted above, Plaintiff also alleges that SNB and Crary denied (or at least equivocated) to Plaintiff that they owed him a fiduciary obligation as a beneficiary. Plaintiff submits that this was in furtherance of their conspiracy to defraud Plaintiff and the other beneficiaries. This issue of fact also should have precluded summary judgment. It is patently unreasonable for SNB - a bank in the business of being a fiduciary – to not grasp their fiduciary obligations to people like Plaintiff, and admit to them accordingly. See Iowa Rules of Professional Conduct, Rule 31:1.1. (A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness, and preparation reasonably necessary for the representation.) The only reason they would have withheld that information from Rand was to cover up their breach of fiduciary responsibility to him. See *In re Estate of Boyd*, 634 N.W.2d 630, 639 (Iowa 2001) (“We start with the general principle that the personal representative of an estate “is a trustee acting in a fiduciary relation” between creditors of an estate and devisees, legatees, and distributees of the estate. *In re Smith's Estate*, 240 Iowa 499, 518, 36 N.W.2d 815, 826 (1949).”) See also *Sabin v. Ackerman*, 846 N.W.2d 835, 840 (Iowa 2014)

(“This background helps to reveal that the duties of an attorney hired by an executor or administrator also extend to the estate and to all other distributes”). The proper administration of the estate requires that the intent of the testator governing the administration of the estate and the distribution of property not be frustrated by a breach of a duty of the attorney. *St. Malachy Roman Catholic Congregation of Geneseo v. Ingram*, 841 N.W.2d 338, 348 (Iowa 2013) (recognizing a lawyer owes a duty to the direct, intended, and specifically identifiable beneficiaries of the will); *Schreiner v. Scoville*, 410 N.W.2d 679, 682 (Iowa 1987) (indicating liability arises when testator's intent is frustrated and beneficiary's interest is lost, diminished, or unrealized). Accordingly, beneficiaries have been permitted to maintain a legal malpractice action against the designated attorney of an estate when the attorney breaches a duty owed to the beneficiary in handling the estate and causes harm. *See, e.g., Schmitz v. Crotty*, 528 N.W.2d 112, 115–17 (Iowa 1995)(involving a breach of a duty to beneficiaries when attorney mishandled a tax return that resulted in higher taxes than should have been paid and improperly reduced the share of the estate to the beneficiaries). Therefore, SNB’s failure to recognize their fiduciary duties and fulfill them, is in and of itself a breach of their fiduciary duty to Rand.

Accordingly, the record shows how a reasonable jury could conclude that SNB breached their fiduciary duties to Plaintiff Rand, causing him damages. The District Court's grant of summary judgment in favor of SNB should be reversed accordingly.

**III. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AND AGAINST PLAINTIFF RAND AS TO HIS CLAIM FOR NEGLIGENT MISREPRESENTATION.**

Next, Plaintiff Rand claims on appeal that the District Court erred in granting summary judgment against him as to his claim of negligent misrepresentation. The Iowa Supreme Court has set forth the elements of this cause of action as follows:

Iowa has adopted the definition of the tort of negligent misrepresentation found in the Restatement (Second) of Torts. *Pitts v. Farm Bureau Life Ins. Co.*, 818 N.W.2d 91, 111 (Iowa 2012). The elements are as follows:

(1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) Except as stated in Subsection (3), the liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

(3) The liability of one who is under a public duty to give the information extends to loss suffered by any of the class of persons for whose benefit the duty is created, in any of the transactions in which it is intended to protect them.

Restatement (Second) of Torts § 552, at 126–27 (1977).

*Bagelmann v. First Nat. Bank*, 823 N.W.2d 18, 30 (Iowa 2012).

In this section of its opinion, the District Court again noted that a misrepresentation had occurred:

The Court also recognizes and agrees that Defendant’s initial letter to Plaintiff indicating that the two percent fee was the legal and statutory fee, as opposed to the maximum fee allowed, could be a basis for a negligent misrepresentation claim (the Court concludes *arguendo* for the purpose of the within Ruling that Defendant either had a sufficient pecuniary interest or was in the business of providing information to be subject to a negligent misrepresentation claim, as opposed to an intentional misrepresentation claim). In particular, Defendant had no duty to inform Plaintiff of the law on Executor fees or what fee would be requested by Defendant<sup>1</sup>; however, once it gave such information, it had a duty to provide accurate information.

(Ruling, p. 20, App. 531). The District Court should have allowed the claim to go forward to trial based on this conclusion, but it erroneously granted summary judgment instead.

The first reason the District Court granted summary judgment is that it concluded that “there is no common law duty existing or established in this matter outside of the Probate Code and Estate proceedings.” (Ruling p. 20;

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<sup>1</sup> For the reasons set forth in this Brief, Plaintiff Rand disagrees with this legal conclusion, and submits that Defendant SNB at the outset had such a duty.



App. 531). For the reasons set forth above in the section pertaining to Plaintiff's fiduciary duty claims, Plaintiff Rand submits this is an erroneous conclusion, and that his negligent misrepresentation claims may be brought as a tort claim outside of the Probate Court. The damages suffered were by Plaintiff Rand personally, so the corresponding tort claim is not confined to the Probate Court. *See* Iowa Code § 633.10; *Kurth v. Van Horn*, 380 N.W.2d 693 (Iowa 1986).

The other reason the District Court granted summary judgment as to Plaintiff Rand's negligent misrepresentation claim is that "no reasonable jury could find that Plaintiff relied upon the alleged 'misrepresentation' made regarding fees in the September 2016 correspondence." (Ruling, p. 21, App. 532). No explanation is given in this section for this finding. The District Court's holding is erroneous as it improperly limits the scope of this claim, as well as fails to find that Plaintiff justifiably relied on the misrepresentation.

After Roger Rand's death on August 29, 2016, Larry Storm of the Crary Firm (who had drafted Roger's will), contacted SNB and arranged for SNB to be made the Executor of Roger Rand's estate. (Rand 5/8/19 depo. pp. 78:5-80-3; 82:17-84:25, App. 434-435). Subsequently, in the September 20, 2016 letter SNB sent to the decedent's beneficiaries, SNB announced it was

the executor of the estate and scheduled a meeting at the bank with the adult children. SNB enclosed in the letter a document they drafted titled “Estate Administration Overview” (Petition, page 3, App. 3) and it is in this enclosure that SNB made its untrue representation to Plaintiff and the other beneficiaries that estate attorney fees are a percentage of the gross estate. (Gagnon 5/7/19 dep. 35:8-37:15, App. 457). In the letter, SNB advised

Rand and the beneficiaries:

Enclosed for your information is an Estate Administration Overview that describes for you in general terms the steps involved in the administration of an estate. Please feel free to call me at [phone number] with any questions you may have.

Iowa law under the supervision of the District Court authorizes the compensation of the executor and attorney handling the estate. The fees are based on the appraised value of the estate reported for inheritance tax purposes whether taxable or not. The appraised value is taken as of the date of death. The fees are computed as follows:

6% of the first	\$1,000.00
4% of the next	\$4000.00
2% of the remaining value	

One-half of these fees may be paid at the time the inheritance tax return is prepared and one-half when the estate is closed.

(Petition, page 3, App. 3). SNB’s misrepresentation aimed at Plaintiff Rand and the other beneficiaries is that Iowa law bases probate fees for the

executor and the attorney handling the estate on a set schedule determined by the appraised value of the estate reported for inheritance tax purposes, thus the statement that the “fees are computed as follows:...”

There can be no dispute that this was a false statement. The schedule which SNB set forth to Plaintiff Rand is the statutory maximum for ordinary services, which is not what all probate fees are based on:

Personal representatives shall be allowed such reasonable fees as may be determined by the court for services rendered, *but not in excess of the following commissions upon the gross assets of the estate listed in the probate inventory ...*

Iowa Code Section 633.197 (emphasis added). “The statutory fee allowed for executors and attorneys in Iowa is not a mandatory fee but a maximum fee for the customary work in estates. *Matter of Simon’s Estate*, 288 N.W.2d 549, 551 (Iowa 1980).

SNB could have corrected this statement and stated to Plaintiff Rand that those probate fees in Iowa are not required, but are capped at a statutory maximum, which is based on a percentage of the estate’s gross assets, but they did not. Instead, they affirmatively provided false information to Plaintiff to enrich themselves:

Q. So my question is: Why didn’t Security Bank tell beneficiaries or potential beneficiaries that the bank could also charge an authorized fee of an hourly?

A. Because the Bank didn't have the practice of charging hour fees in estates and didn't intend to charge fees in that way.

Q. And why didn't the— this language then inform the beneficiary that the attorney's fee could be an hourly and not necessarily the schedule as set out here; the percentage schedule?

A. For a similar reason; in that we understood the attorney intended to charge the statutory maximum as well.

(Hagberg 5/7/19 depo. pp. 16:19-17:9, App. 494).

This is not a case of failure to provide information. This was a false message to the beneficiaries that executor fees cannot be bargained for or be based on anything other than the value of the estate.

As noted above, the District Court does not explain the basis for the conclusion that the September, 2016 misrepresentation was not a cause of damages, but it does so later in its findings as to Plaintiff's claims as to fraud. The Court essentially concluded that the misrepresentation was later cured as a matter of law by Defendant SNB and that Plaintiff did not rely on the misrepresentation. (See, e.g. Ruling pp. 21, 23 – 27 App. 532, 534-538).

First of all, the District Court erroneously limited the scope of Plaintiff's claims, and failed to note the continuing nature of the misrepresentation/fraud. Much of the basis for this is set forth above regarding Plaintiff's fiduciary duty claim, so will not all be repeated, but as

an example, Plaintiff will note that over a year after the initial 2016 misrepresentation, on October 23, 2017 Larry Storm of the Crary firm filed the fee applications of both SNB and the Crary firm, which provided Plaintiff Rand with the form headed “STATUTORY MAXIMUM FOR EXECUTOR/ADMINISTRATOR”. (Petition, page 5, App. 5; Gagnon 5/7/19 depo. pp. 39:19-40:22, App. 458). Plaintiff contends that this form, rather than mitigating the falsity of SNB’s earlier misrepresentation, aggravated it by reinforcing it. The form is just as misleading as the one in the “Estate Administration Overview” sent to Plaintiff by SNB on September 20, 2016. “The Iowa Probate Code provides for reasonable fees as may be determined by the Court for ordinary services *based upon the gross assets of the estate...*”. (Emphasis added.) Plaintiff contends the real significance of that document is that it shows a continuing pattern of SNB and their attorney recklessly misleading beneficiaries.

That being said, that SNB form, however, is not the one that Plaintiff relied on that foreclosed him from the opportunity to bargain with SNB for a competitive fee contract for the Estate or seek another Personal Representative who would agree to do that job for less than SNB. Plaintiff relied on the information SNB sent to him in their September 20, 2016 letter. (Rand 10/15/19 depo. pp. 38:10-39:20; App. 441).

Accordingly, the District Court's decision to grant summary judgment against Plaintiff Rand's negligent misrepresentation claim is erroneous and must be reversed.

**IV. THE DISTRICT COURT ERRED IN GRANTING SUMMARY JUDGMENT IN FAVOR OF DEFENDANT SNB AND AGAINST PLAINTIFF RAND AS TO HIS CLAIM OF FRAUD.**

Plaintiff Rand also appeals from the District Court's dismissal of his fraud claim via summary judgment. The first ground for the dismissal is the conclusion that this claim is limited to Probate Court. (Ruling, pp. 22-23; App. 533-534). Rand submits that this conclusion is erroneous for the reasons set forth above as to his fiduciary duty and negligent misrepresentation claims.

Iowa courts have noted that the elements of a claim for fraud are as follows:

The elements of fraud are: (1) representation, (2) falsity, (3) materiality, (4) scienter, (5) intent to deceive, (6) justifiable reliance, and (7) resulting injury and damage. *Garren v. First Realty Ltd.*, 481 N.W.2d 335, 338 (Iowa 1992); *Cornell v. Wunschel*, 408 N.W.2d 369, 374 (Iowa 1987).

*McGough v. Gabus*, 526 N.W.2d 328, 331 (Iowa 1995).

A plaintiff can establish scienter, or knowledge of the falsity of a material representation, by showing that the defendant had actual knowledge of the falsity, possessed reckless disregard for the truth, falsely stated or implied that the representations were based on personal knowledge or investigation, or had a special relationship with the plaintiff and therefore had a duty to disclose. *Cornell*, 408 N.W.2d at 375-76; *Beeck*, 350 N.W.2d at 155.

*Id.*

The District Court's analysis is limited to the "scienter" and "reliance" elements. (Ruling, pp. 23-27; App. 534-538). As to scienter, the District Court held:

As noted in regard to the negligent misrepresentation claim, this Court concludes in viewing the record in a light most favorable to Plaintiff that this initial statement or enclosure (in September 2016) given to Plaintiff and the other Beneficiaries misrepresented Iowa law in regard to fees. In particular, the statements could be found to be only partially correct or true because they suggest that the fee is automatically based on those percentages of the value of the assets. In this sense, the "misrepresentation" could have and would have been cured as a matter of law if the enclosure in that initial letter from September 2016 had stated, "The maximum fees are computed as follows." This Court concludes as a matter of law, however, that no reasonable jury could find this misstatement or partial misstatement to constitute and raise to the level of fraud.

(Ruling p. 24, App. 535). No further explanation is given for the Court's decision that this misrepresentation did not rise to the level of fraud. As set forth above by the facts and arguments in the fiduciary duty and negligent misrepresentation sections of this Brief, a reasonable jury could conclude that the scope of the fraud was broader than just the September, 2016 letter, and that the false statement was knowingly or recklessly made to Plaintiff Rand and the beneficiaries.

Next, the District Court concluded that the "reliance" element had not been met. (Ruling, pp. 25-27; App. 536-538). Again, Plaintiff submits that

the facts and arguments set forth above as to his fiduciary duty and negligent misrepresentation claims also establish that he relied on the fraudulent statements by SNB to his detriment.

In a nutshell, contrary to the District Court's conclusion, there was reliance causing damage to Plaintiff. Rand, a layperson, was intentionally misled by SNB into believing that the statutory maximum was the required fee he had to pay, and that he had no choice but to submit to that fee as well as to the designation of SNB as the Personal Representative and Crary as the attorneys for the Estate. The Court concluded that there was no damage from this misrepresentation, as it was held that the attorney fees incurred personally by Plaintiff Rand were from the proceedings contesting the fee applications of SNB and Crary, which were allegedly not connected to the misrepresentation. The District Court's conclusion fails to account for the fact that the contest and the hearing would not have occurred at all but for the misrepresentation. If Rand would have been informed correctly at the outset about how those maximum fees were not required fees, and that he had the ability to seek another Personal Representative and attorney for the Estate, he could have negotiated a proper fee from the outset without needing to hire his own attorney to engage in the lengthy and costly process of objecting to SNB and Crary's fee applications. Plaintiff Rand could have



either negotiated a reasonable fee from SNB and Crary at the outset, or would have obtained services at a reasonable fee from other sources, instead of personally bearing the cost of hiring his own attorney to contest their unreasonable fees.

Therefore, a reasonable jury could conclude that Plaintiff Rand's claim for fraud satisfies the elements of such a claim under Iowa law.

**V. PLAINTIFF'S CLAIMS FOR DAMAGES, INCLUDING EMOTIONAL DISTRESS DAMAGES, ATTORNEYS FEES, AND PUNITIVE DAMAGES SHOULD PROCEED TO TRIAL.**

The District Court proceeded to analyze Plaintiff Rand's various claims for damages and separately held that Plaintiff Rand was not entitled to an award of damages on any of his claims. Plaintiff Rand will address these findings *seriatim*.

**A. PLAINTIFF'S CLAIMS FOR DAMAGES SHOULD NOT BE LIMITED TO PROBATE COURT.**

The District Court first concludes that Plaintiff's claims for damages based on the tortious conduct of SNB is barred due to the conclusion that these claims are confined to the jurisdiction of the Probate Court. (Ruling pp. 29-31; App. 540-542). For the reasons set in the discussion regarding jurisdiction pertaining to his fiduciary duty claims, Plaintiff Rand should be able to bring tort claims in District Court for damages, whether those damages were suffered by him personally or by the Estate. Wrongful

conduct by a bank causing harm to the Estate and its heirs should give rise to a cause of action in District Court.

**B. ATTORNEY FEES AS COMPENSATORY DAMAGES, INCLUDING PLAINTIFF'S COMMON LAW ATTORNEY FEES CLAIM.**

The District Court further found that Rand does not have a viable claim for damages based on attorney fees he incurred, whether as an element of damage of his tort claims or as a separate common law claim. (Ruling, pp. 31-32, 38-39; App. 542-543, 549-550). As to whether he could receive damages due to attorney fees he incurred as an element of damage relating to his tort claims, the District Court found that the September, 2016 misrepresentation did not cause damages. For the reasons set forth above in prior sections, this conclusion is in error, as his claims are broader than the September 2016 claim, and he was personally damaged due to having to hire a personal lawyer to rectify the situation caused by Defendant's continuing tortious conduct.

As to his equitable claim for common law attorney fees (Count IV of the Petition, p. 9; App. 9), the District Court erroneously dismissed this cause of action. In this cause of action, Plaintiff claimed that the conduct of SNB (a) exceeded the willful and wanton disregard for the rights of another required for punitive damages and rose to the level of oppression or

connivance to harass or injure another, (b), was harsh, difficult to bear, or tyrannical and cruel, and (c) involved voluntary blindness or intentional failure to discover or prevent the wrong they conducted. *See Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003).

Much of the underlying factual basis for this claim cannot be disputed: SNB was (a) in the business of being a fiduciary in probate matters<sup>2</sup>; (b) had been in business for many years doing so<sup>3</sup>, (c) their Wealth Management division, which did the probate work<sup>4</sup>, was comprised mostly of very experienced and knowledgeable people, including lawyers<sup>5</sup> who held themselves out as such<sup>6</sup>, (d) who carefully operated by committee and policy<sup>7</sup>, (e) that the committee designed the forms<sup>8</sup> that misled Todd Rand,

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<sup>2</sup> Twidwell 5/8/19 depo. pp. 4:10-22; 8:11-9:6; 29:20; App. 484-485, 487; Hagberg 5/7/19 depo. pp. 4:9-7:19; 65:4-8; App. 492-493, 495; Sitzmann 5/8/19 depo. pp. 4:11-6:24; 11:19-12:8; 79:21-81:6; 119:1-120:17; App. 471-473, 479-480.

<sup>3</sup> Twidwell 5/8/19 depo. pp. 6:17-9:6; App. 485.

<sup>4</sup> Twidwell 5/8/19 depo. pp. 8:16-21; App. 485; Sitzmann 5/8/19 depo. pp. 5:14-24; App. 471.

<sup>5</sup> Twidwell 5/8/19 depo. pp. 4:11-15; 6:17-9:6, App. 484-485. Sitzmann 5/8/19 depo pp. 4:11-12:13; 62:15-72:4, App. 471-473, 476-478. Hagberg 5/7/19 depo. pp. 4:9-7:19, App. 492-493. Gagnon 5/7/19 depo. pp. 5:11-13:1, App. 454-457.

<sup>6</sup> Twidwell 5/8/19 depo. pp. 76:1-78:9, App. 488-489. Sitzmann 5/8/19 depo. pp. 121:6-21, App. 480. Gagnon 5/7/19 depo. pp. 69:17-70:21, App. 459-460.

<sup>7</sup> Twidwell 5/8/19 depo. pp. 12:8-20, App. 486.

<sup>8</sup> Gagnon 5/7/19 depo. pp. 71:1-72:13, App. 460.

that the committee used the same misleading forms for many years and routinely sent them to all beneficiaries<sup>9</sup>, and that the forms unequivocally and obviously misrepresented to the beneficiaries that all Iowa probate fees were based on a percentage of the gross estate value and that by misrepresenting this, the bank was putting itself in a position to best maximize its profits at the expense of larger estates. Moreover, SNB knew, or should reasonably have known, that they were marketing to inexperienced vulnerable beneficiaries faced perhaps for the first time with dealing with a large, reputable bank in the probate context, almost immediately after having suffered the death of a loved one. Many of these beneficiaries would be of more limited education.<sup>10</sup> These facts alone show that SNB's conduct rose to the level of reckless oppression or connivance to harass or injure another, that they were cruel, and voluntarily blind to the harm they were causing which is to say they were effectively rigging the system to misappropriate a portion of peoples' life savings by reducing the size of the estate which decedents had intended be passed to their loved ones.

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<sup>9</sup> Gagnon 5/7/19 depo. pp. 71:1-72:13; 73:13-74:24; 75:23-77:14, App. 460-461.

<sup>10</sup> Todd Rand has 2 ½ years of college. A year and a half at Morningside and a year at Iowa State in Ag Business. (Rand 5/8/19 depo. pp. 5:3-6:11, App. 428-429.

By advising beneficiaries such as Rand that they do not need a lawyer<sup>11</sup>, by misrepresenting to them that the maximum fee they are charging is required by the probate code<sup>12</sup>, and structuring their fee applications carefully so as not to disclose how much they are charging<sup>13</sup>, SNB increases the likelihood in every estate they probate, that they will be able to pass off their unreasonable fee request unobjected to at the probate hearing, which is what almost happened here. Plaintiff Rand at first concluded from SNB's October 23, 2017 Fee Application that the Bank was requesting fees of a "hundred and some-odd thousand dollars". This seemed reasonable to Todd based on the work he thought SNB had done.<sup>14</sup>

The lawyer he consulted, the undersigned, couldn't understand from SNB's fee application how much money SNB was asking for and so he called Larry Storm, which led to Todd's fortunate discovery that saved the

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<sup>11</sup> Rand 5/8/19 depo. pp. 124:22-125:7, App. 437.

<sup>12</sup> SNB's Estate Administration Overview enclosed with their September 20, 2016 letter, App. 19-21.

<sup>13</sup> SNB's Fee Application (App. 68-71) compared to their Amended and Substituted Fee Application (App. 287-420) which sets out in the "Wherefore" clause that SNB is seeking \$394,782.00 in ordinary executor fees. (p. 3, App. 289). SNB filed their Amended and Substituted Fee Application only after Plaintiff objected their original Fee Application as not giving proper notice of the fees they were asking to be approved, in violation of their fiduciary obligation to the Estate and Beneficiaries, App. 287-420.

<sup>14</sup> Rand 10/15/19 depo. pp. 82:2-83:14, App. 442.

estate between \$400,000 and \$500,000. (Rand 5/8/19 depo. pp. 116:22-117:25, App. 436. Rand 10/15/19 depo. pp. 82:2-83:14, App. 442).

SNB's "APPLICATION FOR ORDER FIXING FEES FOR ORDINARY SERVICES AND APPLICATION FOR INTERIM ORDER FIXING FEES FOR EXTRAORDINARY SERVICES" constituted "connivance." "Connivance" for purposes of oppressive conduct sufficient to support common law attorney fees is defined as voluntary blindness or an intentional failure to discover or prevent the wrong. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003). Nowhere in SNB's Application does it give notice to the beneficiaries of the dollar amounts of the fees that SNB and Crary were asking the court to approve. Compare it to their Amended and Substituted Fee Application (App. 287-420) which they made after Plaintiff's counsel objected to their original Fee Application because it didn't give the beneficiaries notice of the amount of money SNB was requesting be awarded to them as ordinary fees. The Amended and Substituted Application says in the "Wherefore" clause how much money SNB was asking for- \$394,782.00. As Plaintiff Rand testified, the Application was so misleading to him that he almost did not object because it led him to believe that all SNB was asking for was approximately \$150,000 which he considered a reasonable amount. (Rand 5/8/19 depo. pp.

117:2-11, App. 436). The difference between what Rand thought the bank was asking for, based on their misleading disclosure, and what in fact they intended to ask for was significantly higher.

Furthermore, in the deposition testimony of Larry Storm and Tammi Gagnon, both experienced probate lawyers<sup>15</sup>, they both denied their knowledge of the existence of a fiduciary duty to the beneficiaries of the Roger Rand Estate, furthering the oppressive conduct.<sup>16</sup>

Finally, as stated above, SNB hired Larry Storm as the attorney for SNB without seeking a competitive quote but rather agreed to their fee of the maximum statutory rate. (Gagnon 5/7/19 depo. pp. 11-13; 121:16-125:6, App. 456, 462-463. Also see 9/14/16 letter from Larry Storm to Tammi Gagnon and SNB's acknowledgement and consent to Crary's fee terms; App. 240-242).

There is case law where common law attorney fees have been awarded, and support Plaintiff's position that they should be awarded in this case (or at least establish that there is a factual dispute which should have led the District Court to allow the claim to go to trial). Common law attorney

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<sup>15</sup> Larry Storm 1/4/17 depo. pp. 4:9-20; 30:5-31:25, App. 466, 468. Gagnon 1/4/17 depo. pp. 4:7-5:18, App. 15. Gagnon 5/7/19 depo. pp. 5:11-13:1, App. 454-456.

<sup>16</sup> Storm 1/4/17 depo. pp. 10:14-25, App. 467. Gagnon 1/4/17 depo. pp. 16:13-17, App. 16.

fee claims are in equity. *Williams v. Van Sickel*, 659 N.W.2d 572, 579 (Iowa 2003) (“[i]t is hard to imagine behavior that would be more oppressive or conniving than a public official creating documents which benefit herself to the detriment of those she is elected to represent.” *Equally oppressive and conniving was her attempt to defraud the district court in her scheme to protect herself from liability*). *Id.* (emphasis added); *Hoepfner v. Holladay*, 741 N.W.2d 823 (Iowa Ct. App. 2007) (the tortfeasors conduct was “sufficiently vexatious, tyrannical, cruel, and oppressive to affirm the common law attorney fee award”); *Kline v. Keystar One, L.L.C.*, No. 99-1649, 2002 WL 681237, at \*7 (Iowa Ct. App. Apr. 24, 2002), wherein the Court stated:

As noted, the court awarded the plaintiffs \$36,081.39 representing attorney fees. Mueller appeals from this award. Our review of this matter is de novo. *Hockenberg*, 510 N.W.2d at 158. A party generally has no claim for attorney fees as damages in the absence of a statutory or written contractual provision allowing such an award. *Suss v. Schammel*, 375 N.W.2d 252, 256 (Iowa 1985). Courts have recognized a rare exception to this general rule, however, “when the losing party has acted in bad faith, vexatiously, wantonly, or for oppressive reasons.” *Hockenberg*, 510 N.W.2d at 159. An award of common law attorney fees requires conduct that is intentional and likely to be aggravated by cruel and tyrannical motives. *Id.* Such conduct lies far beyond a showing of mere “lack of care” or “disregard for the rights of another.” *Id.*

*Id.* at \*7.



Each of these cases involves a special relationship, much like the fiduciary relationship between Plaintiff and SNB. Each relationship is, or is comparable to, a fiduciary one where there is a dominant party with a degree of control over a beneficiary which can yield tyrannical breaches of trust, as happened to Plaintiff Rand. Each of these cases, like Plaintiff's, involved the dominant party in the relationship using its position to take advantage of the other in a way that financially benefited that party to the detriment of the other. Accordingly, Plaintiff set forth sufficient facts to pursue an equitable claim for common law attorney fees, and the District Court erred by granting summary judgment.

**C. PLAINTIFF'S EMOTIONAL DISTRESS DAMAGE CLAIMS.**

Plaintiff also submits that the District Court erred by dismissing Plaintiff's emotional distress damages claims as a matter of law. (Ruling, pp. 32-35, App. 543-546).

Plaintiff acknowledges that generally a party may not recover damages for emotional distress premised on negligence without physical harm. As with all generalities, there are exceptions. *Miranda v. Said*, 836 N.W.2d 8, 14 (Iowa 2013) ("The general rule in Iowa is emotional distress damages are not recoverable in torts " 'absent intentional conduct by a defendant or some physical injury to the plaintiff.' " *Clark v. Estate of Rice*

*ex rel. Rice*, 653 N.W.2d 166, 169 (Iowa 2002) (quoting *Mills v. Guthrie Cnty. Rural Elec. Coop. Ass'n*, 454 N.W.2d 846, 852 (Iowa 1990)). This rule generally recognizes there is no duty in tort law to avoid causing emotional harm. Like most other rules, however, exceptions exist.”)

This case involves one of those exceptions. The fiduciary relationship between the parties, coupled with the particular harm imposed, being misled about the fiduciaries entitlement to fees and discovering the magnitude of the problem their negligence caused, an unreasonably excessive claim for a million dollars in fees, having to hire an attorney to fight the recalcitrant fiduciary in court, going through several days of hearings on the fee issue with the nervousness and worry that foreseeably would cause, makes this case an exception. *See, e.g. Miranda v. Said*, 836 N.W.2d 8, 14 (Iowa 2013) (“We recognize “a duty to exercise ordinary care to avoid causing emotional harm” when supported by the nature of the relationship between the parties and the nature of the acts engaged in by the defendant within the context of the relationship. *See Oswald v. LeGrand*, 453 N.W.2d 634, 639 (Iowa 1990); *cf. Blong v. Snyder*, 361 N.W.2d 312, 316 (Iowa Ct.App.1984) (“[P]laintiff’s status as an employee entitled him to more protection from insulting or abusive treatment than would be expected between two strangers.”)).

Accordingly, Plaintiff's claims for emotional distress damages should be allowed to proceed.

**D. PLAINTIFF'S CLAIM FOR PUNITIVE DAMAGES.**

Plaintiff also appeals from the District Court's holding that his claim for punitive damages should be dismissed via summary judgment. (Ruling, pp. 35-38, App. 546-549).

Punitive damages may be awarded when it has been shown "by a preponderance of clear, convincing, and satisfactory evidence, the conduct of the defendant from which the claim arose constituted willful and wanton disregard for the rights or safety of another." Iowa Code § 668A.1(1)(a). "Willful and wanton conduct is shown when an actor has intentionally done an act of an unreasonable character in disregard of a known or obvious risk that was so great as to make it highly probable that harm would follow, and ... usually accompanied by a conscious indifference to the consequences." *Cawthorn v. Catholic Health Initiatives Iowa Corp.*, 743 N.W.2d 525, 529 (Iowa 2007) (internal quotation marks omitted).

For the reasons set forth in the previous sections of this brief, a reasonable jury could find that SNB's conduct meets the standard for punitive damages. This is particularly true in light of the fiduciary relationship between the parties. *See, e.g. Econ. Roofing & Insulating Co. v.*

*Zumaris*, 538 N.W.2d 641, 652 (Iowa 1995)(punitive damages award in a breach of fiduciary duty case); *Midwest Mgmt. Corp. v. Stephens*, 353 N.W.2d 76, 82 (Iowa 1984)(same).

Accordingly, upon remand, Plaintiff's claim for punitive damages should be allowed to be submitted to the jury.

### **CONCLUSION**

For all of the foregoing reasons, Plaintiff-Appellant Todd Rand submits that the decision of the District Court, which dismissed all of his claims pursuant to Defendant-Appellee's Motion for Summary Judgment, should be reversed and remanded with directions to submit all of his claims to trial by jury.

### **REQUEST FOR ORAL ARGUMENT**

Plaintiff-Appellant requests to be heard orally upon submission of this matter.

Respectfully submitted,  
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## COST CERTIFICATE

I hereby certify that the true actual cost of printing the foregoing Plaintiff-Appellant's Final Brief was the sum of \$0.00.

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DATED this 19<sup>th</sup> day of July, 2021.

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**CERTIFICATE OF SERVICE AND FILING**

I hereby certify that on the 19<sup>th</sup> day of July, 2021, the foregoing Plaintiff-Appellant's Final Brief and Request for Oral Argument was filed electronically with the Clerk of Court using the CM/ECF system, which sent notification of such filing to the following:

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