THE SUPREME COURT OF IOWA

Supreme Court No. 22-0917

Blackhawk County No. LACV141273

RON MEYERS,

Petitioner-Appellant

vs.

CITY OF CEDAR FALLS, IOWA,

Respondent-Appellee

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACKHAWK COUNTY

THE HONORABLE JOEL DALRYMPLE

PETITIONER-APPELLANT'S FINAL REPLY BRIEF

THOMAS J. DUFF
JIM DUFF
DUFF LAW FIRM, P.L.C.
4090 Westown Parkway, Suite 102
West Des Moines, Iowa 50266
Telephone: 515-224-4999
Facsimile: 515-327-5401
Email: tom@tdufflaw.com
jim@tdufflaw.com
ATTORNEYS FOR PETITIONER-APPELLANT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

OTHER:

I. DEFENDANT DID NOT PRESERVE ERROR ON WHETHER *SANON V. CITY OF PELLA* SHOULD BE OVERTURNED

As it did below, Defendant argues that *Larsen v. City of Reinbeck*, 776 N.W.2d 301 (Table), 2009 WL 306458 (Iowa App. 2009) and the dissenting opinion in *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015) support the trial court's decision. In both the trial court and in this Court, Defendant argues that the majority opinion in *Sanon* was wrongly decided but never directly asks for outright reversal. While the trial court seemed to put *Larsen* on equal footing with *Sanon*, it nevertheless failed to adopt Defendant's argument that *Sanon* is not good law. Instead, the lower court granted summary judgment—without relying on either *Larson* or *Sanon*—by making the unsupported factual determination that there was an "absence of any evidence showing the city, an officer, or any employee of the municipality knowingly violated either the Iowa Code or the administrative regulations set forth above." (APP.000018) Defendant did not file a motion to reconsider or seek clarification that the majority opinion in *Sanon* was no longer good law or to otherwise adopt the dissenting opinion.

In its Brief filed in this Court, Defendant deftly argues for a reversal of the *Sanon* majority opinion and adoption of the rationale utilized in *Larsen* and the dissent in *Sanon*. Indeed, Defendant takes the position that

the Supreme Court should retain this case because the appeal presents "a substantial question of enunciating principles involving Iowa Code § 670.4.1(l)(immunity of municipality for clams relating to a swimming pool); interpretation of enforcement provisions of the Iowa Department Of Public Health regulations, and the application of *Sanon v. City of Pella*, 865 N.W.2d 506 (Iowa 2015)(a decision involving three dissenting justices)." (Def. Brief p. 13) In other words, Defendant wants the Supreme Court to retain the case and reverse *Sanon*. However, Defendant failed to adequately preserve this issue for appeal.

"It is a fundamental doctrine of appellate review that issues must ordinarily be both raised and decided by the district court before we will decide them on appeal." *Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002). "The reason for this principle relates to the essential symmetry required of our legal system. It is not a sensible exercise of appellate review to analyze facts of an issue without the benefit of a full record or lower court determination." *Id.* (internal quotations omitted). "When a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal." *Id.*

In the proceedings below, Defendant acknowledged that *Sanon* was the law, but adroitly argued that the lower court should adopt the statutory construction and reasoning of *Larsen* and the *Sanon* dissent. As noted above, the district court declined to clearly state one way or another whether it was declining to follow the *Sanon* majority and instead dismissed the case on factual grounds, finding an "absence of evidence" to show a knowing violation. (APP.000018) Defendant now seeks an outright reversal of *Sanon*, but failed to file a motion to reconsider requesting that the trial court rule on this issue. This is fatal to Defendants' request to now have this Court consider the important question of whether an Iowa Supreme Court decision should be overruled.

Defendants may argue that the District Court necessarily decided this issue by granting the motion for summary judgment. This is not the law, and this exact situation was addressed and rejected in *Meier v. Senecaut*, 641 N.W.2d 532 (Iowa 2002). In *Meier* the defendant filed a motion to dismiss on several grounds. One of these grounds was that the district court lacked jurisdiction. *Id.* at 537. "The district court denied the motion in a lengthy written ruling, but did not specifically address the jurisdictional issue[.]" *Id.* On appeal, the defendant "claime[d] the district court necessarily decided the issue by overruling the motion to dismiss." *Id.*

The *Meier* Court rejected this argument and expressly held that the rule of error preservation "requires a party seeking to appeal an issue presented to, but not considered by, the district court to call attention to the district court its failure to decide the issue." *Id.* at 540. "The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it." *Id.* The *Meier* Court ultimately held that the defendant "failed to call to the attention of the district court its failure to consider this issue, and to give the court an opportunity to pass upon it. Accordingly, the issue is waived." *Id.* at 541.

Meier's holding on error preservation was neither novel nor an aberration. Rather, it merely reaffirmed and expounded upon the long standing—and currently applicable—rule requiring error preservation for appellate review. *See also State Farm Mut. Auto Ins. Co. v. Pflibsen*, 350 N.W.2d 202, 206 (Iowa 1984) (refusing to consider issue that was raised by defendant but not decided by district court); *State v. Krogmann*, 804 N.W.2d 518, 524 (Iowa 2011) (stating that "when a court fails to rule on a matter, a party must request a ruling by some means"); *Fennelly v. A-1 Mach. & Tool Co.*, 728 N.W.2d 181, 187 (Iowa 2007) (finding a claim that was not addressed in the district court's summary judgment order and not

subsequently brought to the court's attention had not been preserved for appeal); *Stammeyer v. Div. of Narcotics Enforcement*, 721 N.W.2d 541, 548 (Iowa 2006) (finding an argument not preserved for appeal when there was "nothing indicating the court ruled upon or even considered [it]"); *Boyle v. Alum-Line, Inc.*, 710 N.W.2d 741, 751 n. 4 (Iowa 2006) (stating that "[w]hen a district court fails to rule on an issue properly raised by a party, the party who raised the issue must file a motion requesting a ruling in order to preserve error for appeal.").

The procedural facts of *Meier* are virtually indistinguishable from the present case. Defendant argued for adoption of *Larsen* and the *Sanon* dissent before the district court, but the lower court never addressed that specific legal question in either its Order granting summary judgment or the Order Re: Plaintiff's Motion pursuant to I.R.C.P. 1.904. (APP.000015; APP.000029) Defendant never drew the district court's attention to this important legal question thereby giving the lower court the opportunity to rule on it. Accordingly, Defendants did not properly preserve this issue for appeal. *Meier*, 641 N.W.2d at 541.

II. *SANON V. CITY OF PELLA* IS DISPOSITIVE OF DEFENDANT'S STATUTORY CONSTRUCTION ARGUMENTS

A. Defendant's Statutory Construction Was Expressly Rejected in *Sanon*

Defendant spends a considerable number of pages in its Brief reviewing the relevant statutes and, without directly saying so, asks this Court to adopt the statutory interpretation utilized by the Court of Appeals in *Larsen* and the dissenting opinion in *Sanon*. However, the law in Iowa on the very issues raised below, and in this appeal, were decided by the majority opinion in *Sanon*. The Court in *Sanon* engaged in a painstaking and thorough analysis of the language, legislative history and interplay between the statutes and concluded:

> Moreover, section 135.38[1] and section 135I.5[2] are not inconsistent with each other. Just the opposite is true. When we read these sections in tandem, section 135.38 criminalizes a violation of the department rules, while section 135I.5 criminalizes a violation of a statute contained in 135I.
>
> * * * * * *
>
> Therefore, we find when the legislature enacted section 135I.5, it did not intend to modify section 135.38, but rather created a

[1] Iowa Code § 135.38 states: "Any person who violates any provision of this chapter, or the rules of the department, or any lawful order, written or oral, of the department or of its officers, or authorized agents, shall be guilty of a misdemeanor."

[2] Iowa Code § 135I.5 states: "A person who violates a provision of this chapter commits a simple misdemeanor. Each day upon which a violation occurs constitutes a separate violation."

> comprehensive regulatory scheme criminalizing a violation of the rules and the Code provisions of chapter 135I.

Sanon, 865 N.W.2d at 515. The Court held that the district court should not have granted summary judgment because a violation of the administrative rules relied upon by the parents constituted a criminal offense under Iowa Code section 135.38. *Id*.

B. *Sanon* Does Not Impose a Direct Knowledge Requirement and Rejects Defendant's Argument that a Criminal Conviction is Required to Avoid Immunity

Defendant, relying on *Larsen* and the *Sanon* dissent, fashions an argument that knowledge of a rule violation can only be accomplished through the enforcement mechanism found in section 135I.6 and the applicable administrative rules. Iowa Admin. r. 641--15.6(2)(a & b). In other words, immunity is only lost if the municipal pool owner receives notice of a rule violation from either the Iowa Department of Public Health (IDPH) or the Blackhawk County Health Department (BCHD) along with an opportunity to correct the deficiency.

Neither the majority nor dissenting opinions in *Sanon* imposed such a notice requirement. Indeed, even the dissent noted: "None of the department's inspections addressed the adequacy of the overhead lighting or water clarity, or the use of underwater lighting. The City never received a

citation for murky water or insufficient lighting." *Sanon*, 865 N.W.2d at 519 (Waterman, J. dissenting). The lack of a citation and formal notice to the City of Pella was of no legal significance because there was ample evidence that the City knew about the condition of the pool prior to the plaintiffs' injuries. In this case, there is substantial evidence that the City of Cedar Falls had both constructive and actual knowledge of the dangerous condition of the diving board before Myers fell[3] and failed to take correct the defect.

Defendant next argues that because neither the IDPH or BCHD sought criminal prosecution regarding the diving board that the crime exception to the immunity rule does not apply. Defendant argues: "[t]here is no factual basis with which to establish a misdemeanor occurred with the framework of Iowa Code Chapter 135I, there is no evidence of a criminal offense, and summary judgment is appropriate under the exemption supplied by Iowa Code §670.4(1)(l)." (Def. B*rief p. 28)*

This argument is similar, if not identical to, the argument made in *Sanon* that a "criminal offense" within the meaning of section 670.4(1)(l) cannot be established absent a criminal conviction or prosecution. *Sanon*, 865 N.W.2d at 515. The Court in Division V[4] of *Sanon* soundly rejected this argument: "We conclude no conviction is required to avoid the

[3] See Section C of Myers Opening Brief.
[4] All Justices concurred in Division V.

immunity defense." *Id*. at 516. Instead, plaintiff need only prove by a preponderance of the evidence that a city employee or officer committed a criminal act causing injury. *Id*. at 517.

C. The Legislature Acquiesced to the Majority Opinion in *Sanon*

Justice Waterman in his dissenting opinion in *Sanon* expressed concern that the majority opinion would make it costlier for cities to keep swimming pools open. *Id*. at 518 (Waterman, J., dissenting). The following statement arose out of that concern: "Some pools may close as liability insurance costs climb. I invite the legislature to take a fresh look at the scope of tort immunity for municipal swimming pools in light of today's decision." *Id*. The Iowa Legislature amended Section 670.4 multiple times after *Sanon* was decided in June 2015, but never amended or modified section 670.4(12) (now section 670.4(1(l)) despite the Court's invitation to do so.

The legislative amendments to section 670.4 since 2015 have expanded existing immunities and created new ones. In 2018, section 670.4(q) was added to the statute creating a completely new section immunizing any claim relating to a constructed honeybee hive. 2018 Iowa Acts, ch. 1126 § 2 (April 7, 2018). In 2019 the statute was amended to add clarifying language to section 670.4(k) by expanding the definition of

"municipality." 2019 Iowa Acts, ch. 153, §1 (May 17, 2019). Section 670.4 was amended twice in 2020. First, by adding new immunities relating to equipment used in firefighting or emergency response. Iowa Code § 670.4(r); 2020 Iowa Acts, ch. 1027 § 3 (June 1, 2020). Second, by making amendments to sections 670.4(1) and 670.4(2). 2020 Iowa Acts, ch. 1063, § 371, 372 (June 17, 2020). Notably absent from the legislature's amendments and modifications to section 670.4 was any change to that portion of the statute dealing with swimming pool immunity.

Under the doctrine of legislative acquiescence, "we presume the legislature is aware of our cases that interpret its statutes." *Ackelson v. Manley Toy Direct, L.L.C.*, 832 N.W.2d 678, 688 (Iowa 2013). "When many years pass following such a case without a legislative response, we assume the legislature has acquiesced in our interpretation." *Id.* In *State v. Iowa Dist. Ct. for Jones Cnty.*, 902 N.W.2d 811, 817–18 (Iowa 2017) the Court was interpreting Iowa Code section 903A.2 titled "Earned time" which "allows inmates to reduce their sentences for good conduct." *Id*. at 815. One of the issues before the Court was whether to adhere to its previous interpretation of the statute set forth in *Holm v. State*, 767 N.W.2d 409 (Iowa 2009). *Id*. The Court noted that the legislature amended the statute five times without altering its interpretation in *Holm* and therefore concluded

"that the legislature acquiesced in *Holm's* interpretation of section 903A.2." *Id*. at 818.

In this case, the legislature amended section 670.4 four times since the *Sanon* decision, but made no amendments or modifications to the section involving swimming pool immunity. Accordingly, the Court can safely conclude that the legislature has acquiesced to the *Sanon* majority's construction of section 670.4(1)(l).

D. The Regulations at Issue are Not Vague

The safety regulation at issue in this case is simple and straightforward: "Diving boards and platforms shall have slip-resistant surfaces." *See*, Iowa Admin. r. 641--15.4(4)(c)(6) and Iowa Admin. r.641--15.5(13)(a)(5) (2015). Defendant takes a kitchen sink approach to this regulation arguing that it is speculative, unknown, unknowable and vague to the point it is constitutionally defective. The argument is unsupported both by the record and long-standing case law.

Defendant argues that the regulation in *Sanon* was "clearly discernable" and therefore factually distinct from the rule violation in this case. (Defs. Brief p. 44) However, no Iowa appellate court has ever held a regulation must be "clearly discernable" in order to be enforceable.

Defendant does not even attempt to argue this is a rule of Iowa law: it is simply a rule that Defendant has created out of whole cloth. Even putting aside this fatal flaw, Defendant's argument still fails because the regulation in *Sanon* was arguably less clear than the regulation at issue in this case.

In *Sanon*, the plaintiffs "claimed the deficiencies in water clarity and lighting of the pool constituted a criminal offense as a violation of the rules promulgated by the department." *Id*. at 510. The specific rule at issue in *Sanon* required that the main drain be clearly visible from the pool deck. *Id*. at 509. The City of Pella did not have a functioning underwater light and failed to arrange for additional overhead lighting to compensate for the lack of the underwater light. In *Sanon*, the question of whether the overhead lighting was sufficient to make up for the lack of underwater lighting was not "clearly discernable," but instead required the testimony of two experts to opine that the overhead lighting used by the City did not meet the requirements of the IDPH. *Id*.

In this case, the rule violation was "clearly discernable" given that no expert testimony was required to establish a rule violation. A lay person could easily determine that the Board did not have a slip resistant surface simply by observing it with the naked eye and running a hand across it. Iowa juries are frequently asked to determine whether a condition is

slippery. *See Wieseler v. Sisters of Mercy Health Corporation*, 540 N.W.2d 445, 451[5] (Iowa 1995) (the question presented was whether plaintiff's evidence was sufficient to generate a jury question on whether the frost in defendant's parking lot created an unreasonable risk of harm); *Smith v. Cedar Rapids Country Club*, 124 N.W.2d 557, 563 (Iowa 1963) (finding that even though witnesses for defense testified "that the floor was not slippery in that area, it must be concluded there was a jury question as to that issue."); *Fanelli v. Illinois Cent. R. Co.*, 69 N.W.2d 13, 18 (Iowa 1955)

[5] The Court in *Wieseler* cites numerous cases holding that a jury can and should resolve questions about the slipperiness of a surface. *Frantz v. Knights of Columbus,* 205 N.W.2d 705, 712 (Iowa 1973) (affirming district court judgment in favor of plaintiff and holding the evidence supported plaintiff's contention that defendant breached its duty of care when plaintiff slipped and fell on defendant's ice-covered premises); *Adams v. R.S. Bacon Veneer Co.,* 162 N.W.2d 470, 474 (Iowa 1968) (reversing directed verdict for defendant and holding plaintiff's slip and fall while unloading logs on defendant's slippery premises presented a negligence question for the jury); *Knudsen v. Merle Hay Plaza, Inc.,* 160 N.W.2d 279, 287 (Iowa 1968) (affirming jury verdict in favor of plaintiff who slipped and fell on defendant's ice-covered parking lot, thus agreeing with district court's decision to overrule defendant's motion for judgment notwithstanding the verdict); *Smith v. J.C. Penney Co.,* 260 Iowa 573, 586, 149 N.W.2d 794, 802 (1967) (reversing district court's judgment notwithstanding the verdict and holding plaintiff who slipped and fell on defendant's ice-covered premises generated a jury question on the issue of defendant's negligence); *Hanson v. Town & Country Shopping Center, Inc.,*259 Iowa 542, 552, 144 N.W.2d 870, 876 (1966) (reversing directed verdict for defendant and holding plaintiff's slip and fall on defendant's icy parking lot generated a jury question on whether defendant breached its duty of care to the plaintiff); *Meier v. Phillips,* 256 Iowa 757, 763, 129 N.W.2d 92, 96 (1964) (reversing and remanding to reinstate jury verdict for plaintiff who slipped and fell on defendant's snow and ice covered sidewalk); *Christianson v. Kramer,* 255 Iowa 239, 250–51, 122 N.W.2d 283, 290 (1963) (reversing directed verdict for defendant and holding plaintiff's slip and fall on defendant's ice-covered stairwell generated a jury question as to whether defendant was aware of the condition and should have warned plaintiff of the danger); *Corkery v.Greenberg,* 253 Iowa 846, 851, 114 N.W.2d 327, 330 (1962) (affirming district court's decision to submit negligence case to jury on the issue of whether defendant's failure to cure an icy condition in its parking lot subjects it to liability for damages sustained by plaintiff in a slip and fall).

(holding that "It must be conceded if plaintiff had testified she stepped upon an icy or slippery step while descending from the coach, slipped and fell, a jury question would have been generated"); *Travers v. City of Emmetsburg*, 180 N.W.2d 753, 753 (Iowa 1921) (holding that where plaintiff presented evidence a sidewalk was slippery, "the record makes the fact as to the actual condition of the walk a jury question[.]").

In addition, juries are frequently asked to make factual determinations concerning whether the conduct of a defendant violates a rule or regulation. The uniform jury instructions provide:

> You have received evidence of [applicable safety code provisions.] Conformity with [the provisions of a safety code] is evidence that (name of party) was not negligent and [violations of its provisions] is evidence that (name of party) was negligent. Such evidence is relevant and you should consider it, but it is not conclusive proof.

Iowa Uniform Jury Instruction 700.11 (2020).

The uniform jury instructions also permit jurors to consider code violations as negligence: "(Name of Safety Code) requires (Substance of Safety Code). A violation of this law is negligence." Iowa Uniform Jury Instruction 700.10 (2020). Both of these instructions require a jury to first determine whether a rule was violated *before* they are permitted to consider the violation to be negligence or evidence of negligence. Accordingly, the

argument that a jury should not be allowed to determine whether a safety code was violated is specious at best.

It frequently happens that an expert witness is called to assist the jury in determining whether a code or regulation was violated. *See, e.g. Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 437, 443 (Iowa 2016) (noting that the plaintiff called an expert to testify about causation and explain the defendant's safety code violation); *see also Maxwell v. Palmer*, Nos. 0-632, 00-0061, 2000 WL 1868955 (Iowa Ct. App. Dec. 22, 2000) (noting that plaintiff's expert testified that defendant violated a safety code—in that case the speed limit for vehicles on a roadway). Although not necessary to establish a rule violation, Myers did retain expert Thomas Griffiths who testified about the lack of a slip resistant surface on the take-off area of the board, that this condition was present and observable for an extended period of time before Myers was injured and that this condition was a cause of Myers injuries. (APP.000042; APP.000206 pp. 50:19-51:2, 52:22-53:18, 58:20-59:8, 68:15-25, 84:4-85:22)

Defendant next claims that the regulatory standard in this case is so vague and uncertain that pool owners would be forced "to speculate and guess" when a diving board is no longer in compliance. This argument is directly refuted by the testimony of Defendant's employee. Bruce Verink,

the Recreation and Community Programs Manager, testified that he knows what slip-resistant means specifically in the context of the applicable administrative rule.

> Q: And are you aware that the code requires that the diving board have a slip-resistant surface?
>
> A: Yes.
>
> Q: What does that mean- - what does that mean to you?
>
> A: That it has enough texture to keep prudent people from slipping.

(APP.000161 p. 59:12-21)

Defendants repeatedly argue that whether or not a diving board has an "adequate" slip resistance surface makes the regulation unconstitutionally vague. First, neither the rule nor Myer's allegations say that diving Boards must have an "adequate" slip resistant surface. Myers Amended Petition filed April 4, 2022 removed this language. (APP.000005)

Second, the rule falls far below the stringent standard for a law to be void for vagueness. "[T]he general touchstone of vagueness is whether the statute itself, or as construed, made it reasonably clear at the relevant time that the defendant's conduct was criminal." *State v. Newton*, 929 N.W.2d 250, 255 (Iowa 2019) (quoting *State v. Lanier*, 520 U.S. 259, 267 (1997)). "A statutory term provides fair warning if the meaning of the word is to be

fairly ascertainable by reference to similar statutes, prior judicial determinations, reference to the dictionary, or if the questioned words have a common and generally accepted meaning." Additionally, "the degree of vagueness that the constitution tolerates—as well as the relative importance of fair notice and fair enforcement—depend in part on the nature of the enactment." *State v. Robinson*, 618 N.W.2d 306, 314 (Iowa 2000). "Thus, a law that interferes with the exercise of a fundamental right would be examined more closely than one that does not." *Id.*

In *State v. Robinson*, the Court considered a criminal defendant's challenge to a child pornography law as unconstitutionally vague. *Id.* The *Robinson* court noted that the right at issue in that case "is the defendant's right to possess child pornography. That 'right' is not constitutionally protected." *Id.* Similar to *Robinson*, the right at issue in this case is to have dangerous and slippery surfaces at a public pool. This is not a constitutionally protected right, and any alleged "vagueness" of the law should not be closely scrutinized. *See id.*

Defendant's own witness was perfectly comfortable articulating how to determine a slip resistant surface compliant with the regulation. Mr. Verink acknowledged that "slip-resistant" is a commonly understood term; a surface that prevents a person's foot from sliding across it. The average

eighth-grader would be able to provide this definition. *See Robinson*, 618 N.W.2d at 314 (holding that a term is not vague if the words have a generally accepted meaning).

Finally, the words "slip" and "resistance" have readily available definitions in online or physical dictionaries. The first definition of slip listed in Miriam-Webster's online dictionary is "to move with a smooth sliding motion".[6] Two of Merriam-Webster's three definitions of resistance are: "effort made to stop or fight against someone or something" and "the ability to prevent something from having an effect."[7] From these publicly available dictionary definitions, the average person would understand what "slip-resistant" means. *See Robinson*, 618 N.W.2d at 314 (holding that a term is not vague if the meaning can be ascertained by reference to the dictionary).

III. CONCLUSION

Defendant failed to preserve error with respect to whether *Sanon v. City of Pella* should be overturned. The district court did not address the continuing viability of *Sanon* and Defendant did not file a motion to reconsider or seek clarification. The majority opinion in *Sanon* is the law and the statutory construction urged by Defendant was soundly rejected in

[6] https://www.merriam-webster.com/dictionary/slip?src=search-dict-hed
[7] https://www.merriam-webster.com/dictionary/resistance

that case. Moreover, the Iowa legislature has amended and modified section 670.4 multiple time since the *Sanon* decision in 2015. None of those amendments or modifications involved section 670.4(1)(l) dealing with swimming pool immunity. Accordingly, the legislature has acquiesced to the statutory construction utilized by the majority decision in *Sanon*. Finally, the administrative regulation that requires a diving board to have a slip-resistant surfaces is not vague and such determination can and should be made by the finder-of-fact.

/s/ THOMAS J. DUFF
THOMAS J. DUFF
JIM DUFF
DUFF LAW FIRM, P.L.C
The Galleria
4090 Westown Parkway, Suite 102
West Des Moines, Iowa 50266
Telephone: (515) 224-4999
Fax: (515) 327-5401
Email: tom@tdufflaw.com
jim@tdufflaw.com

ATTORNEYS FOR PLAINTIFF/
APPELLANT

CERTIFICATE OF FILING AND SERVICE

I certify that on **OCTOBER 12, 2022** I electronically filed this Final Reply Brief with the Clerk of Court using the ECF system, which sent notification of same to:

SAMUEL C. ANDERSON
SWISHER & COHRT, PLC
528 West 4th Street
PO Box 1200
Waterloo, Iowa 50704-1200
Email: sanderson@s-c-law.com
ATTORNEYS FOR DEFENDANT

/s/ THOMAS J. DUFF
THOMAS J. DUFF
ATTORNEY FOR PLAINTIFF/
APPELLANT

CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. This brief complies with the type-volume limitation of Iowa R. of App. P. 6.903(1)(g)(1) because this brief contains 4,267 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) (table of contents, table of authorities, statement of issues and certificates).

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

/s/THOMAS J. DUFF
THOMAS J. DUFF
ATTORNEY FOR PLAINTIFF/
APPELLANT