IN THE SUPREME COURT OF IOWA

No. 20-1663
(consolidated with No. 21-0528)

DEBRA EMMERT,
Appellant,

v.

LINCOLN SAVINGS BANK,
Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

THE HONORABLE LINDA FANGMAN AND DAVID ODEKIRK

APPELLEE LINCOLN SAVINGS BANK'S FINAL BRIEF

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ROUTING STATEMENT

The Iowa Supreme Court should transfer this case to the court of appeals pursuant to Iowa Rule of Appellate Procedure 6.1101. This case involves the application of existing legal principles. The issues of this case are appropriate for summary disposition.

STATEMENT OF THE CASE

Lincoln Savings Bank ("**LSB**") lent almost $5 million to Debra D. Emmert ("**Deb**"), her estranged husband Dale T. Emmert ("**Dale**" and, together with Deb, the "**Emmerts**"), and certain corporate entities under the Emmerts' control. The loans were provided to enable the Emmerts to run a furniture store business in Cedar Falls, Iowa and Coralville, Iowa. As set forth below, the promissory notes pursuant to which LSB extended the funding were secured by liens on substantially all of the assets of the Emmerts and their corporate entities, including real estate in Cedar Falls and Coralville. The Emmerts and the corporate entities eventually defaulted on the notes and, despite entering into forbearance agreements and pursuing other strategic alternatives, were unable to repay LSB.

LSB subsequently filed both a replevin action and a foreclosure action in the Iowa District Court for Black Hawk County. In both actions, attorney Philip D. Brooks represented Deb, including accepting service of process in both actions, and attempting to

negotiate a settlement on Deb's behalf with LSB's attorney for two years. Deb did not file an answer in the foreclosure action and LSB obtained a default judgment.

Almost four months after the default order, and 57 days after the default judgment was entered by the district court, Deb, through her current counsel, Gregg Geerdes, filed a motion to set aside the default judgment. She now claims that various of LSB's default notices were deficient because Brooks was, in fact, not her attorney. The district court denied the motion on a number of grounds, including the express finding that Brooks was Deb's attorney, and that her motion to set aside was untimely.

Now, through this appeal, Deb attempts to create ambiguity in various rules and statutes where no ambiguity exists, and continues to ignore the fact that Brooks was her attorney. At its core, Deb's appeal is a strategic ploy to stall the foreclosure action, to which she has no cognizable defenses because they were voluntarily waived pursuant to the forbearance agreements. Indeed, LSB offered to

withdraw its default judgment, re-serve Deb, and allow her to assert any defenses she thinks she has in the underlying foreclosure action, thereby eliminating the need for this appeal. Deb declined.

For the reasons set forth herein, Deb's contentions in this appeal are without merit. As the district court found, Brooks was Deb's attorney during the foreclosure action and, as such, properly accepted service on Deb's behalf under Iowa Rule of Civil Procedure 1.305(12). Further, LSB properly served notice of default on Mr. Brooks pursuant to Iowa Rule of Civil Procedure 1.972. The district court properly denied Deb's motion to set aside the default judgment because it did not assert a good cause for failing to answer, was not timely, and did not raise a valid underlying defense to the foreclosure action. Finally, LSB complied with the Iowa Code when issuing special executions on real estate upon which it held liens.

As such, LSB respectfully requests that this Court affirm the district court on all grounds.

STATEMENT OF THE FACTS

1. The Notes.

The Emmerts owned and operated Simpson Furniture Company ("**Simpson**") and Emmert Management, L.L.C. ("**Emmert Management**"), which sold retail consumer furniture at stores located in Cedar Falls, Iowa and Coralville, Iowa. (App. 467-468). In order to finance their business, the Emmerts, on behalf of Simpson and Emmert Management, sought and received financing from LSB pursuant to two promissory notes (collectively, the "**Notes**").[1] (App. 239, 244-45, ¶¶ 10, 19).

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[1] The Notes were for the original principal amount of $4,722,800.00 and were secured by a variety of collateral including: (i) security agreements granting LSB a lien on essentially all of Simpson and Emmert Management's assets, (ii) assignments of life insurance policies on various policies held by the Emmerts, (iii) a mortgage on the Cedar Falls' store real estate owned by Emmert Management (the "**Cedar Falls Real Estate**"), (iv) a mortgage on the Emmert's personal residence located at 2284 Holiday Road in Coralville, Iowa (the "**Coralville Condo**"), and (v) a number of secured and unsecured personal guaranties from the Emmerts that unconditionally provided for full payment of the amounts due and owing under the Notes. (App. 239-246, ¶¶ 10-21).

During 2017, Simpson and Emmert Management began to face financial issues. (See App. 468). As such, on March 22, 2018, the Emmerts, Simpson, and Emmert Management entered into a forbearance agreement with LSB (as amended, the "**Forbearance Agreement**"). (Id.). The Forbearance Agreement was amended twice; however, it was subsequently breached by the Emmerts, Simpson, and Emmert Management. (Id.). As a result, LSB took actions to enforce its rights under the Notes and related documents in the district court. (Id.).

2. LSB's Legal Actions.

A. The Replevin Action.

On May 2, 2019, LSB filed a *Petition for Replevin* (the "**Replevin Petition**") against Simpson, Emmert Management, the Emmerts, and several other parties (the "**Replevin Action**").[2] (App. 20-78).

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[2] The Replevin Action was filed in the Iowa District Court for Black Hawk County, case number LACV137426.

On June 5, 2019, the district court issued an *Order for Immediate Possession* in the Replevin Action, granting LSB the right to immediately possess certain collateral set forth more fully in the Replevin Petition (the "**Collateral**"). (App. 82-86).

On June 11, 2019, the district court issued a *Writ of Replevin* to the Black Hawk County Sheriff to take possession of the Collateral. (App. 87-88).

On July 19, 2019, the district court issued a *Default Judgment and Order for Final Possession* in the Replevin Action in favor of LSB. (App. 90-94). The remaining Collateral was sold at a public sale in order to complete the Replevin Action. (App. 468). Although the Replevin Action is not the subject of this appeal, Deb's legal representation in the Replevin Action has significance, as set forth below.

B. Foreclosure Action.

On July 24, 2019, Lincoln Savings Bank ("**LSB**") filed a *Petition for Mortgage Foreclosure and Foreclosure of Security Interest* (the

"**Foreclosure Petition**") against Simpson, Emmert Management, the Emmerts, and several other parties (the "**Foreclosure Action**").[3] (App. 95-219). The Foreclosure Action sought foreclosure on LSB's mortgages on the Cedar Falls Real Estate, Coralville Condo, and certain other collateral under the Notes granted by the security agreements (as defined in the Foreclosure Petition) between LSB and Simpson and Emmert Management. (App. 106-115, ¶¶ 31-60).

On August 21, 2019, LSB amended the Foreclosure Petition to update the address of Simpson's Coralville store where certain collateral under the Notes was located. (Foreclosure Amended Petition ¶¶ 2-4).

At the time of the Foreclosure Action, LSB had a second mortgage on the Coralville Condo. (App. 246-47, ¶¶ 22(A)-22(C)). This mortgage was junior to a mortgage held by Farmers State Bank ("**FSB**"). (Id.). On December 11, 2019, pursuant to a purchase and

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[3] The Foreclosure Action was filed in the Iowa District Court for Black Hawk County, case number EQCV138057.

sale agreement between FSB and LSB, LSB purchased and was assigned FSB's mortgage on the Coralville Condo. (Id., ¶ 22(C)). LSB was prevented, however, from amending the Foreclosure Petition due to the COVID foreclosure moratorium instituted by Governor Reynolds. (App. 469). After the moratorium was lifted, LSB amended the Foreclosure Petition for a second time to also foreclose on the mortgage it acquired from FSB. (Id.).

C. Deb's Representation.

Deb was represented by attorneys Philip D. Brooks and Abram V. Carls throughout negotiations with LSB, the Replevin Action, and the Foreclosure Action. (See, e.g., App. 470-72). For example, Brooks represented Deb during the negotiation of the Forbearance Agreement. (App. 470-71). On October 1, 2018, he sent LSB's counsel a letter enclosing the *Third Amendment to the Forbearance Agreement*, which had been executed by Deb. (App. 480-88).

On May 30, 2019, Brooks and Carls also entered their appearances in the Replevin Action. (App. 80, 81). Likewise, on May

30, 2019, Brooks also filed an *Acceptance of Service of Original Notice and Petition* accepting service of the petition and original notice issued to Deb in the Replevin Action. (App. 79).

Importantly, on August 7, 2019, Brooks also filed an *Acceptance of Service on Behalf of Defendant, Debra D. Emmert* in the Foreclosure Action (the "**Foreclosure Action Acceptance of Service**"). (App. 220).

Further, Brooks maintained correspondence with LSB's counsel during the negotiation of the Forbearance Agreement, during the pendency of the Replevin Action, and during the Foreclosure Action through the entry of default judgment against Deb (as set forth below), during which time he attempted to negotiate a settlement on Deb's behalf. (App. 470-72). For example, on September 20, 2020 Brooks emailed counsel for LSB to communicate a settlement offer on behalf of Deb. (App. 502-08). On September 22, 2020, LSB's counsel sent a counteroffer and advised Brooks that LSB would be filing default judgment pleadings in two days. (Id.). Brooks acknowledged

the counteroffer and default judgment pleadings, stating that "that's not enough time" and sought to discuss further the following day. (Id.). Following discussions between Brooks and LSB's counsel, LSB's counsel advised that LSB would not accept Deb's settlement offer, but was still open to continuing settlement negotiations after the default judgment was entered. (Id.).

During these exchanges, Brooks never stated that he was not authorized to represent Deb. (See id.). To the contrary, he always acted on behalf. While Brooks did inform LSB's counsel that "[i]f the matter takes a more adversarial approach [he] will be out of it" on March 5, 2020, he never communicated his withdrawal and, in fact, continued negotiating on Deb's behalf through early December 2020. (App. 492-501).

D. Foreclosure Action Default.

On September 11, 2019, LSB sent a *Notice of Intent to File Written Application for Default* to Brooks as counsel for Deb. (App. 223, 227-28).

On December 31, 2019, LSB filed an *Application for Default Entry by Clerk Against Co-Defendants Simpson Furniture Company; Emmert Management, L.L.C.; Dale T. Emmert; Debra D. Emmert; and Strategic Funding Source, Inc.* (the "**First Default Application**"). (App. 221-28). That same day, the district court entered an order granting the First Default Application (the "**First Default Order**"). (App. 229-31).

On March 20, 2020, LSB filed *Plaintiff's Motion for Leave to Amend Petition* (the "**Motion to Amend**") in order to foreclose on the mortgage acquired from FSB on the Coralville Condo. (App. 232-34). The district court granted the Motion to Amend on March 30, 2020. (App. 235-36). However, LSB was unable to file its Second Amended Foreclosure Petition until August 5, 2020 due to the COVID-related moratorium. (App. 469). LSB served notice of the Second Amended

Foreclosure Petition on Brooks, as attorney for Deb, via the EDMS and the U.S. Postal Service. (App. 380-82).

On September 1, 2020, LSB's counsel sent a *Notice of Intent to File Written Application for Default of Second Amended Petition* to Mr. Brooks, as attorney for Deb (the "**Second Default Notice**"). (App. 386, 390-91). LSB served the Second Default Notice on Brooks, as attorney for Deb, via the U.S. Postal Service. (App. 391).

On October 1, 2020, LSB filed its *Application for Default Entry by Clerk Against All Defendants* (the "**Second Default Application**"). (App. 383-91).

On October 2, 2020, the district court entered an order granting the Second Default Application (the "**Second Default Order**"). (App. 392-94).

On November 16, 2020, Geerdes filed an appearance on Deb's behalf in the Foreclosure Action. (App. 395).

On December 2, 2020, at 10:57 AM, the district court entered a *Foreclosure Judgment Entry and Decree* foreclosing LSB's mortgages on

the Cedar Falls Real Estate and the Coralville Condo (the "**Foreclosure Judgment**"). (App. 408, ¶ IX). Two hours later, at 12:58 PM, Geerdes, on behalf of Deb, filed a *Resistance to Entrance of Judgment and Request for Time Extension* (the "**Foreclosure Judgment Resistance**"). (App. 412-424). As the district court had already entered the Foreclosure Judgement, it took no action on the Foreclosure Judgment Resistance.

E. LSB's Execution on the Foreclosure Judgment.

On December 4, 2020 at 8:46 AM, pursuant to Iowa Code § 626, the Clerk for the Iowa District Court for Black Hawk County issued a "Special Execution" to the Black Hawk County Sheriff to foreclose on the Cedar Falls Real Estate, which is located in Black Hawk County (the "**Black Hawk Special Execution**"). (App. 440-449).

On December 4, 2020 at 10:16 AM, pursuant to Iowa Code § 626, the Clerk for the Iowa District Court for Black Hawk County issued another "Special Execution," this time to the Johnson County

Sheriff to foreclose on the Coralville Condo, which is located in Johnson County (the "**Johnson Special Execution**"). (App. 427-39).

On January 20, 2021, the Black Hawk County Sheriff issued a Sheriff's Deed to Lincoln Savings Bank as a result of the Black Hawk Special Execution and Sheriff's Sale. (App. 440-449). On February 3, 2021, Lincoln Savings Bank cancelled the sheriff's sale pursuant to the Johnson Special Execution.

F. Deb's Post-Appeal Motions in the Foreclosure Action.

On December 16, 2020, Deb, through Geerdes, filed a *Notice of Appeal* in the Foreclosure Action. (App. 425-26).

On January 29, 2021, Deb, through Geerdes, filed a *Motion to Set Aside Judgment and Quash Sheriff's Sale* in the Foreclosure Action ("**Deb's Motion to Set Aside**"). (App. 452-66). There, she argued the district court should set aside the Foreclosure Judgment because it lacked personal jurisdiction over Deb, alleging that Brooks' acceptance of service of the original notice and petition was insufficient. (App. 452-53, ¶ 6). Deb also argued LSB was required to

send her, in addition to Brooks, the ten-day notice of default required by Iowa Rule of Civil Procedure 1.972. (App. 452-53). Finally, Deb argued that the district court did not have "jurisdiction to decide the issues raised in this motion until this appeal is resolved." (App. 453, ¶ 7). Nevertheless, she requested that the district court hold a hearing "and issue appropriate relief including setting aside any judgment, executions, and Sheriff's sale entered in this matter." (App. 453, ¶ 8).

On March 4, 2021, the district court held a hearing on Deb's Motion to Set Aside, at which Deb testified.

The same day, the district court issued an order denying Deb's Motion to Set Aside (the "**March 4th Order**"). (App. 549-51) There, the district court found Deb "testified that Philip Brooks was not her attorney and had no authority to file an acceptance of service, not to receive the notice of intent to file for default . . . [h]owever, the exhibits attached to the Plaintiff's resistance clearly indicate that Philip Brooks was representing Debra Emmert in these proceedings

and was, in fact, counsel of record in companion case Black Hawk County LACV137426." (App. 549-50). Further, the district court found that Deb's claim that Brooks was not her attorney was not "credible." (App. 550).

Additionally, in the March 4th Order, the district court denied Deb's Motion to Set Aside the Second Default Order and Foreclosure Judgment as "untimely." (App. 549-50). Specifically, the district court found that Deb's Motion to Set Aside "was not even filed until a year" after the First Default Order, and "almost four months" after the Second Default Order. (App. 549-50). The district court noted that this was true even though Deb's current counsel, Geerdes, filed an appearance in the Foreclosure Action on November 16, 2020, over two weeks before the Foreclosure Judgment was entered. (App. 550)

On March 12, 2021, Deb filed *Defendant Debra Emmert's Iowa R. Civil Proc. 1.904(3) Motion* ("**Deb's 1.904(3) Motion**"). (App. 552-556). There, Deb requested the district court reconsider or enlarge its

findings in the March 4th Order. (App. 552, ¶ 1). LSB filed a response on March 22, 2021. (App., 557-62).

On March 25, 2021, the district court ruled on Deb's 1.904(3) Motion, granting the motion only to the extent that it further elaborated on the district court's findings in the March 4th Order (the "**March 25th Order**"). (App. 563-65). The district court stated it "stands by" its March 4th Order, which found that the Second Default Order had provided proper notice of default to Deb. (App. 563). Further, the district court found that Deb's Motion to Set Aside was untimely and, alternatively, even if timely, it failed to allege "mistake, inadvertence, surprise, excusable neglect or unavoidable casualty" because Deb was "well aware of the proceedings and was represented by counsel." (App. 563).

ARGUMENT

I. THE DISTRICT COURT DID NOT ERR IN ENTERING THE DEFAULT JUDGMENT AND FORECLOSURE JUDGMENT AGAINST DEBRA.

Error Preservation: LSB is satisfied with Appellant's statement with regards to the preservation of error on this issue.

Standard of Review: This issue involves an interpretation of the Iowa Rules of Civil Procedure and the standard of review is for correction of errors of law. *Reis v. Iowa Dist. Court for Polk Cnty*, 787 N.W.2d 61, 66 (Iowa 2010). The district court's findings of fact are binding so long as they are supported by substantial evidence. Iowa R. App. P. 6.904(3).

A. The district court's finding that attorney Brooks represented Deb in the Foreclosure Action is supported by substantial evidence.

A district court's findings of facts are binding so long as they are supported by substantial evidence. Iowa R. App. P. 6.904(3). "Evidence is substantial when a reasonable mind would accept it as adequate to reach a conclusion." *Cole v. Staff Temps*, 554 N.W.2d 699,

702 (Iowa 1996). Here, substantial evidence supports the district court's finding that attorney Brooks represented Deb in the Foreclosure Action.

First, the district court found that "the exhibits attached to the Plaintiff's resistance clearly indicate that Philip Brooks was representing Debra Emmert in these proceedings and was, in fact, counsel of record in companion case Black Hawk County LACV137426." (App. 549-50). In reviewing those exhibits, the district court noted that Brooks represented Deb's interests in negotiating the Forbearance Agreement, including the amendments thereto. (App. 549-50).

Second, the district court identified Brooks' participation in the accompanying Replevin Action as additional grounds for the conclusion that Brooks, regardless of whether he filed an appearance, was Deb's attorney. (App. 549-50).

Third, even though he did not formally appear in the Foreclosure Action, Brooks filed an acceptance of service in that proceeding as well. (App. 220).

Fourth, and most importantly, Brooks continued to correspond with LSB's counsel on Deb's behalf for a two-year period. (App. 47072; 492-511). These interactions included negotiation of settlement offers two months before the Foreclosure Judgment and continued correspondence regarding the Foreclosure Action after the Foreclosure Judgment was entered.[4] (Id.). Further, throughout the duration of her various post-appeal motions, Deb failed to present any documents, e-mails, or otherwise to show that Brooks did not represent her in the Foreclosure Action.

Finally, Deb makes a number of inaccurate and misleading claims related to Brooks' representation, including the statement that

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[4] The only evidence to the contrary that Deb has presented is her own testimony, which the District court determined was not credible. (App. 549-51; App. 563-65).

"Brooks specifically told LSB's counsel that he would not represent Ms. Emmert in a foreclosure and thereafter engaged only in out-of court [sic] attempts at settlement." (Appellant's Br. at 21). Brooks, however, made no such statements to LSB's counsel, and Deb presents no evidence to support this claim. Rather, on March 5, 2020, Brooks advised LSB's counsel that he would "share some stuff with" LSB's counsel and "[i]f the matter takes a more adversarial approach [his law firm] will be out of it." (App. 492-501). Brooks did not represent he was withdrawing his representation of Deb and, indeed, continued to negotiate a settlement on her behalf with LSB for an additional nine months thereafter. Indeed, for someone to—at some point—be "out of it" necessarily means they are currently "in it".

As such, the district court's finding that Brooks was Deb's attorney in the Foreclosure Action was supported by substantial evidence. Therefore, as set forth below, Brooks was an attorney "known" by LSB to represent Deb in the Foreclosure Action, and

LSB's notice of default to Brooks pursuant to Rule 1.972(3)(b) was proper.

B. Iowa Rule of Civil Procedure 1.972 unambiguously provides mutually exclusive routes to send notice of default.

Deb's primary argument is that Iowa Rule of Civil Procedure 1.972(3) requires a party seeking entry of default to send a notice to both the party in default (here, Deb) and its attorney (here, Brooks). This interpretation, however, contradicts the plain language of the Rule. By its terms and structure, Rule 1.972 requires a party seeking a default judgment to send a default notice to the party in default or their attorney, if represented by counsel.

Indeed, the Rule makes clear the requisite notice is dependent on the status of the party in default – i.e. whether or not they are a "represented party":

> *a.* *To the party.* A copy of the notice of intent to file written application for default shall be sent by ordinary mail to the last known address of the party claimed to be in default. No other notice to a party claimed to be in default is required.

> b. *Represented party.* When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of notice of intent to file written application for default shall be sent by ordinary mail to the attorney for the party claimed to be in default. This rule shall not be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

Iowa R. Civ. P. 1.972(3). There is no "and" or other language suggesting compliance with both paragraphs (a) and (b) is required when—as here—it is undisputed the party in default is represented by counsel. Nor does paragraph (b) use words such as "also" or "in addition to" that would suggest notice sent to counsel for a "represented party" is somehow insufficient.

Further, the text of Rule 1.972(2) is inconsistent with Deb's proposed interpretation. The Rule uses the singular form of the word "notice" throughout, making clear only one notice (depending on the status of the party in default) is required. For example, any application for entry of default must include certification that

"written notice of intention to file the written application for default was given" and a "copy of the notice shall be attached." Iowa R. Civ. P. 1.972(2) (emphasis added).

Deb improperly seeks to insert the word "and" between Rule 1.972(3)(a) and (b) and insert plurals where none are to be found. Read properly, Rule 1.972(3) unambiguously provides that a party seeking entry of default need only send one notice of default—either to the party, if unrepresented, or to the party's attorney, if represented.

C. Even if the language of Rule 1.972 is ambiguous, the rules of statutory construction resolve the ambiguity in favor of a mutually exclusive notice provision.

Even if the language of Rule 1.972(3) is ambiguous, when considered in light of (i) the other provisions of the Iowa Rules of Civil Procedure, (ii) attorneys' ethical obligations, and (iii) the history underlying the enactment of Rule 1.972, the Court should resolve the ambiguity in favor of a mutually exclusive notice provision.

Court rules such as the Iowa Rules of Civil Procedure are subject to the same rules of statutory construction as statutes. *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986). In construing an ambiguous statute, the Iowa Code provides that courts are to consider, among other things, "[t]he object sought to be attained," the facts and circumstances surrounding the creation of the rule, the results and "consequences" of constructions, and "laws upon the same or similar subjects." Iowa Code § 4.6. The courts' goal when interpreting a statute "is to give effect to the legislature's intent, as expressed by the language used in the statute." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006). Legislative intent is gleaned from what the rule maker said "rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m).

1. Rule 1.972 in light of other Rules of Civil Procedure.

When interpreting a statute, courts must reconcile two statutes dealing with the same subject matter. *State v. Harrison*, 325 N.W.2d 770, 772 (Iowa Ct. App. 1982). Further, courts must not construe a

rule or statute to give undue influence to one section at the exclusion of the other. *Id.*; *see also State v. Boggs*, 741 N.W.2d 492, 503 (Iowa 2007) ("In construing statutes, it is also important to read the text of the statute in light of its overall context.").

With these principles in mind, Rule 1.972(3) must be read in light of Rule 1.442, which provides for the service and filing of "pleadings and other papers." Iowa R. Civ. P. 1.442. Rule 1.442(1) provides that "[u]nless the court orders otherwise . . . everything required to be filed by the rules in this chapter . . . [including] every written notice . . . shall be served upon each of the parties." *Id.* at 1.442(1). Further, Rule 1.442(2) provides that when a party is represented by an attorney, service "shall be made upon the attorney unless service upon the party is ordered by the court." *Id.* at 1.442(2). Thus, unless a party is not represented by counsel, service of every document in an action, unless ordered otherwise by the court, must be made upon the attorney of record.

Deb's proposed interpretation of Rule 1.972(3) contradicts Rule 1.442 and, thus, fails as a matter of statutory interpretation. As discussed further below, Rule 1.442 makes good sense considered in the context of an attorney's ethical obligation to avoid communications with parties that are represented by counsel. Deb's interpretation of the statute ignores the plain language of Rule 1.442, without a clear indication otherwise from the drafters of the Rules. As such, Deb's argument—that Rule 1.972(3) requires service of a notice of default on both an attorney and their client—fails as a matter of statutory interpretation.

2. Rule 1.972(3) in light of an attorney's ethical obligations.

Deb's proposed interpretation of Rule 1.972(3) would also lead to a conflict with an attorney's ethical obligations and, thus, could not have been the intention of the drafters. Courts are to consider the "consequences of a particular construction" when interpreting an ambiguous statute. Iowa Code § 4.6(5); *Boggs*, 741 N.W.2d at 503. This Court refuses to interpret statutes in a way which leads to

"impractical and illogical consequences." *Olsen v. Jones*, 209 N.W.2d 64, 67 (Iowa 1973). The goal when interpreting a statute "is to give effect to the legislature's intent, as expressed by the language used in the statute." *Lange*, 710 N.W.2d at 247.

The Iowa Rules of Professional Conduct make clear that an attorney is not to communicate with an opposing party who the attorney knows is represented by counsel:

> [A] lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized to do so by law or a court order.

Iowa R. Prof. Conduct 32:4:2(a). Comment 1 to the Rule further explains:

> This rule contributes to the proper functioning of the legal system by protecting a person who has chosen to be represented by a lawyer in a matter against possible overreaching by other lawyers who are participating in the matter, interference by those lawyers with the client-lawyer relationship, and the uncounseled disclosure of information relating to the representation.

Id. at Comment 1. These ethical obligations—that an attorney "shall not" communicate with a party represented by counsel unless,

among other things, they are "authorized by law to do so"—support the conclusion that the legislature did not intend for notice to be sent to both a party in default and her attorney.

Despite these ethical obligations, Deb argues that the drafters actually intended for attorneys to send notices of default to both the party in default and their attorney, even though the drafters omitted any language in Rule 1.972(3) stating as much. Given the ethical consequences for attorneys who violate the Iowa Rules of Professional Conduct, the drafters would, no doubt, have expressly authorized communication with a represented party in the context of default judgments. The fact they did not makes clear that such a result was not intended. Instead, as the plain language of the statute makes clear, notice is required to either the party, if they are unrepresented, or the attorney, if the party is represented.

3. The legislative history of Rule 1.972.

The legislative history of Rule 1.972(3) also demonstrates that the drafters intended Rule 1.972(3) to provide mutually exclusive

options of sending notice of default. "In construing a statute, it is important to consider the state of the law before the statute was enacted and the evil it was designed to remedy, and it is the business of courts to so construe the statute as to suppress the mischief and advance the remedy." *Appleby v. Farmers State Bank*, 56 N.W.2d 917, 921 (Iowa 1953) (internal citations and quotations omitted). Further, to glean legislative intent "it is fair to consider both the words used and deleted in companion subsections, in addition to the circumstances involved." *City of Nevada v. Slemmons*, 59 N.W.2d 793, 795 (Iowa 1953).

Rule 1.972's origins stem from this Court's decision in *Central Nat'l Insurance Co. v. Insurance Co. of North America*. 513 N.W.2d 750 (Iowa 1994). There, the Court addressed a plaintiff's failure to provide notice of default prior to seeking a default judgment. At the time of the decision, there was no rule requiring a party seeking a default to provide notice to the defaulting party or, if represented, the defaulting party's attorney. *Id.* at 753. There was, however, a local

custom in Polk County of providing notice to the attorney of the party alleged to be in default or to an attorney known to regularly represent the defaulting party. *Id.* at 754. The *Central National* plaintiff did not send any notice to the party in default or their known attorney. *Id.* Default judgment was entered and the party in default moved to set the default aside, which the trial court granted. *Id.* at 752. The party seeking default appealed and the Iowa Supreme Court reversed the district court, finding that the default should have been granted. *Id.* at 756.

In reversing the district court, the *Central National* court commented on the "troublesome problem" facing attorneys seeking default judgment without notice to the attorney for the party in default and without a rule or statute directing otherwise. *Id.* at 757. The Court expressly recommended an amendment to the Rules to require notice to defaulting parties prior to taking a default. The Court noted that one state, Pennsylvania, had enacted such a rule, pursuant to which notice of default must be sent "to the party against

whom judgment is to be entered and to the party's attorney of record, if any." Pa. R. Civ. P. 237.1 (emphasis added). On October 31, 1997, the Iowa Supreme Court enacted the current Rule 1.972(3) (formerly numbered rule 231(c)) to presumably address this issue. *See In the Matter of Amendments to the Iowa Rules of Civil Procedure*, Report of the Supreme Court, at 145–46 (October 31, 1997).

Importantly, however, what became Rule 1.972 differed in two ways from the Pennsylvania rule cited in *Central National*. First, and most critically, the drafters of Rule 1.972 omitted the word "and," thereby removing the explicit requirement to send the notice of default to the party and its attorney. *Compare* Iowa R. Civ. P. 1.972(3)(b) *with* Pa. R. Civ. P. 237.1. Second, Rule 1.972 requires notice be sent to the attorney, not only if they are of record in a matter, but also if the party seeking the default knows that the attorney represents the defaulting party. *Id.* Thus, in two important ways, the drafters of Rule 1.972 changed the statute from Pennsylvania's enactment.

The differences are illustrative and help give meaning to Rule 1.972. The drafters' deletion of the word "and" signals an intention to depart from the Pennsylvania rule's requirements, just as the expansion of the requirement to send to any "known" counsel in the matter signals the intention of the drafters to reach beyond just attorneys of record in the matter. Further, the enactment of Rule 1.972 remedied the problems noted by the Court in *Central National*—a party's receipt of notice of a default directly if they are unrepresented, and through their counsel if they are represented. Through either route, the issue the *Central National* Court noted—the possibility of no notice to a party—was remedied.

II. THE DISTRICT COURT DID NOT ERR IN FINDING DEB WAS PROPERLY SERVED WITH NOTICE OF THIS ACTION.

Error preservation: LSB is satisfied with Appellant's statement with regards to the preservation of error on this issue.

Standard of review: LSB is satisfied with Appellant's statement with regards to the standard of review on this issue.

A. Deb was properly served in the Foreclosure Action.

Iowa Rule of Civil Procedure 1.305(12) provides that service of an original notice and a copy of the petition may be made "[u]pon any individual, corporation, partnership or association suable under a common name, either as provided in these rules, as provided by any consent to service or in accordance with any applicable statute." Iowa R. Civ. P. 1.305(12) (emphasis added). The Foreclosure Action Acceptance of Service filed by Brooks, Deb's attorney, constituted "consent to service" as provided for in the Iowa Rules of Civil Procedure. It demonstrated Deb's acceptance of service through Brooks, her counsel. As such, LSB properly served Deb and the district court had personal jurisdiction.

Alternatively, Deb argues her due process rights were violated when LSB served the Second Amended Foreclosure Petition on Brooks, her attorney, rather than on her personally. This argument is likewise without merit. Rule 1.442(1) provides that, among other things, "every pleading subsequent to the original petition . . . shall

be served upon each of the parties." Further Rule 1.442(2) provides that "[s]ervice upon a party represented by an attorney shall be made upon the attorney" unless the court otherwise directs. *Id.* at 1.442(2). As the Iowa Rules of Civil Procedure make clear, LSB was not required to personally serve Deb with a copy of the Second Amended Foreclosure Petition. Instead, because she was represented by Brooks, LSB was required to serve it upon her attorney, which LSB did. Thus, Deb was properly served with the Second Amended Foreclosure Petition.

Deb also argues that her due process rights were violated when LSB served both the original Petition and the Second Amended Petition upon Brooks, her attorney. Due process is satisfied where sufficient notice is given to provide time and an opportunity to "meaningfully participate in the proceeding." *War Eagle Village Apartments v. Plummer*, 775 N.WE.2d 714, 721 (2009). Pursuant to Iowa Rule of Professional Conduct 32:1.4, attorneys are required to "keep the client reasonably informed about the status of the matter."

Iowa R. Prof. Conduct 32:1.4. Deb's contention that service upon her attorney, Brooks, violated her due process rights is simply wrong. Service upon a represented party's attorney clearly satisfies due process as that attorney is obligated to communicate with their client regarding the notice, thereby giving the litigant the opportunity to participate. To the extent Brooks did not notify Deb about LSB's filings in the Foreclosure Action, Deb's issues are with Brooks, not LSB.

B. Deb waived any objections to personal jurisdiction.

Regardless of Rules 1.305 and 1.442, Deb waived any objections to personal jurisdiction through her Foreclosure Judgment Resistance, filed on December 2, 2020, because she did not raise the issue of personal jurisdiction in that pleading. Personal jurisdiction is an individual constitutional right that can be waived. *See, e.g.*, *Liberty Bank, F.S.B. v. Best Litho, Inc.*, 737 N.W.2d 312, 314–15 (Iowa Ct. App. 2007). "Every defense to a claim for relief in any pleading must be asserted in the pleading responsive thereto." Iowa R. Civ. P. 1421(1).

One such defense is lack of personal jurisdiction. *Id.* at 1.421(1)(b). "If a pre-answer motion does not contain any matter specified in rule 1.421(1) or 1.421(2) that matter shall be deemed waived, except lack of jurisdiction of the subject matter or failure to state a claim upon which relief may be granted." *Id.* at 1.421(4).

Geerdes, Deb's new counsel, filed the Foreclosure Judgment Resistance on December 2, 2020. (App. 412-424). This was the first responsive pleading Deb filed in the Foreclosure Action (other than the acceptance of service filed by Brooks). In it, Deb requested a 20-day extension to file a motion to set aside for three asserted reasons, none of which included improper service of process. (Id.). Paragraph 5 of the Foreclosure Judgment Resistance alternatively requested that it "be treated as a 1.977 motion" and that the "motion is timely made." (Id.).

The Foreclosure Judgment Resistance, by its own terms, was a motion and it was made prior to Deb filing an answer. As such, it was a "pre-answer motion" under Rule 1.421(4) and it did not assert

lack of personal jurisdiction as a defense. Deb therefore waived the ability to contest the personal jurisdiction because she did not raise such defense in her pre-answer motion.

III. THE DISTRICT COURT DID NOT ERR WHEN IT DENIED DEB'S MOTION TO SET ASIDE.

Error preservation: LSB is satisfied with Deb's statement with regards to the preservation of error on this issue.

Standard of review: LSB is satisfied with Deb's statement with regards to the standard of review with respect to interpretation of the rules of civil procedure. LSB, however, contends that there are no constitutional issues with respect to this question.

A. A motion to set aside a default judgment requires a showing of good cause.

Iowa Rule of Civil Procedure 1.977 provides that "[o]n motion and for good cause shown . . . the court may set aside a default or the judgment thereon, for mistake, inadvertence, surprise, excusable neglect or unavoidable casualty." Iowa R. Civ. P. 1.977. Further, Rule 1.977 states that any motion to set aside the default "must be

filed promptly after the discovery of the grounds thereof, but not more than 60 days after the entry of the judgment." *Id.* (emphasis added).

While courts typically disfavor default judgments, movants seeking to set aside a default judgment pursuant to Rule 1.977 must demonstrate "good cause" for failing to act in a lawsuit. *No Boundry, LLC v. Hoosman*, 953 N.W.2d 696, 700 (Iowa 2021). "Good cause is a sound, effective, and truthful reason" for failing to act. *Central Nat'l Insurance Co.*, 513 N.W.2d at 754. Good cause is only established if the movant offers "something more than an excuse, a plea, apology, extenuation, or some justification" for the failure to act. *Id.* While courts construe the concept of "good cause" liberally in favor of the movant, the movant still bears the burden of establishing such sound reasons for their failure to act. *Id.* Finally, good cause also requires that the movant assert a good faith defense to the underlying action. *Id.*

This Court's recent decision in *No Boundry, LLC v. Hoosman* is illustrative of the concept of "good cause" in this context. 953 N.W.2d 696, 700 (Iowa 2021). There, the defendant, a man with a legal disability, failed to respond in an action to foreclose a tax sale deed for his home for a disputed $220 property tax deficiency. *Id.* at 698–99. The plaintiff sought and received a default judgment. *Id.* Twenty-one days later, the defendant filed a motion to set aside and stated both that he had been determined to be legally incompetent in two criminal matters and that he had a statutory defense to the underlying action—*i.e.* his legal disability exempted him from paying property taxes. *Id.* at 699, 702–03. The district court denied the motion to set aside the default judgment.

On appeal, this Court reversed the district court and set aside the default judgment. *Id.* at 704. In particular, the Court noted the defendant's "cause" for not timely responding in the action was his "alleged legal disability," which created excusable neglect. *Id.* at 700–01. The defendant also submitted evidence from a psychologist

discussing his legal disability. *Id.* at 701. While not dispositive, the Court noted the disability and evidence in support thereof weighed in favor of setting aside the default judgment. *Id.* Additionally, the Court found that the defendant acted "promptly" to set aside the judgment and that the defendant asserted a "meritorious defense in good faith." *Id.* at 702.

B. The district court did not err in holding Deb did not establish good cause to set aside the default judgment.

The district court determined that Deb did not promptly move to set aside the default and did not establish "good cause" for doing so. (App. 549-551; App. 563-65). The district court did not err, and its ruling should be affirmed.

First, as the district court noted, Deb's only excuse for failing to answer LSB's Second Amended Foreclosure Petition was her belated, implausible claim that she was not represented by an attorney, Brooks, who was negotiating and proceeding on her behalf in the Foreclosure Action. (App. 549-550). Unlike the defendant in *Hoosman*, Deb presented no other evidence that Brooks did not

represent her, other than her own testimony, which the district court determined was not credible. (App. 549-550; App. 563-65). As such, the district court found that Deb "failed to prove that there was mistake, inadvertence, surprise, excusable neglect or unavoidable casualty that excused her failure to answer in this case." (App. 563).

Second, the district court determined that Deb's Motion to Set Aside was not timely because two defaults were entered prior to the Foreclosure Judgment. (App. 563). Indeed, Geerdes appeared for Deb in the Foreclosure Action two weeks before the district court entered the Foreclosure Judgment. Nevertheless, a motion to set aside the default was not filed until January 29, 2021. (App. 452-466).

Third, Deb did not set forth any meritorious defenses to the Foreclosure Action—nor could she. Pursuant to the Forbearance Agreement, Deb acknowledged the validity of all of LSB's debt, acknowledged the validity of LSB's liens on the Cedar Falls Real Estate and the Coralville Condo, acknowledged that she was in

default under the Notes, and generally waived all claims against LSB, among other things. (App. 482-88).

The district court properly denied Deb's Motion to Set Aside. Deb failed to establish good cause for not timely responding to the Foreclosure Petition, did not promptly seek to set aside the First Default Order, the Second Default Order, or the Foreclosure Judgement, and failed to allege any meritorious good faith defense she had in the Foreclosure Action. For these reasons, the district court's March 4th Order and March 25th Order should be affirmed.

IV. LSB'S SPECIAL EXECUTIONS WERE PROPER UNDER THE IOWA CODE.

Error preservation: The issue of whether LSB's special executions were proper under Iowa law was raised by Appellant in a subsection of her third issue for appeal ("III. The Trial Court erred when it failed to set aside the judgment and quash the sheriff's sale in this matter."). LSB addresses this issue under a separate heading herein; however, it is satisfied with Appellant's statement with regards to the preservation of error on this issue.

Standard of review: Appellant did not provide a statement with regard to the standard of review for this sub-issue. The appropriate standard of review for statutory interpretation is for errors at law. *Jahnke v. Deere & Co.*, 912 N.W.2d 136, 141 (Iowa 2018).

A. The district court properly found that the issue of multiple executions was moot.

The district court properly found that the issue of multiple executions outstanding was moot. (App. 549-51). Mootness occurs when a case "no longer present[s] a justiciable controversy because the issues involved have become academic or nonexistent." *Martin-Trigona v. Baxter*, 435 N.W.2d 744, 745 (Iowa 1989). The test for determining whether an issue is moot "is whether a judgment, if rendered, would have any practical legal effect upon the existing controversy." *Junkins v. Branstad*, 421 N.W.2d 130, 133 (Iowa 1988).

Further, Iowa Code § 626 generally sets forth the rules governing execution on judgments and liens. Iowa Code § 626.3 provides that "[o]nly one execution shall be in existence at the same time." Iowa Code § 626.3. However, Iowa Code § 626, as explained

further below, draws a distinction between general "executions" and "special executions." *Compare* Iowa Code § 626.3 *with* Iowa Code §§ 626.20, 626.46. Regardless, the Iowa Code does not prescribe any remedy in the event that a judgment creditor has more than one execution outstanding at one time.

As the district court properly found, Deb's contention that LSB violated Iowa Code § 626.3 was moot. Deb's contention that LSB had two executions outstanding at one time became "academic" because LSB, out of an abundance of caution, cancelled the Johnson County Execution on February 3, 2021 prior to a sheriff's sale. (App. 563-64). Thus, there was no harm to Deb. Even assuming *arguendo* that LSB violated Iowa Code § 626.3, the Iowa Code provides no remedy in the event of such a violation. Therefore, there is no "practical legal effect" to the adjudication of the issue and Deb's appeal merely raises "academic" issues.

B. LSB complied with Iowa Code § 626.3 because "special executions" are different from general "executions" on judgments.

Even if the issue of multiple executions is not moot, LSB still complied with Iowa Code § 626.3. As noted above, Iowa Code § 626.3 provides that "[o]nly one execution shall be in existence at the same time." Iowa Code § 626.3. The Iowa Code, however, differentiates between "executions" and "special executions." *Compare* Iowa Code § 626.3 *with* Iowa Code §§ 626.20, 626.46.

Indeed, the Iowa Code uses the term "special execution" twice in reference to a secured lender foreclosing a previously recorded security interest. First, § 626.20 deals with how an officer levies upon real estate: "If real estate is levied upon, except by virtue of a special execution issued in cases foreclosing recorded liens…" Iowa Code § 626.20. Likewise, § 626.46, which deals with priority of liens when there are multiple security agreements, provides that when there are issues regarding priority of liens, "the decree shall determine the priority of liens, and direct the order of payment out of the proceeds

of the property which shall be sold under special execution to be awarded in said cause." Iowa Code § 626.46. Other states' laws on "executing" judgments follow the distinction contained in the Iowa Code between general executions on a judgment debtor and executions on real estate. *See, e.g.*, Minn. Stat. § 550.03 (stating that under Minnesota law "[t]here shall be two kinds of executions, one against the property of the judgment debtor, and the other for the delivery of real or personal property, or such delivery with damages for detaining, or for taking and withholding, the same"); N.D. Cent. Code. § 28-21-03 (stating that under North Dakota law "[t]here are two kinds of execution, one against the property of the judgment debtor and another for the delivery of the possession of property and any damages for withholding the property").

This Court's decision in *DuTrac Cmty. Credit Union v. Hefel* is helpful for understanding Iowa Code § 626.3. 893 N.W.2d 282 (Iowa 2017). There, the plaintiff, DuTrac Community Credit Union, lent money to the defendants pursuant to a series of notes. *Id.* at 285.

Following default, DuTrac filed suit against the defendants resulting in a series of court actions in and out of bankruptcy court. *Id.* at 285–89. After eventually receiving a judgment, DuTrac received a general execution and directed the sheriff to garnish and levy under the general execution nine specific items including, among other things, the debtors' wages, machinery, and payments and tax interest from a city. *Id.* at 288. The defendants filed a motion to quash the garnishments and levies, arguing DuTrac had multiple executions outstanding at once in violation of Iowa Code § 626.3. *Id.* This Court disagreed. *Id.* at 295.

In particular, the Court held that the statutory construction of Iowa Code § 626 indicated that there could be multiple garnishments or levies under one general execution. The Court focused on § 626.4, which referenced "any levy made under the execution" for reinforcement that multiple levies could be issued pursuant to a general execution. *Id.* (emphasis in original). Similarly, § 626.28 states that a court officer, after serving a garnishment, "shall return to

the clerk of court a copy of the execution . . . so far as they relate to the garnishments . . ." *Id.* (emphasis in original). The Court relied on the use of the plural forms of the words to support the assertion that the legislature intended that multiple garnishments and levies can be issued under one general execution. *Id.*

The lesson from *DuTrac* is that statutory context matters. While Deb would like to read Iowa Code § 626.3 myopically, her understanding is at odds with the rest of the statute. The legislature's use of two separate terms—execution and special execution—conveys that these are two distinct concepts that are to be treated differently. General executions—to which Iowa Code § 626.3 refers—are actions taken pursuant to a money judgment against a debtor. Special executions—to which Iowa Code § 626.3 does not refer—are actions taken against property. As such, having the Black Hawk Special Execution and Johnson Special Execution outstanding was not a violation of Iowa Code § 626.3.

CONCLUSION

For the reasons stated herein, Appellee Lincoln Savings Bank respectfully requests the district court's judgment be affirmed.

REQUEST FOR ORAL ARGUMENT

Appellee Lincoln Savings Bank respectfully requests oral argument regarding the issues presented in this appeal.

Dated: August 30, 2021

Respectfully submitted,

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ATTORNEY'S COST CERTIFICATE

I, David T. Bower, certify that there were no costs to reproduce copies of Appellees' Brief because the appeal is being filed exclusively in the Appellate EDMS system.

/s/ David T. Bower

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/s/ David T. Bower

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I hereby certify that on August 30, 2021, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

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