

IN THE SUPREME COURT OF IOWA

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NO. 22-1865

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COUNTY BANK,  
Plaintiff-Appellee,

vs.

CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA  
Defendants-Appellants.

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CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA,  
Counterclaim Plaintiffs-Appellants,

vs.

COUNTY BANK,  
Counterclaim Defendant-Appellee,

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CLINTON ALLAN SHALLA and MICHELLE LYNN SHALLA,  
Third Party Plaintiffs-Appellants,

vs.

CHRIS GOERDT and PEOPLES TRUST AND SAVINGS BANK  
Third Party Defendants-Appellees.

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APPEAL FROM THE DISTRICT COURT IN AND FOR WASHINGTON COUNTY  
THE HONORABLE MICHAEL SCHILLING, and SHAWN SHOWERS, JUDGES

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APPELLANTS' REVISED BRIEF AND ARGUMENT

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## **STATEMENT OF ISSUE PRESENTED FOR REVIEW**

- I. WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND LATER DIRECTED VERDICT ON SHALLAS' NON-CONTRACT CLAIMS BASED UPON THE IOWA CODE SECTION 535.17 CREDIT AGREEMENT STATUTE OF FRAUDS?**

### **AUTHORITIES**

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940 N.W.2d 46 (Table)  
2019 WL 4678179 (Iowa Ct. App 2019)

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780 N.W.2d 730 (Iowa 2010)

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745 N.W.2d 724 (Iowa 2008)

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958 N.W.2d 573 (Iowa 2021)

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907 N.W.2d 124 (Iowa 2018)

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875 N.W.2d 684 (Iowa 2016)

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841 N.W.2d 68 (Iowa 2013)

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Su Pharm, Inc. v. Summit Nutritionals Int'l, Inc.  
859 N.W.2d 182 (Iowa 2015)

Postell v. American Family Mut. Ins. Co.  
823 N.W.2d 35 (Iowa 2012)

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253 N.W.2d 579 (Iowa 1977)

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219 N.W.2d 513 (Iowa 1974)

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480 B.R. 852 (N.D. Iowa 2013)

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670 N.W.2d 119 (Iowa 2003)

C & J Vantage Leasing Co. v. Wolfe  
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STATUTORY:

Iowa Code § 535.17

**II. WHETHER THE TRIAL COURT ERRED IN DENYING SHALLAS THE OPPORTUNITY TO CONDUCT DISCOVERY BASED ON AN AGREEMENT TO SUSPEND DISCOVERY PENDING DEFENDANT GOERDT'S CRIMINAL PROSECUTION?**

**AUTHORITIES**

Willard v. State

893 N.W.2d 52 (Iowa 2017)

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530 N.W.2d 678 (Iowa 1985)

Mitchell v. City of Cedar Rapids

926 N.W.2d 222 (Iowa 2019)

**STATUTORY:**

Iowa R. Civ. P. 1.506

**III. WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF THE PRINCIPLES OF VICARIOUS LIABILITY/RESPONDEAT SUPERIOR TO COUNTY BANK BASED ON THE ACTIONS OF ITS OFFICER GOERDT?**

**AUTHORITIES**

Willard v. State

893 N.W.2d 52 (Iowa 2017)

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730 N.W.2d 198 (Iowa 2007)

McKinley v. Chicago & N.W.R.Co.

44 Iowa 314, 24 Am.Rep. 748, Affirmed 99 U.S. 147, 9 Otto 147, 25 L.Ed. 272 (1876)

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339 N.W.2d 374 (Iowa 1983)

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841 N.W.2d 338 (Iowa 2013)

**STATUTORY:**

18 U.S.C. § 656

**IV. WHETHER A NEW TRIAL SHOULD BE GRANTED  
BECAUSE THE VERDICT FAILS TO EFFECTUATE  
SUBSTANTIAL JUSTICE?**

**AUTHORITIES**

Crow v. Simpson  
871 N.W.2d 98 (Iowa 2015)

Thompson v. Rozeboom  
272 N.W.2d 444 (Iowa 1978)

North v. Miles Homes, Inc. of Iowa  
204 N.W.2d 850 (Iowa 1973)

**STATUTORY:**

Iowa R. Civ. P. 1.1004(1)-(9)

Iowa R. App. P. 6.903(3)(d)

Iowa R. App. P. 6.903(3)(c)

## **ROUTING STATEMENT PER IOWA R. APP. P. 6.903(2)(d)**

This case raises a substantial issue concerning whether Iowa Code § 535.17 Credit Agreement Statute of Frauds is limited to contract claims, or also applies to tort claims. The Iowa Supreme has never addressed this issue. In fact, Clinton National Bank v. Saucier, 5801 N.W.2d 717, 718 (Iowa 1998) specifically recognized the applicability of Section 535.17 to tort claims was not before it.

The plain terms make clear the statute only applies to contract law, not tort claims. The legislative history confirms this limited scope. The initial draft of the statute broadly prohibited any claim against a lender not confirmed by a writing signed by the lender. The proposed statute was completely revised, and as enacted, contained language very clearly limiting the application to contract claims.

The Iowa Court of Appeals affirmed the application of Section 535.17 to tort claims in the unreported case of Geiger v. Peoples Trust and Savings Bank, 940 N.W.2d 46 (Table) 2019 WL 4678179 (Iowa Ct. App. 2019). An Application for Further Review specifically laid out legislative history, which had not been presented to the Trial Court or the Court of Appeals. The Supreme Court exercised its discretion to decline further review.



An argument based on legislative history was before the Trial Court in this case. Even though not controlling authority the Trial Court felt constrained to follow the Geiger case in granting summary judgment on Shallas' tort claims.

The Supreme Court should retain this case and provide controlling authority on the scope of the Section 535.17, consistent with its plain language and confirmed by legislative history.

## **STATEMENT OF THE CASE**

### **NATURE OF THE CASE**

This appeal arises from the relationship of Clinton Allan Shalla (hereinafter “Clint”) and spouse, Michelle Lynn Shalla (hereinafter “Michelle”) (hereinafter collectively referred to as “Shallas”), with Chris Goerdt (hereinafter “Goerdt”), who was initially President of Peoples Trust and Savings Bank (hereinafter “Peoples”) and later Vice-President at County Bank (hereinafter “County”). Clint entered into a Purchase and Option Agreement (hereinafter “Koch Agreement”) with Gregory Koch and Heather Koch (hereinafter collectively referred to as “Kochs”) where Kochs satisfied a foreclosure judgment and other lien obligations against Clint to obtain clear title of real property owned by Clint and conveyed to Kochs. In exchange, Kochs provided Clint an option to repurchase the property.

Clint contacted Goerdt at Peoples to obtain financing to exercise his option. Goerdt agreed to seek financing and further agreed to handle the exercise of the option. Goerdt obtained Board approval for financing from Peoples, but the loan was not funded.

Goerdt learned from Kochs and advised Clint the Kochs would not consummate the option claiming it was not timely exercised.

Clint had remedies, including challenging the Koch transaction as an equitable mortgage. (See Steckelberg v. Randolph, 448 N.W.2d 458 (Iowa 1989)). However, Goerdt advised Clint not to seek legal counsel because he already talked to lawyers and nothing could be done. Goerdt then negotiated an agreement with Kochs for Shallas to buy the property back for \$1.25 million. Before a loan could be approved at Peoples, Goerdt left Peoples and became Vice-President at County. County loaned Shallas the funds to repurchase the land from Kochs. On the morning of the closing, Goerdt requested Clint deliver \$25,000.00 in cash to Goerdt ostensibly to cover incidentals at closing. Later, County declared default on Shallas' loan. County's foreclosure initiated this action.

Goerdt committed many acts of fraud and theft against bank customers. The day before Goerdt's deposition, Goerdt's attorney realized Goerdt had criminal exposure and asked to postpone the deposition and Shallas agreed. Goerdt was indicted shortly thereafter pleading guilty to 15 counts of a federal indictment. One involved withdrawing money from Shallas' account to pay his in-laws' property taxes. The parties documented an agreement to reset

deadlines once Goerdts was sentenced, which was substantially delayed, in part because of the COVID-19 pandemic.

Peoples, County, and Goerdts filed Motions for Summary Judgment which were stayed until Goerdts was sentenced and his deposition could be taken. The summary judgment motions sought dismissal of Shallas' tort claims based on the Iowa Code Section 535.17. The Trial Court, Judge Schilling, initially denied, but then granted, summary judgment on the negligence tort claims based upon Section 535.17. Judge Schilling also denied Shallas the right to conduct further discovery. At trial, the Trial Judge, Judge Showers, followed the prior Section 535.17 ruling and also found County was not vicariously liable for Goerdts' acts.

## RELEVANT PROCEEDINGS

County filed a Petition against Shallas seeking judgment to foreclose on promissory notes secured by mortgages for real property owned by Shallas. (March 28, 2018 Petition, App. 81) The Shallas' Answer denied County's claims and asserted affirmative defenses of fraud and equitable estoppel. (May 3, 2018 Answer, App. 144) Shallas moved to amend to assert counterclaims and additional defenses against County for vicarious liability and aiding and abetting for acts committed by Goerdt, third party claims against Peoples for vicarious liability for Goerdt's acts, and third party claims against Goerdt for conversion, negligence and fraud and sought actual and punitive damages against all parties. (July 25, 2018 Counterclaims and Third Party Claims, App. 153) The Amendment was allowed. (August 15, 2018 Order Granting Motion to Amend, App. 151) County Answered, denied Shallas' counterclaims, and asserted affirmative defenses. (September 21, 2018 County's Answer to Counterclaims, App. 168) Peoples Answered, denied Shallas' claims, and asserted affirmative defenses including Shallas' claims were barred by Section 535.17. (October 1, 2018 Peoples' Answer to Third Party Claims, App. 172) Goerdt Answered, denied Shallas'

claims, and asserted affirmative defenses including Section 535.17. (October 2, 2018 Goerdt's Answer to Third Party Claims, App. 193)

The parties scheduled depositions the week of March 11, 2019. On March 12, 2019, the day before Goerdt's deposition was scheduled, Goerdt's counsel advised he could not allow Goerdt to testify and needed to reschedule Goerdt's deposition because Goerdt's counsel recognized Goerdt needed to consult with criminal defense counsel. The other counsel agreed. Goerdt was indicted on multiple criminal counts on May 8, 2019. This is documented in Shallas' July 25, 2019 Motion to Suspend Proceedings. (July 25, 2019 Motion to Suspend Proceedings, App. 341)

On June 25, 2019, Peoples filed a supported Motion for Partial Summary Judgment (hereinafter "Peoples MSJ"). (June 25, 2019 Peoples' Motion for Partial Summary Judgment, App. 213; June 25, 2019 Peoples' Statement of Facts, App. 218; June 25, 2019 Peoples' Motion for Summary Judgment Brief, App. 227) Peoples' MSJ sought dismissal of Shallas' Counts III-VII third party claims for vicarious liability, negligence, fraudulent misrepresentation, conversion, and aiding and abetting, respectively. On June 28, 2019, Goerdt Joined Peoples MSJ and filed his own supported Motion for Partial Summary

Judgment. (hereinafter “Goerdt’s MSJ”) (June 28, 2019 Goerdt’s MSJ, App. 331; June 28, 2019 Goerdt’s Statement of Facts, App. 335; June 28, 2019 Goerdt’s Memorandum, App. 338) Goerdt’s MSJ sought dismissal of Shallas’ Count III third party claims for negligence.

On July 29, 2019 County Joined Peoples MSJ and filed a supported Motion for Partial Summary Judgment (hereinafter “County’s MSJ) (July 29, 2019 County’s MSJ, App. 345; July 29, 2019 County’s Statement of Facts, App. 348; July 29, 2019 County’s Memorandum, App. 350) County’s MSJ sought dismissal of Shallas’ Counts I and II counterclaims for vicarious liability for Goerdt’s acts of fraudulent misrepresentation and conversion, respectively.

On July 25, 2019, Shallas filed a Motion to Suspend Proceedings until the resolution of Goerdt’s criminal case. Shallas’ Motion sought suspension until after Goerdt was deposed, which couldn’t occur until the resolution of Goerdt’s criminal case. The Motion also recited an agreement between Goerdt and Peoples to suspend the summary judgment proceedings until Goerdt’s deposition was taken, if all proceedings were rescheduled, trial

continued and new deadlines set. (July 25, 2019 Motion to Suspend Proceedings, App. 341)

Peoples Response to Shallas' Motion confirmed Peoples and Goerdts agreed to suspend the summary judgment proceedings until Goerdts deposition provided all proceedings are rescheduled, the trial continued and new pretrial deadlines set and that Shallas agreed with Peoples' proposal. Peoples further stated it did not agree to Shallas' request to suspend the summary judgment if the trial date and pretrial deadlines remain as set. Peoples requested the Court suspend the summary judgment proceedings and enter an Order to continue the trial date and reset pretrial deadlines. (August 7, 2019 Peoples' Response to Motion to Suspend Proceedings, App. 353)

Peoples supplemented the Motion on November 15, 2019. (November 15, 2019 Peoples' Request for Ruling on the Motion to Suspend Proceedings, App. 358) Peoples filed a Second Supplement based upon Goerdts November 15, 2019 guilty plea and a sentencing scheduled for February 25, 2020. (December 19, 2019 Peoples' Supplement to Request for Ruling on Motion to Suspend Proceedings, App. 363) On November 19, 2019, the Court entered an Order scheduling hearing for December 20, 2019. (November 19,



2019 Calendar Entry, App. 375) County resisted the Motion to Suspend. (December 16, 2019 County's Resistance to Motion to Suspend Proceedings, App. 363) Shalla supplemented their Motion. (December 18, 2019 Shallas' Supplement to Motion to Suspend Proceedings, App. 372) The Court granted the Motion to Suspend Proceedings, finding Goerdt's deposition should be taken prior to the case proceeding. The Court set a status conference for April 3, 2020. (December 20, 2019 Order Staying Proceedings, App. 865)

Goerdt's sentencing was substantially delayed for reasons which appear in Shallas' Court filings advising of the Federal Court status based not only on the COVID-19 pandemic, but also issues with Goerdt's credibility and other issues. The Court record then reflects a series of notifications as to the status of the Federal Court proceedings on March 25, 2020, May 19, 2020, August 24, 2020, October 12, 2020, February 3, 2021, and May 13, 2021. Goerdt's deposition was finally taken in May of 2021.

On May 27, 2021, Peoples' supplemented Peoples' MSJ (May 27, 2021 Peoples' Supplemental Statement of Facts, App. 379; May 27, 2021 Peoples' Supplemental Brief, App. 382)

Shallas resisted Peoples' MSJ on June 21, 2021 as well as Goerdts' MSJ and County's MSJ. (June 21, 2021 Shallas' Resistance, App. 400; June 21, 2021 Shallas' Response to Statement of Facts, App. 403; June 21, 2021 Shallas' Resistance Memorandum, App. 478) Peoples filed a Reply Brief on June 30, 2021. (June 30, 2021 Peoples' Reply Brief, App. 493) The Shallas filed a Supplement to the Record for Summary Judgment. (July 1, 2021 Supplement to the Record, App. 525) The following day the Shallas supplemented their factual Response. (July 2, 2021 Shallas' Supplemental Response to Statement of Facts, App. 570)

On August 25, 2021, the Trial Court, Judge Schilling ruled on the Motions. The Trial Court granted summary judgment in regards to third party claims Count III, indemnity claim, and Count VII, aiding and abetting claim in their entirety, Count V fraud claim, only in regards to Michelle's claim in connection with the option, and Count VI, conversion claim only against Peoples related to the \$25,000 transaction, denied summary judgment in regards to counterclaim Count I fraud claim, Count IV third party claim negligence, and Count V third party claim fraud in regards to Clint's claim related to the option. The Ruling included clarification and summation of its Ruling

and how it affected each of the individual claims and the individual parties. (August 25, 2021 MSJ Ruling and Order, App. 576).

On September 9, 2021, Peoples filed a Rule 1.904 Motion to Reconsider. (September 9, 2021 Peoples' Motion to Reconsider, App. 614) Peoples sought an Order from the Trial Court granting summary judgment on third party claims Count IV, negligence claim and Count V, fraudulent misrepresentation claim relying on Iowa Code § 535.17. Shallas resisted. (September 24, 2021 Shallas' Resistance to Motion to Reconsider, App. 625) Shallas' Resistance argued Peoples' reliance on Iowa Code § 535.17 was misplaced because Section 535.17 was limited to contract law claims. Shallas' included the legislative history of the statute which made clear the legislative intent of Iowa Code § 535.17 was in contract law and did not bar tort claims. On October 1, 2021, Peoples filed a Reply which again relied upon Iowa Code § 535.17. (October 1, 2021 Peoples' Reply, App. 633)

As the Motions for Summary Judgment were filed and resisted, Court Administration issued a notice for a trial setting conference. (July 2, 2021 Notice, App. 572) This conference did not occur and the Court ordered counsel to file a Trial Scheduling Order by the end

of August. (August 24, 2021 Order, App. 574) Shallas moved for a discovery conference. The Motion sought a discovery conference because Peoples now refused to agree to new pretrial deadlines. (August 31, 2021 Shallas' Motion for Discovery Conference, App. 600) The Court entered another Trial Scheduling Order. (September 3, 2021 Order Extending Deadline to Submit Trial Scheduling Order, App. 612) In response to the Order and based upon the disagreement, Shallas proposed a discovery plan which reviewed the filings showing Peoples' agreement to set new deadlines, and proposed a Trial Scheduling and Discovery Plan consistent with the agreement for further discovery. (September 30, 2021 Shallas' Service of Proposed Trial Scheduling and Discovery Plan, App. 604) Peoples resisted. (October 6, 2021 Third-Party Defendant Peoples Trust and Savings Bank's Response and Resistance to Shallas' Service of Proposed Trial Scheduling and Discovery Plan, App. 639)

Judge Schilling entered an Order stating he had just learned of the pending 1.904 Motion and provided they be deemed submitted. (October 22, 2021 Order, App. 643) The Court then entered an Order denying a request to extend established deadlines. (November 7, 2021 Order Re Pretrial Deadlines, App. 645)

On December 9, 2021, the Trial Court granted Peoples' 1.904 Motion. (December 9, 2021 Order, App. 647) The Trial Court dismissed Counts IV and V of Shallas' third party claims, but only as to Peoples.

On August 25, 2022, Goerdts filed what amounted to a Rule 1.904 Motion. (August 25, 2022 Goerdts' Request for Pre-Trial Conference, App. 656) Shallas' resisted arguing Goerdts was effectively seeking relief pursuant to Rule 1.904 and therefore said Motion was untimely. (September 2, 2022 Shallas' Resistance to Goerdts' Motion to Reconsider, App. 662) The Trial Court, Judge Schilling, denied Goerdts' Motion citing Goerdts didn't even file a joinder to Peoples' Rule 1.904 Motion and therefore, no clarification of the applicability of the Court's December 9, 2021 Order was necessary. (September 5, 2022 Calendar Entry, App. 666). On the following day, Shallas filed a Supplement based upon Trial Court's statement during the pre-trial conference that the Trial Court notified the Judge who entered the December 9, 2021 Order that Goerdts was seeking to modify said Order. (September 6, 2022 Shallas' Supplement to Resistance to Goerdts' Motion to Reconsider, App.

668) In light of the notification, Shallas felt it was necessary to resist Goerdts' Motion on its merits.

On September 7, 2022, County filed a Motion to Dismiss Shallas' Counterclaims. (September 7, 2022 Motion to Dismiss, App. 741). Shallas resisted arguing County's Motion resembled a Motion for Summary Judgment rather than a Motion to Dismiss, did not comply with Iowa R. Civ. P. 1.421(1)(f), and was inconsistent with Iowa R. Civ. P. 1.945. Shallas further argued even if County's Motion were considered a motion for summary judgment, it must fail as untimely since it was filed six days before trial date. (September 9, 2022 Shallas' Resistance to Motion to Dismiss, App. 760) On the same date, County filed Supplement to County Bank's Motion to Dismiss. (September 9, 2022 County's Supplement to Motion to Dismiss, App. 764) The Trial Court entered an Order Re: County Bank's Motion to Dismiss wherein the Trial Court denied County's Motion. (September 12, 2022 Order Re: County's Motion to Dismiss, App. 770)

Peoples filed a joint Motion with Shallas to sever trials which effectively removed Shallas' remaining claim against Peoples from trial the schedule and provided it may be separately tried.

(September 12, 2022 Motion to Sever Trials, App. 773) The Trial Court entered an Order granting Peoples' Motion. (September 12, 2022 Order, App. 777)

On September 20, 2022, at the close of evidence, Goerdt presented his Motion for Directed Verdict in regards to Shallas' third party claims Counts IV and V against Goerdt. The Trial Court granted Goerdt's Motion on the record and later that day, entered an Order. (September 20, 2022 Order Re: Goerdt's Motion for Directed Verdict, App. 803) Also that day, the jury returned a verdict finding Goerdt converted \$5,800 from the Shallas but found Goerdt did not convert the \$12,000, \$25,000, or \$2,218. (September 20, 2022 Verdict, App. 806) On September 21, 2022, the Trial Court entered Judgment entry in favor of the Shallas against Goerdt in the amount of \$5,800 plus statutory interest. (September 21, 2022 Judgment Entry, App. 810) On the same day, the Trial Court entered an Order granting County's Directed Verdict based upon County's oral motion on the record. (September 21, 2022 Order Granting Directed Verdict, App. 813) On September 22, 2022, the Trial Court granted County's foreclosure related claims against the Shallas. (September 22, 2022 Trial Order & Decree re: Equitable Proceedings, App. 815)

On October 5, 2022, the Shallas filed Motion for New Trial based upon adverse pre-trial Rulings including the Order granting partial summary judgment and the Order regarding Peoples Rule 1.904 Motion. (October 5, 2022 Motion for New Trial App. 834) Shallas argued the parties agreed discovery would continue after Goerdts's deposition prior to a November 7, 2021 Order entered by the Court denying the extension of discovery deadlines. This effectively deprived the Shallas the right to a fair trial. Shallas also argued the verdict failed to effectuate justice and other facts supporting a new trial. On October 14, 2022, the Trial Court entered Order Re: Motion for New Trial denying Shallas' Motion. (October 14, 2022 Order, App. 860) On November 10, 2022, Shallas filed their Notice of Appeal. (November 10, 2022 Notice of Appeal, App. 862).

### **STATEMENT OF FACTS**

Clint owns approximately 422 acres of real property, including homestead, in Washington County, Iowa which has been in Clint's family for decades. (March 28, 2018 Petition, App. 81; March 28, 2018 Petition Ex. M, App. 139; County's Ex. 20a & 22, App. 985 &



1004; Transcript-Day-4 pg. 64, App. 1475) Clint purchased the property in 1989. (Transcript-Day-4 pg. 70, App. 1479) Although Shallas dispute the valuations as undervaluing the property, separate appraisals were conducted on behalf of County on the homestead and the farmland show valuations of \$550,000 (County's Ex. 21, App. 986) and \$2,525,000 (County's Ex. 19, App. 917), respectively.

Kari Lynn Honsey (hereinafter "Honsey") is Clint's ex-wife. (Transcript-Day-4 pg. 66-67, App. 1476-1477) Clint and Honsey's dissolution decree required Clint to pay Honsey \$200,000 in cash with the first \$100,000 in 2007 with \$50,000 to be paid in 2012 and again in 2017. (Transcript-Day-4 pg. 68, App. 1478) Clint and Michelle were married in February 2014. (Transcript-Day-4 pg. 177, App. 1552)

Clint experienced financial problems as a result of his payments to Honsey because the first two payments would have been used to prepay farming expenses that were deductible for taxes. (Transcript-Day-4 pg. 71-72, 78, App. 1480-1482) Also, Clint needed to expand his home to accommodate Michelle and her three daughters. (Transcript-Day-4 pg. 70, 177-178 App. 1479, 1552-1553) All problems combined lead Clint to default on loan obligations with

Washington State Bank resulting in a foreclosure, Washington County Case No. EQEQ005775. At the time, Clint's 2017 payment to Honsey was outstanding and a lien against the property. (Shallas' Ex. S1, App. 1078) On February 10, 2014, a judgment was entered in rem against Client's property and in personam judgments against Clint subject to a right of redemption. (Shallas' Ex. S1, App. 1078)

To facilitate redemption, Clint entered into a Debt Settlement Agreement (hereinafter "Koch Agreement") with the Kochs wherein Clint conveyed his right to redeem to the Kochs in exchange for the Kochs' satisfying the Washington State Bank judgment and Honsey's lien. Clint enjoyed an exclusive option to buy back the property upon payment of the "Purchase Price" of \$497,074.76. Exercise of the option required Clint to notify the Kochs of his intent to exercise the option no later than August 15, 2015 with the closing occurring by October 15, 2015. (County's Ex. 39, App. 1036)

Clint met Goerdts, President of Peoples, in May 2015. (Transcript-Day-4 pg. 80-81 App. 1483-1484) After the second or third time meeting, Goerdts agreed to arrange financing through Peoples and handle all matters necessary to complete the buyback. (Transcript-Day-4 pg. 87-88, App. 1488-1489) Clint advised Goerdts

the terms of the buyback option, provided Goerdt the Koch Agreement and other documents, and understood Goerdt was going to arrange the financing and handle the buy back. (Transcript-Day-4 pg. 81-82, 101 App. 1484-1485, 1499)

Goerdt contacted Clint regularly, exchanging frequent text messages that included discussions outside of banking matters which made Clint feel comfortable with Goerdt trust Goerdt. (Transcript-Day-4 pg. 83, 86 App. 1486, 1487; Shallas' Ex. S27, S28, S29, & S31, App. 1165, 1180, 1195, 1210)

Goerdt made a loan presentation to Peoples on September 23, 2015 for \$675,000 despite the Purchase Price being just under \$500,000 and the August 15, 2015 deadline. (Shallas' Ex. S23, App. 1131 County's Ex. 39, App. 1036) Goerdt claims Clint requested \$675,000 intending to pay the Kochs, \$75,000 to consolidate farm debt, and the remaining, approximately \$100,000, for home improvements, (Goerdt Ex. 13 pg. 74-75 App. 1262) The loan was not funded and Shallas were not aware of the specific loan presentation until after this litigation commenced. (Transcript-Day-4 pg. 89 App. 1490; Shallas' Ex. S23, App. 1131)

Goerdt claims he first met Gregory Koch in October 2015<sup>1</sup>, discovered the Koch Agreement existed, and the deadline to notify the Kochs had lapsed. (Goerdt Ex. 13 pg. 64-66 App. 1259-1260) Goerdt called Clint advising the deadline lapsed and the Purchase Price was off the table. (Transcript-Day-4 pg. 88-91 App. 1489-1492; Goerdt Ex. 13 pg. 67 App. 1260) After advising Clint, Goerdt negotiated with the Kochs on behalf of the Shallas a buy back price of \$1.3 million. (Transcript-Day-4 pg. 91 App. 1492) Clint, rightfully upset at the idea of paying \$1.3 million rather than the Purchase Price, directed Goerdt to negotiate a lower price. (Transcript-Day-4 pg. 91 App. 1492) Ultimately Goerdt negotiated down to \$1.25 million. (Transcript-Day-4 pg. 92 App. 1493)

Goerdt's negotiations lead to the Shallas and the Kochs entering into a Purchase and Sale Agreement (hereinafter "Sale Agreement") signed by the parties on December 10, 2015 wherein the Shallas agreed to pay the Kochs \$1.25 million to buy back the property. (Shallas' Trial Ex. S9, App. 1114) The Sale Agreement was prepared by bank officials. (Transcript-Day-4 pg. 87 App. 1488;

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<sup>1</sup> Goerdt's actual testimony was October 2016. However, it is likely Goerdt meant to say October 2015 since facts later presented will show the Sale Agreement was executed in December 2015 and Goerdt was terminated from County in May 2016 and both of these events had to have occurred after Goerdt meeting with Gregory Koch and Goerdt discovering the Koch Agreement.

Shallas' Ex. S9, App. 1114) At no point did Goerdt advise or direct the Shallas to seek legal counsel nor did Goerdt discuss Shallas' rights with an attorney. Instead, Goerdt assured the Shallas he would handle matters. (Transcript-Day-4 pg. 92-93 App. 1493-1494; Goerdt's Ex. 13 pg. 69, App. 1261) The Sale Agreement effectively waived the Shallas' potential rights pursuant to equitable mortgages.

At approximately the same time, Goerdt was negotiating employment with County. In his discussions with County, Goerdt used the Shallas' potential loan to bargain with County for a position and ultimately started at County on or about January 18, 2016.

(Goerdt's Ex. 13 pg. 98-100 App. 1268)

On November 20, 2015, Goerdt arranged a \$50,000 loan from Peoples to Clint as an operating loan to pay some debts. From the proceeds, \$16,200 was paid to Miller Hybrid and \$28,000 was paid to Washington Ag. (Transcript-Day-4 pg. 93-94 App. 1494-1495; Shallas' Ex. S8, App. 1110) The payments to Miller Hybrid and Washington Ag were approved by Clint. A third payment in the amount of \$5,800 to Art Sweeting (hereinafter "Art"), was not authorized by Clint because Clint did not owe Art money. (Transcript-

Day-3 pg. 71 App. 1438; Transcript-Day-4 pg. 93-95 App. 1494-1496; Shallas' Ex. S8, App. 1110) Goerdt used Clint's money to pay Goerdt's debt to Art.

Goerdt facilitated a line of credit for Art at County. (Transcript-Day-3 pg. 61-64 App. 1432-1435) While getting ready to prepare books for taxes, Art discovered his account was short \$5,800 and Art contacted Goerdt about the shortfall in and Goerdt advised the shortfall was the result of an investment Art made with Goerdt. (Transcript-Day-3 pg. 71-72 App. 1438-1439) Goerdt persuaded Art to invest funds with Bruce Tracy, who Art never met and only knew by name. (Transcript-Day-3 pg. 79-81 App. 1444-1446) Eventually, the \$5,800 drawn from the Shallas' loan at Peoples was deposited into Art's account at County. (Transcript-Day-3 pg. 72-73 App. 1439-1440; Shallas' Ex. S8, App. 1110) Art discovered \$77,815 in fraudulent advances from Art's County line of credit prompting Art to Dan O'Rourke (hereinafter "O'Rourke") at County notifying O'Rourke of the fraud. County acknowledged the fraudulent advances and they were written. (Transcript-Day-3 pg. 64-66, 75 App. 1435-1437, 1441)

On or about November 25, 2015, Goerdt directed Clint to advance Goerdt \$12,000 in cash which Goerdt would use to pay bills. Goerdt directed Kelly Klein (hereinafter "Klein"), at the time a Peoples' employee, to process the transaction. When the cash was delivered to Goerdt, he advised Clint he could not walk out with the cash and directed Clint to take the cash and meet at Clint's home where Goerdt took the cash. (Transcript-Day-4 pg. 95-97 App. 1496-1498; Shallas' Ex. S7, App. 1108)

At some point, Goerdt advised the Shallas he was now employed at County. Goerdt already had the Shallas' information for loan application and simply relayed the information to a County application. Initially, Goerdt advised Clint he needed to obtain financial assistance from his sister and brother-in-law in order to be approved with County. However, Goerdt later advised assistance would not be necessary but Goerdt still wanted to work with Clint's sister and brother-in-law. (Transcript-Day-4 pg. 102-103 App. 1500-1501)

On January 25, 2016, a week after Goerdt started at County, the Shallas executed a promissory note in the amount of \$1.3 million with County and Goerdt signed as Vice-President of County.

(County's Ex. 3, App. 896) The Shallas also executed two mortgages securing the promissory note. (County's Ex. 1-2, App. 873, 884) From the proceeds of the promissory note, Goerdts claims \$1.25 million was paid to the Kochs and the other \$50,000 was requested by Clint for home improvements. (Goerdts Ex. 13 pg. 53-54 App. 1257) However, the additional \$50,000 was Goerdts idea and Goerdts did not advise the Shallas the purpose or intended use of the additional \$50,000. (Transcript-Day-4 pg. 105 App. 1503)

The Shallas did not attend the closing with the Kochs as Shallas did not feel comfortable meeting with the Kochs after what transpired relating to the buyback. Goerdts agreed to meet the Shallas at their home on January 25, 2016, the day of closing. (Transcript-Day-4 pg. 104-107 App. 1502-1505; Shallas' Ex. S29, App. 1187) During the meeting, Goerdts presented Clint a check for \$30,405.80. (Transcript-Day-4 pg. 107-108 App. 1505-1506; Shallas' Ex. S11, App. 1120) Goerdts claims he advised Clint the check could not be used for home improvements and had to be deposited into escrow. (Goerdts Ex. 13 pg. 49-56 App. 1256-1257)

Contrary to Goerdts claims, Goerdts directed Clint to contact Klein at Peoples to arrange a \$25,000 cash withdrawal. Goerdts



further directed Clint to deposit the check at Peoples, withdraw \$25,000<sup>2</sup> in cash which would pay closing costs, with the remaining balance of \$5,405.80 to be paid to County to open an account. Clint made the call as directed while Goerdts was still present. (Transcript-Day-4 pg. 108, 114 App. 1506, 1512; Shallas' Ex. S11, App. 1120) Afterwards, Client drove to Peoples, deposited the \$30,405.80 check, and obtained a bag filled with \$25,000 in cash. (Transcript-Day-4 pg. 108-109 App. 1506-1507; Shallas' Ex. S11, App. 1120) Because he had never seen \$25,000 in cash, Clint snapped a picture of the cash. (Transcript-Day-4 pg. 110 App. 1508; Shallas' Ex. S21, App. 1130) The metadata for the picture shows the photo was taken on January 25, 2016. (Transcript-Day-4 pg. 111-113 App. 1509-1511; Shallas' Ex. S20, App. 1128) The documents related to the deposit and withdrawal of the \$25,000 are dated January 25, 2016. (Shallas' Ex. S11, App. 1120) Text communications show Goerdts messaged Clint at 1:30 p.m. to meet him at Subway. (Transcript-Day-4 pg. 109 App. 1507; Shallas' Ex. S29, App. 1195) Goerdts denies any knowledge or involvement with events relating to the \$30,405.80 check including but not limited to meeting with Clint and accepting the cash.

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<sup>2</sup> Both Clint and counsel referred to \$12,000. The reference to \$12,000 was a mistake and is

However, Goerdt acknowledged Clint obtained \$25,000 in cash. (Goerdt's Ex. 13 pg. 55-59, App. 1257-1258) Goerdt denies meeting with Clint any time on January 25, 2016 after the meeting at Shallas' home. (Shallas' Ex. S11, App. 1120) However, Goerdt acknowledged the Subway text was sent after the meeting and when pressed to provide an explanation of the inconsistency, Goerdt suggested if there was in fact a handoff of information later on January 25, 2016, it would have been with grain sales. (Goerdt's Ex. 13 pg. 58-59, App. 1258)

Upon Clint arriving at Subway, Goerdt was already parked. Clint vividly recalls precise details regarding the interaction, including the color of Goerdt's vehicle, the exact spots the vehicles were parked, and even the number of spots between Goerdt's and Clint's vehicles. Clint gave Goerdt the bag, Goerdt dumped the cash, and returned the bag to Clint. (Transcript-Day-4 pg. 113-14, App. 1511-1512)

Klein claims she doesn't recall the specific amount of the withdrawal, but remembers the check for \$30,000, cash being taken out of the vault with another Peoples' employee, acknowledged the

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presumed to be the result of confusion between the \$25,000 actually presented to Clint in cash

documents reflecting the transaction along with her initials, and that all events occurred on January 25, 2016. (Transcript-Day-4 pg. 37, 40-43 App. 1462, 1464-1466; Shallas' Ex. S11, App. 1120) However, Klein claims she was not present when Clint picked up the cash. (Transcript-Day-4 pg. 42 App. 1465)

The Shallas later discovered the \$25,000 was not used for closing related expenses and the \$12,000 was not used to pay bills. (Transcript-Day-4 pg. 114-115, App. 1512-1513) O'Rourke called Clint and scheduled a meeting at the Shallas' home. O'Rourke inquired and was advised about the \$25,000 transaction. (Transcript-Day-4 pg. 121-122, App. 1515-1516) O'Rourke never advised or encouraged the Shallas to investigate their finances. (Transcript-Day-4 pg. 128-129, App. 1519-1520) O'Rourke advised the Shallas a loan to Clint's sister, Candyce Peters (hereinafter "Candyce") and her husband Rick Peters (hereinafter "Rick") (hereinafter collectively referred to as "Peters") facilitated by Goerd, had to be transferred to the Shallas. (Transcript-Day-4 pg. 121-122, App. 1515-1516) O'Rourke presented Shallas a \$155,330.18 promissory note and a mortgage which were executed on May 12,

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and a prior mentioned incident in which Goerd directed Clint to obtain \$12,000 in cash from Klein.

2017. (County's Ex. 9 & 10, App. 899 & 911) Based upon O'Rourke's statements, the Shallas felt compelled to execute the promissory note and mortgage. (Transcript-Day-4 pg. 123, App. 1517)

After County filed its Petition, the Shallas retained counsel. Prior to this litigation, the Shallas were not represented by counsel because Goerdts assured Clint he was representing the Shallas, Clint trusted Goerdts, and Clint felt it was the first time someone was taking care of the situation for him. After retaining counsel, the Shallas learned of the potential for an equitable mortgage claim against the Kochs. (Transcript-Day-4 pg. 127-128, App. 1518-1519)

After litigation commenced, Michelle's involvement increased and the Shallas discovered the \$5,800.00 defrauded by Goerdts while employed at Peoples to pay Goerdts' debt to Art (Transcript-Day-4 pg. 130, App. 1521; Shallas' Ex. S8, App. 1110) and discovered on or about March 31, 2016, \$2,218.00 was debited from the Shallas' County account and applied towards Steven Richard Stumpff and Kimberly Stumpffs' (hereinafter collectively referred to as "Stumpffs") property taxes (Transcript-Day-4 pg. 128-129, App. 1519-1520; Shallas' Trial Ex. S15, App. 1124) Goerdts identified the Stumpffs as

his in-laws. (Goerdts' Ex. 13 pg 9-10, App. 1246) The County debit slip included "per Chris Goerdts" and "to pay March taxes" notations. (Shallas' Ex. S15, App. 1124) This conversion was the basis for Count 16 of a 16-count May 8, 2019 federal indictment against Goerdts. Count 16 specifically identified \$2,218.00 as the amount willfully misapplied and embezzled, the account from which the funds were embezzled belonged to "C.S.", which is in reference to "Clint Shalla", and it was "S.S." property taxes paid, "S.S." in reference to "Steven Stumpff." (Shallas' Ex. S24, App. 1157)

There is no dispute Goerdts converted the funds since Goerdts plead guilty to Count 16 admitting the specific acts related to said conversion. (Goerdts' Ex. 13 pg 9-10, App. 1246) Goerdts denied converting the \$12,000 and \$25,000 from the Shallas. Goerdts' admission to the conversion of the \$2,218 while denying the \$12,000 and \$25,000 is self-preservation since Goerdts was not charged for those acts, admitting the acts would be self-incrimination, and denying the \$2,218.00 conversion would be constitute perjury. (Shallas' Ex. S24, App. 1157) Either of those would potentially expose Goerdts to additional prosecution.

Count 16 of the indictment against Goerdt alleges specifically:

On or About March 31, 2016, in the Southern District of Iowa, defendant, CHRISTOPHER MICHAEL GEORDT, being an officer and employee of County Bank, a bank whose deposits are insured by the Federal Deposit Insurance Corporation, with intent to injure and defraud County Bank, willfully misapplied, and embezzled the sum of approximately \$2,218.00 of the money entrusted to the custody and care of County Bank, in that the defendant took money from the account of C.S. and paid the property tax of S.S. whom C.S. is not associated with nor gave permission to do. (Shallas' Ex. S24, App. 1157)

Although County is identified as injured and defrauded party, the allegations make clear the funds did not belong to County, rather the "custody and care" of the funds were "entrusted" to County and the funds were taken from Clint's account. Also, the allegations specify Clint did not give Goerdt permission to take the funds nor apply them towards Steven Stumpff's property taxes. (Shallas' Ex. S24, App. 1157) The reference to providing permission implies authority and proprietary rights over the funds. Therefore, Clint is the injured and defrauded party.

An important distinction needs to be made Count 16 was for "Misapplication by Bank Officer" and alleged the conversion of the funds was committed by Goerdt while "being an officer and employee

of County Bank.” (Shallas’ Ex. S24, App. 1157) This distinction, combined with other facts presented are important in regards to the Trial Court’s ruling on the motions for directed verdict and summary judgment for vicarious liability, which will be addressed in more detail later.

Candace first met Goerdt when the Peters were looking to finance home reconstruction. (Transcript-Day-5 pg. 78, App. 1598) Around November 2015, Goerdt approached Candyce regarding loaning Clint approximately \$14,000 from the Peters’ line of credit to make the Shallas’ loan application more presentable assuring the funds would be returned by Thanksgiving, and Candyce agreed. Later, Goerdt advised Candyce Clint needed a \$150,000 loan to make him look more creditworthy.

Later, Goerdt contacted Candyce, advised he was now at County, and suggested a meeting between Goerdt, the Peters, and the Shallas which occurred on February 5, 2016. Around this time, the Peters discovered the \$14,000 Goerdt requested was actually \$16,000 and the funds had not been returned. (Transcript-Day-5 pg. 87, App. 1599) At the meeting, Goerdt presented documents and advised the Peters they were assisting Clint by showing Clint was

creditworthy. Goerdt directed everyone where to sign without offering much for explanation other than Clint's creditworthiness and there was no risk to the Peters. The Peters did not receive copies of the documents they signed. (Transcript-Day-5 pg. 88, 92-93, Supp. App. 1600, 1604-1605)

The documents signed by the Peters included a \$150,000 promissory note and a mortgage securing the promissory note. (Shallas' Ex. S41 & S40, App. 1240 & 1229) Goerdt presented a cashier's check to Rick from County for \$150,000. (Shallas' Ex. S38, App. 1227) Goerdt directed Rick to deposit the check into the Peters' bank account and directed Candyce to write a \$150,000 check to Clint. (Transcript-Day-5 pg. 89-90, App. 1601-1602; Shallas' Ex. S39, App.1228) As they were leaving, the Peters confronted Goerdt regarding the \$16,000 transaction and Goerdt responded it was a family issue. (Transcript-Day-5 pg. 90, App. 1602)

In the beginning of 2016, the Peters were seeking permanent financing for the home reconstruction. Around this time O'Rourke showed up at the Peters' home for a meeting during which O'Rourke advised the Peters there was a mortgage for the \$150,000 transaction facilitated by Goerdt against the Peters. O'Rourke



presented the Peters the promissory note and the mortgage which the Peters recognized as the documents they signed at the meeting. In addition to the mortgage and promissory note, O'Rourke presented the Peters a document that listed assets the Peters allegedly, but did not in fact own. (Transcript-Day-5 pg. 91-93, Supp. App. 1603-1605)

Prior to leaving, O'Rourke assured the Peters he would make things right. (Transcript-Day-5 pg. 94, 96-97, App. 1606, 1608-1609) Ultimately, the Peters received permanent financing from County for the reconstruction of their home and O'Rourke advised the Peters the \$150,000 loan was discharged. (Transcript-Day-5 pg. 94-96, App. 1606-1608) That loan with interest was the \$155,330.18 loan O'Rourke transferred to the Shallas. (Transcript-Day-5 pg. 100-101, App. 1612-1613, County's Ex. 10, App. 911)

Upon the close of the evidence, County moved for directed verdict. (Transcript-Day-5 pg. 131-135, App. 1620-1624) County argued its equitable relief was uncontroverted and further argued the Shallas neglected to present certain expert witnesses to support the Shallas' defenses and claims. County further suggested the Trial Court may want to enter separate orders of judgment regarding the

separate equity and law claims. In regards to the \$2,218 property tax claim and the \$25,000 cash claim, County argued it wasn't liable because it already credited the full amounts to the Shallas' line of credit. (Transcript-Day-5 pg. 131-132, App. 1620-1621)

County argued it terminated Goerd. Although it was unclear what County was suggesting with Goerd's termination, it appeared County was suggesting firing Goerd fixed the problems and because of his termination, there were no lingering damages related to Goerd or his actions. Although prefacing that Goerd may not be credible, County suggested the level of credibility in Goerd's testimony was increased because he plead guilty to all but one of the counts against him. (Transcript-Day-5 pg. 133, App. 1622) This suggestion ignores Goerd offered false testimony including illogical explanations for certain events including but not limited to Goerd's explanation behind directing Clint to meet him at Subway.

County argued crediting of the funds converted by Goerd was an act of goodwill because nothing was proven in regards to the conversions. (Transcript-Day-5 pg. 135, App. 1624) This argument followed immediately after County acknowledged the FDIC considered including an additional count in Goerd's indictment

related to the \$25,000. (Transcript-Day-5 pg. 133, App. 1622) The consideration of the additional count is indicative there was a basis to support it happened. Not all criminal acts are prosecuted, even those known to prosecuting agencies because the burden of proof in criminal prosecution is substantially higher. This is particularly true when it comes to criminal defendants already being prosecuted for other crimes, such as the case with Goerd. Klein and Clint's testimony, combined with the photographic and text evidence, make clear Goerd converted the \$25,000.

Authorities cited by County suggested the amount of damages is equal to the value of the loss at the time of the loss. County argued crediting the amounts to the line of credit satisfied any damages that would be associated with Goerd's acts assuming the facts proved they occurred. (Transcript-Day-5 pg. 134, App. 1623)

This argument is flawed because the line of credit was an obligation which could be satisfied over the course of multiple years. The funds stolen by Goerd were immediately available for the Shallas to use at their discretion. The Shallas could have used the funds to work in their favor. Instead, the funds were put to work in

Goerdt because he got the use and enjoyment of the funds which were accruing interest in favor of County, all adverse to the Shallas.

The flawed argument also ignores the Shallas never requested the additional \$50,000 from the County loan. That was devised by Goerdt because Goerdt intended to steal funds from the loan proceeds. It also ignores the entire premise of the County loan was the result of negligence and fraud by Goerdt.

Shallas argued County's motion for directed verdict wasn't a motion for directed verdict in form and there was no procedural vehicle available to address the matter. (Transcript-Day-5 pg. 136, App. 1625) Shallas summarized County's argument as arguing under no stretch of the evidence, there was no basis for fraud and equitable estoppel claims. The clear and irrefutable evidence showed County recognized and admitted there was fraud. (Transcript-Day-5 pg. 131, App. 1620) Furthermore, Goerdt lied to the Shallas every step of the way inducing them to take actions they otherwise would/would not have taken and under the circumstances, were not required to take, such as paying the Kochs \$1.25 million rather than approximately \$500,000. Shallas argued a directed verdict could only be granted if there is no basis in the evidence to support the claims. Shallas

argued County was inconsistent arguing it wasn't liable for Goerd't's acts but admitted it credited the Shallas. County never advised the Shallas it intended to credit or did credit the lines of credit.

(Transcript-Day-5 pg. 136-138, App. 1625-1627)

The Trial Court indicated had County raised its directed verdict arguments sooner, the Trial Court would have dismissed the Shallas claims against County, which is consistent with the Trial Court's September 12, 2022 Order wherein the Trial Court acknowledged it was tempted to dismiss the Shallas' claims against County and the only reason it didn't was the timing of County's Motion. (Transcript-Day-5 pg. 143, App. 1632) The Trial Court's September 12, 2022 Order along with the basis provided in granting County's directed verdict suggest the Trial Court did not adequately consider the evidence at trial and the Trial Court's decision was already made before opening statements and therefore any evidence presented at trial would not be considered.

In any event, the Trial Court ruled Goerd't was not acting under the scope of his employment with County<sup>3</sup> in regards to the \$25,000 because the Trial Judge has never personally met a banker that

committed acts that Goerdt committed specifically stating “bankers don’t operate in that way.” (Transcript-Day-5 pg. 144, App. 1633) The Trial Judge’s anecdotal basis for this finding is inconsistent with Iowa authorities regarding employer liability. Because of news coverage, there have been plenty of examples known by the general public where bankers have committed similar acts. The fact there are regulatory and statutory provisions addressing these specific acts is indicative Goerdt’s acts have occurred often enough that legislative action was necessary to address the matter.

The Trial Court found Goerdt’s acts were grossly outside the scope of his employment pointing out O’Rourke notified authorities of Goerdt’s acts when discovered. (Transcript-Day-5 pg. 144-145, App. 1633-1634) Although not expressly stated by the Trial Court, this particular finding appears to suggest an employer is not civilly liable for any criminal acts committed by an employee or officer so long as the employer reports the acts to the proper authorities.

Goerdt moved for directed verdict in regards to IV, V, and VI, for negligence, fraud, and conversion, respectively. In regards to the conversion, Goerdt argued County’s credit to the Shallas’ satisfied

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<sup>3</sup> Trial Court referred to Peoples but this is obviously in error since the meeting occurred with the

any potential damages resulting from the conversion and without damages, no claim can be pursued. Furthermore, Goerdt argued the Shallas benefited from the credit made by County and therefore the claims should be dismissed. The Trial Court rejected Goerdt's arguments pointing out there was substantial evidence to support Shallas' claims of conversion. (Transcript-Day-5 pg. 147-150, 152-155, App. 1636-1639, 1641-1644)

The Trial Court's directed verdict rulings were inconsistent. While the Trial Court granted directed verdict in favor of County, in part, because County credited the Shallas for the funds converted by Goerdt, the Trial Court found substantial evidence to submit the conversion claims to the jury, even the claims for the funds County admitted it credited. If there was enough evidence to deny Goerdt's motion for directed verdict on the conversion, and the evidence makes clear the only means in which Goerdt was able to commit the conversion was by way of his role as an officer of County, then the Trial Court erred in granting directed verdict in favor of County.

Shallas argued all parties' counsel agreed to suspend Goerdt's deposition and to continue discovery after Goerdt's deposition.

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\$25,000 transaction which occurred in conjunction with the \$1.3 million County loan.

However, in a pre-trial Ruling, a different Judge declined to permit continued discovery. (Transcript-Day-5 pg. 151-152, App. 1640-1641)

Goerdts moved for directed verdict on the negligence and fraud counts echoing arguments raised by Peoples in its Rule 1.904 Motion, specifically relying on Iowa Code § 535.17. Shallas argued the Trial Court's Ruling was flawed because of its interpretation of the statute since Section 535.17 is not applicable to tort claims. The Trial Court found it was unclear the Supreme Court ever distinguished the question between contract and torts claims as it relates to Section 535.17. Furthermore, the Trial Court found it was bound to follow the misinterpretation of Section 535.17 found in the cited authorities and granted directed verdict in regards to the negligence and fraud counts against Goerdts. The Trial Court did find Shallas preserved error regarding the claims dismissed prior to trial on summary judgment. (Trial Transcript Day 5 pg. 155-159, App. 1644-1648)

### **LEGAL ARGUMENT**

- I. **WHETHER THE TRIAL COURT ERRED IN GRANTING SUMMARY JUDGMENT AND LATER DIRECTED VERDICT ON SHALLAS' NON-CONTRACT**



## **CLAIMS BASED UPON THE IOWA CODE SECTION 535.17 CREDIT AGREEMENT STATUTE OF FRAUDS?**

### **PRESERVATION OF ERROR**

The Trial Court found the Shallas preserved error on record regarding the claims against Peoples, which were dismissed prior to trial on summary judgment. (Transcript-Day-5 pg. 158-159, App. 1651-1652) Shallas also preserved error by moving for a new trial (October 5, 2022 Motion for New Trial, App. 860) and filing their Notice of Appeal. (November 10, 2022 Notice of Appeal, App. 862)

### **STANDARD OF REVIEW**

Summary judgment rulings are reviewed for correction of errors at law and summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Luana Savings Bank v. Pro-Build Holdings, Inc., 856 N.W.2d 892, 895 (Iowa 2014). To grant summary judgment, the moving party must show the non-moving party has no evidence to support a determinative element of that party's claim. Huck v. Wyeth, Inc., 850 N.W.2d 353, 362 (Iowa 2014), certiorari denied 135 S.Ct. 1699, 191 L.Ed.2d 695. The moving party has the

burden to show no genuine issue of material fact. Bill Grudner's Sons Constr., Inc. v. Ganzer, 686 N.W.2d 193, 197 (Iowa 2004). The resisting party is afforded every legitimate inference that can be reasonably deduced from the evidence—and if the review of the evidence pertaining to a particular issue shows reasonable minds can differ on how the issue should be resolved, an order entering summary judgment on the issue must be vacated or reversed. Vossoughi v. Polaschek, 859 N.W.2d 642, 649 (Iowa 2015).

### **ARGUMENT**

The primary issue in this appeal is whether the Iowa Code Section 535.17 Credit Agreement Statute of Frauds also applies to tort claims or is limited to contract claims. The plain language of the statute makes clear it only applies to “contract law.” This limitation is consistent with the legislative history. The initial bill was broad but what passed and was signed into law was specifically restricted to contract claims.

The Iowa Supreme Court has never addressed the scope of the statute. Clinton Nat. Bank v. Saucier, 580 N.W.2d 717, 718 (Iowa 1998) specifically stated the issue of application to tort law was

not raised on appeal. The unreported Court of Appeals decision relied on by the Trial Court was decided without the benefit of any argument based on the legislative history. While legislative history was presented to the Supreme Court on further review, the Supreme Court exercised its discretion and declined further review. Legislative history was squarely presented to the Trial Court and must be decided on appeal.

### Statutory Construction

The first step in ascertaining the true intent of the Legislature is to look at the statute's language. Zimmer v. Vander Waal, 780 N.W.2d 730, 733 (Iowa 2010); Estate of Ryan v. Heritage Trails, 745 N.W.2d 724, 729 (Iowa 2008).

State v. Zacarias, 958 N.W.2d 573, 581 (Iowa 2021) stated:

The first step in our statutory interpretation analysis is to determine whether the statute is ambiguous

...

Our inquiry ends with the plain language if the statute is unambiguous.

State v. Zacarias, Id. quoting State v. Coleman, 907 N.W.2d 124, 135

(Iowa 2018), stated:

‘If reasonable minds could differ or be uncertain as to the meaning of the statute’ based upon the context of the statute, the statute is ambiguous and requires us to rely on principles of statutory construction to resolve the ambiguity.

The Court applies these guiding principles in statutory interpretation:

The purpose of statutory interpretation is to determine the legislature’s intent. We give words their ordinary and common meaning by considering the context within which they are used, absent a statutory definition or an established meaning in the law. We also consider the legislative history of a statute, including prior enactments, when ascertaining legislative intent. When we interpret a statute, we assess the statute in its entirety, not just isolated words or phrases. We may not extend, enlarge, or otherwise change the meaning of a statute under the guise of construction.

DuTrac Community Credit Union v. Hefel, 893 N.W.2d 282, 294

(Iowa 2017). State v. Howse, 875 N.W.2d 684, 691 (Iowa 2016);

Shafer v. Putnam, 841 N.W.2d 68, 75 (Iowa 2013).

If the Legislature has not defined a word or used it within established meaning, the Court gives the word its ordinary and common meaning considering the context within which the words are used. Zacarias, 958 N.W.2d at 582; State v. Ross, 941 N.W.2d 341,

347 (Iowa 2020); Auen v. Alcoholic Beverages Div., 679 N.W.2d 586, 590 (Iowa 2004).

### Analysis of the Statute's Language

Iowa Code Section 535.17 by its terms only bars claims and defenses based upon contract law, but does not bar tort claims. An analysis of the statute demonstrates this.

Subsection 535.17(1) provides:

A credit agreement is not enforceable *in contract law* by way of action or defense by any party unless a writing exists that contains all the material terms of the agreement and is signed by the party against whom enforcement is sought. (Emphasis supplied)

Certain terms in subsection 535.17(1) are defined. Subsection 535.17(5)(c) defines “credit agreement” to mean:

...any contract made or acquired by a lender to loan money, finance any transaction or otherwise extend credit for any purpose, and includes all of the terms of the contract.

The definition then excludes certain contracts subject to other statutory provisions.

Subsection 535.17(5)(b) defines “Contract” as

...a promise or set of promises for the breach of which the law would give a remedy, or the performance of which the law would recognize a duty, and includes promissory obligations based upon any instruments and similar documents on the contract doctrine of promissory estoppel.”

It is significant the definition of “contract” specifically includes the related contract law principle of promissory estoppel, but does not include equitable estoppel.<sup>4</sup>

The inclusion of the contract doctrine of promissory estoppel, but the exclusion of equitable estoppel, which is based upon misrepresentation, is significant evidence the Legislature did not intend to include misrepresentation claims within the purview of Section 535.17.

The scope of the Credit Agreement Statute of Frauds is defined in subsection 535.17(7), which provides:

This section entirely displaces principles of common law and equity that would make or recognize exceptions to otherwise limit or dilute the force and effect of its provisions concerning the enforcement *in contract law*, credit agreements or modifications of credit agreements. However, this section did not displace any additional or other requirements of which shall

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<sup>4</sup> The elements of promissory estoppel are (1) a clear and definite agreement; (2) proof that the party urging the doctrine acted to its detriment in reasonable reliance on the agreement; and (3) a finding that the equities support enforcement of the agreement. National Bank of Waterloo v. Moeller, 434 N.W.2d 887, 889 (Iowa 1989). The elements of equitable estoppel are (1) the defendant has made a false representation or has concealed material facts; (2) the Plaintiff lacks knowledge of the true facts; (3) the Defendant intended the Plaintiff to act upon such representation; and (4) the Plaintiff did in fact rely on such representations to his prejudice. Su Pharm, Inc. v. Summit Nutritionals Int'l, Inc., 859 N.W.2d 182, 191 (Iowa 2015).

continue to apply, with respect to the making or enforcement of contracts, including the requirements of consideration or other basis of validation. (Emphasis supplied).

The scope is contract law.

Further evidence of the limited scope is found in Subsection 535.17(6) and provides a guide to interpretation and application:

This section shall be interpreted and applied purposely to ensure that *contract actions and defenses on credit agreements* are supported by clear and certain written proof of the terms of such agreement to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements.

In subsection 535.17(6) the term “contract” modifies “actions” and “defenses” which demonstrate there was no intent to broaden the applicability to claim of fraud or equitable estoppel, or any other tort claim.

The specific definition of “contract” in subsection 535.17(5)(b) does not include tort claims. The statements in subsection 535.17(1) and (7) limiting the statute to “contract law” and the inference in the guide to interpretation and application to “contract actions and defenses on credit agreements” in subsection 535.17(6) make clear that the terms of the statute do not bar tort claims.

### Legislative History

What ultimately resulted in the enactment of Section 535.17 began with a bill proposed as H.F. 677 on March 20, 1989 (H.J. 851), which passed the House on March 30, 1989. H.F. 677 broadly prohibited maintaining any action on a credit agreement:

A debtor shall not maintain an action on a credit agreement and evidence of a credit agreement is not competent unless the credit agreement is in writing, expresses consideration, sets forth the relevant terms and conditions and is signed by the creditor and the debtor.

H.F. 677 was similar to legislation adopted in other states. On February 27, 1990, House File 677 was completely rewritten. The language in the amendment limited the scope with the language in subsection 535.17(1):

A credit agreement is not enforceable in contract law by way of action or defense...

The legislative history shows the Legislature intended to limit the scope of the law to “contract law” claims. The legislative history of a statute is instructive in determining legislative intent. Postell v. American Family Mut. Ins. Co., 823 N.W.2d 35, 49 (Iowa 2012) The Court may resort to legislative journals in determining the meaning of the statute. Unification Church v. Clay Central School District, 253 N.W.2d 579, 581 (Iowa 1977); Lenertz v. Municipal Court of the City of Davenport, 219 N.W.2d 513, 516 (Iowa 1974). Striking a provision



before enactment of a statute is indication the statute should not be construed to include it. Iowa State Education Association v. PERB, 269 N.W.2d 446, 448 (Iowa 1978).

The initial draft of the bill, which passed the House in the 1989 Session, broadly precluded actions on credit agreements, and their admissibility, unless in writing and signed by the debtor and creditor. However, the initial draft was scrapped. The broad language was replaced in the 19901 Session with the present form of the statute which is limited to claims and defenses in contract law and does not bar the admissibility of unsigned credit agreements.

#### Review of Cases

No reported Iowa cases citing Section 535.17 apply the section to tort claims. Clinton Nat. Bank v. Saucier, 580 N.W.2d 717 (Iowa 1998) is the first Iowa Supreme Court decision to address Iowa Code Section 535.17. On appeal, Counterclaimant Saucier only asserted a breach of contract claim.

...defendants raise no issue concerning their claims for defamation, interference with contract and misrepresentation.

580 N.W.2d at 718.

In Re Agriprocessors, Inc., 480 B.R. 852, 878-80 (N.D. Iowa 2013), cited Clinton Nat'l. Bank v. Saucier, 580 N.W.2d 717, 719

(Iowa 1998) and applied Iowa Code Section 535.17 Statute of Frauds to a claimed agreement for handling overdrafts.

Beal Bank v. Sims, 670 N.W.2d 119, 125-27 (Iowa 2003) addressed subsection 535.17(2), which provides oral modifications are unenforceable where there has been a proper notification that oral modifications are not permitted, but declined to enforce the prohibition against modification because it was not stated in sufficient bold-faced type as required by subsection 535.17(3).

C & J Vantage Leasing Co. v. Wolfe, 795 N.W.2d 65, 82 (Iowa 2011) addressed Section 535.17. The case provided no guidance to the reach of the statute, but merely addressed the question whether the credit agreement contained all material terms.

One reported and two unreported Iowa Court of Appeals decisions have addressed Section 535.17. American Bank v. Urbandale Laser Wash, LLC, 874 N.W.2d 650 (2015) discussed Section 535.17(2) in connection with whether there was a meeting of the minds on proposed forbearance agreement. The unpublished decision of Raccoon Valley State Bank v. Gratiis, 728 N.W.2d 224 (Table) 2006 WL 3798902 (Iowa App. 2006) involved a claim of

misrepresentation based upon an oral statement modifying a written credit agreement, but relied on Section 535.17(4).

Geiger v. Peoples Trust and Savings Bank, 940 N.W.2d 46 (Table) 2019 WL 4678179 (Iowa App. 2019), involved a claim of fraud in connection with the breach of an agreement with a bank. The Iowa Supreme Court exercised its discretion to deny further review. The substantial legislative history advanced by counsel in that case in the Application for Further Review was not before the Court of Appeals.

The rulings granting summary judgment and then directed verdict based upon the prior ruling are based on Geiger. Geiger was wrongly decided and 535.17 does not extend to tort claims. The plain meaning of the statute is limited to contract law, and legislative history shows the Legislature considered a broad scope, and narrowed the scope to contract law.

**II. WHETHER THE TRIAL COURT ERRED IN DENYING SHALLAS THE OPPORTUNITY TO CONDUCT DISCOVERY BASED ON AN AGREEMENT TO SUSPEND DISCOVERY PENDING DEFENDANT GOERDT'S CRIMINAL PROSECUTION?**

## **PRESERVATION OF ERROR**

Shallas preserved error by moving to have the Court confirm the parties' agreement to suspend discovery and set new deadlines in their August 31, 2021 Motion for Discovery Conference, App. 600, which tendered a new Trial Scheduling and Discovery Plan, and September 30, 2021 Service of a Proposed Discovery Plan, App. 600. Shallas further preserved error by raising the error of the November 7, 2021 Order, App. 645, denying extension of deadlines when resisting Motions for Directed Verdict at the close of the evidence. (Transcript-Day-5 pg. 151-152, Supp. App. 1644-1645) Shallas again preserved error by moving for a new trial (October 5, 2022 Motion for New Trial, App. 834) and filing their Notice of Appeal. (November 10, 2022 Notice of Appeal, App. 862)

## **STANDARD OF REVIEW**

Review of a District Court's discovery decision is for abuse of discretion. An abuse of discretion exists where the District Court's ruling rests upon clearly untenable or unreasonable grounds. A ground is untenable when it is based on erroneous application of the law. Willard v. State, 893 N.W.2d 52, 58 (Iowa 2017) In this case, the Trial Court's November 7, 2021 ruling denying additional discovery was perfunctory, made no analysis of the arguments advanced, let alone address the fact that the parties had an agreement to extend deadlines. Rather the ruling was based solely on the length the case had been pending, and the erroneous conclusory statement the interests of justice were not served. In fact, the ruling states the Court was relying on the "reasons cited in Plaintiff's Resistance," when Third Party Defendant Peoples was the party resisting. The length the case had been pending was a matter outside of Shallas' control, but the result of delays in a criminal proceeding involving Defendant Goerdts, and the two Banks where he served as an officer.

## **ARGUMENT**

Courts have enforced stipulations and other agreements by parties concerning discovery. In this case, discovery was interrupted when Goerdt's counsel realized the day before Goerdt was to give his deposition his client was subject to a criminal investigation. Shallas' counsel agreed to cancel the deposition and also decided Shallas did not wish to take the deposition of a representative of Peoples, which was also scheduled on the same day as Goerdt.

Peoples then filed a Motion for Summary Judgment, which the other Defendants joined. At Shallas' request, consideration of the Motion was deferred until Goerdt's deposition. The proceedings were effectively stayed because Goerdt could not be deposed while criminal proceedings were pending. Goerdt's criminal defense counsel was not willing to let Goerdt be examined in the civil action until after his sentencing. Shallas' counsel acquiesced in deferring the deposition, but desired to defer additional discovery.

Counsel for Shallas documented the agreement to put discovery on hold. Counsel for Peoples consented to this in court filings. Counsel for Goerdt and County Bank never filed anything stating any disagreement.

After the Trial Court initially denied the Peoples Bank Summary Judgment Motion on the Credit Agreement Statute of Frauds grounds, and at the time, Peoples Bank sought Rule 1.904 reconsideration, Shallas sought, and Peoples resisted, formal modification of the discovery deadline, consistent with the parties' prior agreement. The Trial Court (Judge Shilling) denied Shallas the right to any additional discovery, (other than the pending deposition of Goerdt) stating it was based on the resistance of County Bank. This ruling, regardless who resisted, was contrary to the agreement of the parties, substantially prejudiced Shallas and should be a basis for a new trial.

Iowa R. Civ. P. 1.506 grants the parties authority to modify discovery procedures. The comments to Rule 1.506 show the trend toward informality. The official comment to the 1976 Amendment said the Amendment provided stipulations be filed with the Court and further provided stipulations may be superseded by Court order.

The comment to the 1998 Amendment recognized parties rarely enter into formal stipulations and removed the requirement for formal stipulations, other than for responses to requests for admissions. The rule also addressed and clarified the time within

which a response would be required if the Court superseded a stipulation. The comment to the 2001 Amendment was identical.

Trial courts have routinely blessed enforcement of informal arrangements. Ladburg v. Ray, 508 N.W.2d 694, 695-96 (Iowa 1993) enforced an informal agreement on discovery where the Plaintiff claimed surprise because of exhibits produced by an expert deposed on the eve of trial where the parties informally agreed to extend deadlines. Provenzano v. Wetrich, McKeown & Haas, P.C., 481 N.W.2d 536 (Iowa Appeals 1991), upheld an agreement to allow additional designations of experts, but did not allow that agreement to provide extensions beyond what was agreed to.

A basic component of a fair trial requires that when a party injects a legal issue into a lawsuit, the opposing party is entitled to discover the relevant evidence concerning the issue. Fenceroy v. Gelita USA, Inc., 908 N.W.2d 235, 243 (Iowa 2018); Squealer Feeds v. Pickering, 530 N.W.2d 678, 684 (Iowa 1985). The philosophy underlying our discovery rules is that litigants are entitled to every person's evidence and the law favors full access to relevant information. Mitchell v. City of Cedar Rapids, 926 N.W.2d 222, 228 (Iowa 2019).



It was not Shallas' fault that Goerdt, the former president of Peoples and an officer of County Bank, committed multiple criminal acts, was subject to a federal criminal investigation and understandably was allowed to defer his deposition until after his sentencing when he was no longer subject to potential self-incrimination. To accommodate Peoples former President, the proceedings were stayed, but based upon an agreement that discovery would resume, Shallas should not be penalized for consenting to a reasonable accommodation to Peoples' former President.

The denial of that right to Shallas, other than to take Goerdt's deposition, substantially prejudiced them. The only remedy is to vacate the November 7, 2021 Discovery Order and all Orders subsequent to that, and allow Shallas full discovery on remand.

The arguments made later related to vicarious liability included assumptions and inferences. While there was some evidence to suggest these were accurate, proving them at trial was inhibited by the Shallas inability to conduct additional discovery and further inhibited by the Trial Court dismissing many of the claims against the parties. It is more probable than not had the Shallas been permitted

to continue discovery as agreed upon, the Shallas would have discovered evidence to support the assumptions and inferences.

**III. WHETHER THE TRIAL COURT ERRED IN ITS APPLICATION OF THE PRINCIPLES OF VICARIOUS LIABILITY/RESPONDEAT SUPERIOR TO COUNTY BANK BASED ON THE ACTIONS OF ITS OFFICER GOERDT?**

**PRESERVATION OF ERROR**

Shallas preserved error regarding summary judgment rulings and directed verdicts on record upon the close of evidence during arguments related to motions for directed verdict and the Trial Court found error was preserved. (Transcript-Day-5 pg. 130-159, Supp. App. 1623-1643) Shallas also preserved error by moving for a new trial (October 5, 2022 Motion for New Trial, App. 834) and filing their Notice of Appeal. (November 10, 2022 Notice of Appeal, App. 862)

**STANDARD OF REVIEW**

Review of a District Court's discovery decision is for abuse of discretion. An abuse of discretion exists where the District Court's ruling rests upon clearly untenable or unreasonable grounds. A ground is untenable when it is based on erroneous application of the

law. Willard v. State, 893 N.W.2d 52, 58 (Iowa 2017) In this case, the Trial Court's ruling denying additional discovery was perfunctory, made no analysis of the arguments advanced, let alone addressed the fact that the parties had made an agreement, but rather was based solely on the pendency of the case, a matter outside of Shallas' control, but the result of delays in a criminal proceeding involving Defendant Goerdts, and the two Banks where he served as an officer. In fact, the ruling states it was relying on the arguments of the Plaintiff County, when in fact the arguments were being made by Peoples.

### **ARGUMENT**

Shallas' claims against Goerdts were based on three claims: first, that Goerdts undertook to provide services to assist Clint Shalla with the exercise of his option, and was negligent in doing so. Specifically, Goerdts failed to see that the notice of option was exercised in a timely manner and then, when Kochs raised lack of timeliness, Goerdts gave legal advice to Shallas that they should not pursue the matter.

The Court granted summary judgment on this claim based upon the Credit Agreement Statute of Frauds as to Peoples Bank

and the Trial Court adopted that ruling in granting the Motion to direct verdicts in favor of County Bank and Goerdt.

In addition Shalla claimed Goerdt's conversion and fraud, both as an affirmative claim and as a defense to the Bank's mortgage.

Finally, Shallas claimed conversion against County Bank and Goerdt based upon Goerdt's misappropriations. The Trial Court directed a verdict as to County Bank on the basis that Goerdt was acting outside the scope of his authority.

A claim of vicarious liability under the doctrine of respondeat superior has two elements: proof of the employer-employee relationship and proof that the injury occurred within the scope of that relationship. Walderbach v. Archdiocese of Dubuque, Inc., 730 N.W.2d 198, 201 (Iowa 2007).

Any rationale based upon the fact that Goerdt committed criminal acts does not take the conduct out of vicarious liability. McKinley v. Chicago & N.W.R.Co., 44 Iowa 314, 24 Am.Rep. 748, Affirmed 99 U.S. 147, 9 Otto 147, 25 L.Ed. 272 (1876) recognized a corporation is liable for malicious and criminal acts of its employee toward its patrons while he is executing what is supposed to be

orders of the corporation even though the orders do not contemplate such acts.

Sandman v. Hagan, 154 N.W.2d 113 (Iowa 1968); Sandman v. Hagan, 261 Iowa 560, 154 N.W.2d 113, 117-118 (Iowa 1967) addressed vicarious liability in the context of contractor's employee committed against a City Inspector. Sandman v. Hagan recognized the employer is responsible to third persons for the employee's tortious acts if committed while the employee is furthering the employer's business or interests within the scope of his employment. The deviation from the employer's business or interests to pursue the employee's own business or interest must be substantial in nature to relieve the employer from liability. The Court concluded the question that while scope of employment is ordinarily a jury question, the Court may decide as a matter of law the act departs markedly from the scope of employment.

Like Walderbach, many of the cases testing the limit of scope of responsibility involve committing acts of sexual abuse. Sexual abuse could in no way be committing a sexual act by an employer could in no way be within the scope of the employee's authority, at

least in states like Iowa which do not allow payment for sexual services.

The Godar Court relied on Sandman v. Hagan and recognized the deviation from the interests must be substantial in nature. The Court then relied on Section 229(2) of the Restatement (Second) of Agency listing the factors to be considered. Notably, the Court in Godar recognized it could not be reasonably said that committing sexual abuse is of the same general nature as the duties authorized as a Curriculum Director for the school or that the acts of abuse were in furtherance of his duties of the employee's duties. Rather, the Court found the alleged sexual abuse would be a substantial deviation, and substantially different from the acts authorized by the school district. Godar v. Edwards, 588 N.W.2d 701, 705-06 (Iowa 1999).

Here, Goerdt's defalcations were committed as part of the duties of a bank, which includes exercising control over a customer's funds. Therefore, Goerdt's actions are not so far removed from the scope of his duties like the school employee committing sexual abuse in Godar v. Edwards or the construction worker hitting the City Inspector with a shovel.

Briner v. Hyslop, 337 N.W.2d 858, 867 (Iowa 1983), while dealing with the liability of the employer for punitive damages, recognized actual damage liability for or on the part of the employer by an intoxicated driver.

Claims involving fraud raise are treated differently. Kimmel v. Iowa Realty Co., Inc., 339 N.W.2d 374, 382 (Iowa 1983), a case involving the liability of the broker for acts of its salesperson found a basis for vicarious liability.

St. Malachy v. Ingram, 841 N.W.2d 338, 347-48 (Iowa 2013) involved the liability of a financial registered representative for estate planning services. In that case, the securities registered representative argued he was only able to give incidental advice on investment decisions. 841 N.W.2d at 347. The Court noted:

Even though Ingram was not licensed to provide legal services, he had a general legal duty to exercise care in whatever services he did provide as Engels's agent.

...

If an agent undertakes to perform services, as a practitioner of a trade or profession, the agent "is required to exercise the skill and knowledge normally possessed by members of that profession or trade in good standing in similar communities" unless the agent represents that the agent possesses greater or lesser skill.

There is no dispute Goerdt negotiated on behalf of Shallas with Kochs and as a result, Shallas accepted Kochs' offer. There is no dispute Goerdt directed Clint to seek legal counsel. Competent counsel would have advised Shallas of a claim against the Kochs based on an equitable mortgage. See Steckelberg v. Randolph, 404 N.W.2d 144, (Iowa 1987). However, due to Goerdt's direction, Shallas did not get legal advice and lost leverage in their negotiating position.

In addition to Count 16 of Goerdt's indictment, Goerdt's was charged with 15 criminal counts including Counts 1-11, bank fraud, Count 13, aggravated identity theft, and Counts 14-15, wire fraud. (Shallas' Ex. S24, App. 1149)

In regards to Counts 1-11 for bank fraud, Goerdt obtained an unauthorized credit card under Peoples, designated himself as the sole authorized officer and used the card to pay for personal expenses. (Shallas' Ex. S24, App. 1149) There can be no dispute Counts 1-11 were committed as an officer of Peoples. First, Goerdt would not have been able to obtain the card but for his position with Peoples. Furthermore, Peoples is incapable of making transactions, but through officials and employees. Transactions on behalf of



Peoples must be facilitated by an actual person. There was no other person capable of making these particular transactions because Goerdt was the sole authorized officer on the account.

Counts 1-11 relate to Goerdt diverting Peoples' customers' loan proceeds for personal use. (Shallas' Ex. S24, App. 1149) At all relevant times, Goerdt was the only loan officer at Peoples. (Shallas' Ex. S24, App. 1149) Therefore, it was only Goerdt facilitating new loan applications and managing the accounts thereafter. The specific acts Goerdt committed could only be committed by someone employed by or authorized by Peoples. Simply put, Goerdt's position with Peoples put him the unique and necessary position to have the ability to commit these specific acts. Counts 1-11 also set forth Goerdt diverted funds the loans of one Peoples' customer to another which is consistent with the fraud he committed regarding the \$5,800 to Art. (Shallas' Ex. S24, App. 1149)

In regards to Count 13, aggravated identity theft, Goerdt used the Social Security number of Peoples customer, "C.S" while committing a felony, specifically, a violation of 18 U.S.C. § 656. (Shallas' Ex. S24, App. 1149) 18 U.S.C. § 656 is in regards theft, embezzlement, or misapplication by a bank officer or employee.

Although not expressly stated in the indictment, it's reasonably inferred "C.S." refers to "Clint Shalla" because the only count in the indictment consistent with 18 U.S.C. § 656 is Count 16, which also refers to "C.S." and relates to Goerdt's theft, embezzlement, or misapplication of the \$2,280 for his in-laws' property taxes.

Furthermore, 18 U.S.C. § 656 is specifically referenced in Count 16. (Shallas' Ex. S24, App. 1149) The aforementioned theft, embezzlement, or misapplication occurred while Goerdt was an officer at County. (Shallas' Ex. S15, App. 1116)

Goerdt had similar duties and authorities at Peoples including processing loan applications and opening accounts. It's common knowledge loan applications and bank accounts generally require customers' Social Security numbers. There can be no dispute Goerdt obtained Clint's Social Security number by way of acts performed pursuant to his position with County and Peoples. The County debit slip which states the withdrawal was "per Chris Goerdt." is indicative Goerdt either directed an employee to process the transaction or he did it himself. (Shallas' Ex. S15, App. 1116) Either way, Goerdt was acting under the scope of his authority as bank officer because achievement could only be reached because of

Goerdt's position and authority. Finally, 18 U.S.C. § 656 sets forth the act is committed by a "bank officer or employee."

Counts 14 & 15 for wire fraud relate to criminal activity by Goerdt while employed at an insurance agency. (Shallas' Ex. S15, App. 1116) In short, after Goerdt left County, Goerdt became employed at an insurance agency during which he solicited customers to sign up for insurance policies and without authorization, Goerdt included insurance policies for customers' children which resulted in Goerdt being paid additional bonuses. (Shallas' Ex. S24, App. 1149) The allegations make clear all acts committed were under the scope of Goerdt's employment as an insurance agent. (Shallas' Ex. S24, App. 1149)

The other criminal acts subject to Goerdt's indictment and convictions were all committed while under the scope of his role as an officer with County, Peoples, and as an insurance agent. In fact, most of the criminal counts relates to offenses that could only be committed as an employee or officer of a bank or the insurance company. The acts subject to the Shallas' claims against Goerdt, County, and Peoples and the Shallas' affirmative defenses all have

identical or similar scenarios, characteristics, and patterns found in Goerdt's criminal convictions.

Shallas' affirmative defenses include fraud, misrepresentation, and equitable estoppel regarding the January 25, 2016 County promissory note. Counts 14 & 15 relate to Goerdt defrauding customers by signing them up for bigger or additional policies by covering customers' children to obtaining compensatory bonuses. It's reasonable to infer bank officers generally receive bonuses or compensation based upon loans processed and/or managed.

The record is clear the Koch Agreement Purchase Price was just under \$500,000. Clint met Goerdt and provided Goerdt all the necessary information and documents to complete the buy back from the Kochs long before the deadline while Goerdt was at Peoples. The credible evidence proves Goerdt agreed to be handle the buyback on behalf of the Shallas and acts such as negotiating with the Kochs were performed pursuant to this agreement. The negotiations are crucial because there is no dispute Goerdt negotiated the initial Kochs' demand of \$1.3 million down to \$1.25.

A bank officer has the incentive to process a loan application promptly if not for any other reason, ensure the notes and mortgages

are executed and the loan is funded and secured locking the borrower in place. Once in place, the lender begins benefiting from the loan as a result of interest. Furthermore, bank officers generally are compensated for the loans they fund and manage. Yet, Goerdt didn't even present the loan to Peoples until approximately one month after the deadline and Goerdt alleges it wasn't until Peoples approved the loan he met with the Kochs and discovered the deadlines. Goerdt then directed Clint not to bother contacting a lawyer because Goerdt already received legal advice and there was nothing that could be done. Even if Goerdt's allegations were true, that still constitutes negligence.

The record is clear Goerdt was the primary party involved in the buy back from the Kochs. The Shallas' involvement was so limited, the Shallas did not even attend the closing because of the bad feelings resulting from what transpired. The record is clear the Shallas negligence claims are not related to a credit agreement. The credit agreement is, in theory, worthless without ensuring the Koch Agreement terms were met first. This is clearly shown by the fact Peoples approved the loan and Goerdt alleges he met with the Kochs and was ready to close the deal when the Kochs refused.

Aside from executing documents, the Shallas were not involved in the buy back process because Goerdts agreed and did act on the Shallas' behalf. There can be no dispute Goerdts was the only one communicating with and negotiating with the Kochs and if it wasn't for these negotiations, the Sale Agreement would never exist because the Shallas weren't comfortable being in the same room as the Kochs for a closing let alone communicate and negotiate with the Kochs. Without the Sale Agreement, the financing from Peoples or County is a moot point. While Goerdts denies he ever agreed to act on the Shallas behalf regarding the buyback, the acknowledged work Goerdts performed related to the buyback is completely consistent with someone acting on behalf of the Shallas and thus, consistent with the Shallas claims Goerdts agreed to act on their behalf.

Taking into consideration the depth of Goerdts involvement and coming back to the incentive Goerdts, Peoples, and County have in closing a loan, it would be irrational for Goerdts to blow the deadline and miss the opportunity to facilitate the financing and receive the associated compensation..... Unless..... (emphasis added) Goerdts saw and was shooting for an even bigger payday. Goerdts presentation to Peoples included recognition the property

value was approximately \$2 million. (Shallas' Ex. S23, App. 1123) If Goerdt is compensated based upon the size of the loan, the bigger the loan, the more Goerdt will receive in compensation. It's reasonably deduced Goerdt recognized with the security assets available, most banks are going to loan substantially more than the approximate \$500,000 needed against the assets. County obviously did.

The record shows the majority of Goerdt's acts involved Goerdt skimming small portions from of large sources of funds. These small portions were actually thousands of dollars but were still proportionally small compared to the source of the funds. A larger loan amount provided Goerdt the opportunity to collect a larger sum of legitimate compensation and to steal a larger amount of cash without being detected or arising suspicion. Its reasonably deduced Goerdt knew how much would be approved against the security assets despite Clint's recent financial problems. The approximately \$500,000 Clint owed to the Kochs narrowed the scope of funds available to steal. However, if the Koch Agreement deadlines were not met, Goerdt recognized the opportunity to negotiate a higher price for the buyback and thus the opportunity to put more money in

his pocket. The aforementioned behavior is consistent with Goerdt's convictions, in particular the acts he committed as an insurance agent where, Goerdt, seeking additional compensation, illegally signed customers up for unwanted policies to increase his bonuses.

In regards to the \$5,800 to Art, this is consistent with Goerdt's acts subject to Counts 1-11 of the indictment, specifically, diverting funds from Peoples' customers' loans for personal use and diverting funds from one customer to another to cover his scheme. In regards to the \$12,000 and \$25,000 cash conversions, these are consistent with Counts 1-11, specifically converting funds from customers' accounts for personal use. The \$2,218.00 related to the property taxes has already been discussed.

While Peoples and County argue Goerdt's acts were inconsistent with role and duties as a bank officer and he was acting in his individual capacity, this argument ignores the obvious fact all of the loans were through Peoples and/or County. There is not a single agreement, other than Goerdt's agreement to represent the Shallas on the buyback, between the Shallas and Goerdt. While Goerdt may have been compensated by Peoples and County for the loans he facilitated, all benefits from the loans belong to the banks. All



promissory notes, mortgages, security agreements, and any other agreements subject to this litigation were between the Shallas and Peoples or County. Furthermore, all funds related to this litigation were advanced by County or Peoples. Not a penny from Goerdts was advanced to the Shallas. If Goerdts was acting in his individual capacity, then Goerdts would have been a party to the agreements and it would have been Goerdts's funds advanced to the Shallas.

County argues the Shallas have no damages because the Shallas received credit for the converted funds. Not one penny of the Shallas' money stolen by Goerdts has been returned by Goerdts. The credits were advanced by County to the Shallas against accounts the Shallas had at County. These credits constitute acceptance of liability by County for Goerdts acts. County can't choose to be liable for some of Goerdts's acts and not others. Either Goerdts was acting under the scope of his position with County or not.

The aforementioned facts make clear each and every act committed by Goerdts subject to the Shallas' claims of fraud occurred while under the scope of his role as an officer of Peoples and County and could not have been accomplished otherwise.

**IV. WHETHER A NEW TRIAL SHOULD BE GRANTED BECAUSE THE VERDICT FAILS TO EFFECTUATE SUBSTANTIAL JUSTICE?**

**PRESERVATION OF ERROR**

Shallas preserved error by moving for a new trial (October 5, 2022 Motion for New Trial, App. 834) and filing their Notice of Appeal. (November 10, 2022 Notice of Appeal, App. 862)

**STANDARD OF REVIEW**

In ruling on Motions for New Trial, the District Court has broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. Iowa R. App. P. 6.904(3)(c). Review of denial of a new trial for failure to administer substantial justice is for abuse of discretion. Crow v. Simpson, 871 N.W.2d 98, 105 (Iowa 2015).

**ARGUMENT**

A new trial can be granted based upon the grounds set forth in Iowa R. Civ. P. 1.1004(1) – (9). In addition, a new trial can be granted when a verdict fails to effectuate substantial justice. Thompson v. Rozeboom, 272 N.W.2d 444, 446-47 (Iowa 1978). For a Court to grant a new trial, some reason must appear in the record.

Thompson v. Rozeboom, Id., North v. Miles Homes, Inc. of Iowa, 204 N.W.2d 850, 861 (Iowa 1973).

It is well recognized the Court is slower to interfere with the grant of a new trial than with its denial. Thompson v. Rozeboom, 272 N.W.2d at 446; Iowa R. App. P. 6.904(3)(d). The ruling on motions for new trial in the District Court has a broad, but not unlimited, discretion in determining whether the verdict effectuates substantial justice between the parties. Thompson v. Rozeboom, Id.; Iowa R. App. P. 6.904(3)(c).

In this case Shallas were handicapped by two errors: the erroneous ruling granting reconsideration of the summary judgment by applying the Credit Agreement Statute of Frauds to Shallas' negligence and other tort claims, and the failure to enforce the agreement to allow Shallas to conduct discovery after the delay caused by the inability to depose Goerdt because of the pending criminal proceedings.

Those issues prejudiced Shallas, and inhibited the Shallas' ability to present their case. This is demonstrated by the verdict. The jury did not even find Goerdt liable for a defalcation he pled guilty to.

## **CONCLUSION**

The plain language and legislative history of Section 535.17 make clear the statute does not bar tort claims. Summary judgment was granted because the Judge felt a wrongly decided Court of Appeals decision controlled. The Trial Judge felt constrained to follow the summary judgment ruling. The problems caused by this unreported decision must be remedied.

## **REQUEST FOR ORAL SUBMISSION**

Shallas request oral argument due to the lengthy factual and procedural record and because the issues in this appeal involve a statute misinterpreted by the Iowa Court of Appeals.

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\_\_\_\_\_  
Peter C. Riley

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that the preceding Appellant's Revised Brief was served on the 20<sup>th</sup> day of July, 2023, upon the Clerk of the Supreme Court and the following by electronic filing:

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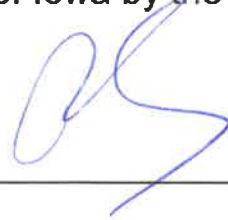
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## CERTIFICATE OF FILING

The undersigned hereby certifies that the preceding Appellant's Revised Brief was filed with the Supreme Court of Iowa by the EDMS system on the 20<sup>th</sup> day of July, 2023.

A handwritten signature in blue ink, consisting of a large loop followed by a series of connected strokes, positioned above a horizontal line.