IN THE SUPREME COURT OF IOWA

Supreme Court Case No. 22-1865

COUNTY BANK,
Plaintiff-Appellee,
v.
CLINTON ALLAN SHALLA AND MICHELLE LYNN SHALLA
Defendants-Appellants,

CLINTON ALLAN SHALLA AND MICHELLE LYNN SHALLA
Counterclaim Plaintiffs-Appellants,
v.
COUNTY BANK,
Counterclaim Defendant-Appellee,

CLINTON ALLAN SHALLA AND MICHELLE LYNN SHALLA
Third Party Plaintiffs-Appellants,
v.
CHRIS GOERDT AND PEOPLES TRUST AND SAVINGS BANK,
Third Party Defendants-Appellees.

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR WASHINGTON COUNTY
HONORABLE MICHAEL SCHILLING AND SHAWN SHOWERS

REVISED FINAL BRIEF OF THIRD PARTY DEFENDANT-APPELLEE CHRIS GOERDT

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None

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ROUTING STATEMENT

This case involves the application of existing legal principles to the facts of the case and, therefore, the case should be transferred to the Court of Appeals pursuant to Iowa R. App. P. 6.1101.

STATEMENT OF THE CASE

The undisputed facts show that Clinton and Michelle Shalla ("Clinton" and "Michelle" individually; collectively the "Shallas"): (1) read the Debt Settlement Agreement before signing it and understood it was Clinton's sole obligation to exercise its Buyback Option provision by its August 15, 2015 termination deadline; (2) Clinton admitted he never communicated with Greg and Heather Koch (the "Kochs") about exercising the Debt Settlement Agreement's Buyback Option prior to its August 15, 2015 termination; (3) Clinton admitted he never discussed with his banker, Chris Goerdt ("Goerdt"), about exercising the Buyback Option or Goerdt's assistance in exercising it prior to its August 15, 2015 termination; and (4) Clinton admitted his strictly oral communications with Goerdt were limited to "secure financing" (*e.g.*, a loan) for Clinton, not to exercise the Buyback Option on Clinton's behalf.

At issue for this Court: given these undisputed facts, are the Shallas' entitled to a reversal of summary judgment and directed verdict in favor of Peoples Trust and Savings Bank ("Peoples") and Goerdt on the Shallas' negligence and fraud claims, wherein the District Court found Goerdt's alleged oral promises to the Shallas about securing financing and exercising the Buyback Option were oral promises made in connection with an unwritten credit agreement and thus unenforceable pursuant to Iowa Code Section 535.17, the Credit Agreement Statute of Frauds?

Secondarily at issue: are the Shallas' entitled to a reversal of the District Court's orders against the Shallas regarding case discovery deadlines and their vicarious liability claim against County Bank and/or Peoples, and a reversal of the Jury's Verdict primarily in favor of Goerdt on the Shallas' conversion claims?

As a matter of law and fact, the answer to these questions is unequivocally "no", and the Shallas' Appeal that the District Court and Jury erred should be disregarded. Instead, the District Court's decisions in favor of County Bank, Peoples, and/or Goerdt and the Jury's verdict primarily in favor of Goerdt were all proper and consistent with Iowa law and facts in the record, and should be affirmed here.

STATEMENT OF THE FACTS

I. Factual and Procedural Background.[1]

A. Overview.

This case arises out of Clinton's failure to timely exercise a Buyback Option to repurchase his farm real estate located in Washington County, Iowa (hereinafter the "Farm") in an agreement he had with the Kochs. Clinton admitted he did not exercise the Buyback Option by its deadline and he admitted he never discussed the Buyback Option deadline before the deadline expired with Goerdt, who, at the time (Fall of 2015), was President at Peoples and assisted Clinton in obtaining financing for the repurchase of Clinton's Farm. Despite Clinton's failure to timely exercise the Buyback Option, Clinton voluntarily proceeded to repurchase his Farm for approximately $1.25 million from the Kochs with a loan from County Bank, which was secured by Goerdt, who, by that time (January 2016), was a loan officer with County Bank. (7/18/23 Revised and Combined Appendix ("App.") 1114 (¶ 2); App. 873 - 898.)

After repurchasing the Farm in early 2016, things did not go well for the Shallas because, by March 2017, the Shallas were not making payments on the

[1] Goerdt disputes numerous alleged facts contained in the Shallas' Statement of Facts in their Brief, as many of them are inaccurate, misleading, inflammatory, and/or irrelevant to this Appeal (or even to this dispute entirely). Despite this, for the sake of brevity, Goerdt will seek to only address relevant facts at the expense of countering all of the Shallas' alleged "facts."

Farm and related loans, and they were in default. (App. 83-84 (¶¶ 13-16).) As a result, County Bank brought an Action to foreclose on the Farm on March 28, 2018. (App. 81-143.)

Two years after their dealings with Goerdt, the Shallas first alleged counterclaims and third-party claims against County Bank, Peoples, and Goerdt, primarily asserting it was Goerdt's fault (who was employed at Peoples and then County Bank, so by the Shallas' logic, these Banks' faults, too) that Clinton did not timely exercise the Buyback Option that, as Clinton later admitted in his deposition and trial, only Clinton knew about. (App. 157-158 (¶¶ 9-17).) The Shallas claim that by missing the Buyback Option deadline – which, again, *Goerdt, Peoples, and County Bank did not know about prior to its expiration* – resulted in an increased loan that was used by the Shallas to repurchase Clinton's Farm, thus allegedly damaging the Shallas. (App. 158-160, 163-165 (¶¶ 17-18, 21, 28, 52-65).) Specifically, the Shallas asserted numerous and sprawling counterclaims / third-party claims stemming from Clinton's failure to exercise the Buyback Option, summarized as follows:

Claims against County Bank. The Shallas asserted a counterclaim alleging fraudulent misrepresentation and nondisclosure against County Bank (hereinafter "Count I"), asserting County Bank made representations and nondisclosures to the Shallas that: (1) the Shallas should obtain $25,000 in cash from Peoples for Goerdt to use for potential incidental expenses at the closing

on the Farm loan, which Goerdt then did not use for that purpose; and (2) Goerdt would render services to the Shallas with respect to the Buyback Option and failing to exercise the knowledge and skill normally possessed by bankers. (App. 160-161 (¶¶ 33-41).)

The Shallas' also asserted a counterclaim against County Bank alleging conversion (hereinafter "Count II"), asserting that the $25,000 in cash the Shallas were to obtain from Peoples for Goerdt to use for potential incidental expenses at the closing on the Farm loan was misappropriated. (App. 160, 162 (¶¶ 29, 42-48).) The Shallas also asserted County Bank was liable for Goerdt's alleged conversion of $2,218. (App. 1124.) At trial, the Shallas asserted County Bank was liable on Counts I and II through a vicarious liability / respondeat superior theory, which was dismissed in favor of County Bank on directed verdict and is subject to this Appeal.

Claims against Peoples and Goerdt. The Shallas' asserted a third-party claim against Peoples and Goerdt for negligence (hereinafter "Count IV"), alleging Peoples and Goerdt failed to ensure a timely exercise of giving notice of the Buyback Option to the Shallas, and Peoples and Goerdt failed to advise the Shallas to seek legal advice after the Buyback Option exercise deadline passed. (App. 163-164 (¶¶ 51-58).)

The Shallas' asserted a third-party claim against Peoples and Goerdt for fraudulent misrepresentation (hereinafter "Count V"), alleging Peoples and

Goerdt made representations that (1) Goerdt would assist Clinton in exercising the Buyback Option with the Kochs; (2) Goerdt failed to advise Clinton that Goerdt did not intend to protect his rights with respect to the Buyback Option; and (3) the Shallas should withdraw $12,000 from their account and provide it to Goerdt, so that Goerdt could pay the Shallas' accountant and farm implement dealership. (App. 164-165 (¶¶ 59-65).) The District Court granted summary judgment in favor of Peoples and directed verdict in favor of Goerdt against the Shallas on Counts IV (negligence) and V (fraudulent misrepresentation) because, pursuant to Iowa Code § 535.17, oral promises made in connection with credit agreements are unenforceable and barred under the statute of frauds. (App. 649-655; App. 804.) These claims are at issue in this Appeal. (Shallas' Am. Fin. Br., p. 10.)

The Shallas' asserted a third-party claim for conversion against Peoples and Goerdt (hereinafter "Count VI"), alleging Peoples and Goerdt misappropriated (1) $12,000 of the Shallas' funds by alleging Goerdt did not pay the Shallas' accountant and farm implement dealership; (2) $25,000 of the Shallas' funds by alleging Goerdt did not use these funds for incidental expenses relating to closing on the $1.2 million Farm repurchase loan, as the Shallas claim Goerdt said he would do while Goerdt was employed at County

Bank[2]; (3) $5,800 of the Shallas funds' were misappropriated by Goerdt; and (4) $2,218 of the Shallas' funds were misappropriated by Goerdt while employed at County Bank. (App. 166 (¶¶ 66-72); App. 1124; App. 1113.) Through summary judgment order and Jury verdict, Peoples and/or Goerdt have largely prevailed on these claims, aside from the $5,800 conversion claim against Goerdt wherein the Jury found in favor the Shallas.

Put another way, the Shallas have lost on almost all their claims against County Bank, Peoples, and Goerdt.

Despite this (and seemingly unfazed by Clinton's repeated admission regarding the Shallas' primary claim that he never told Goerdt about the Buyback Option deadline prior to its expiration), the Shallas *still persist* that County Bank, Peoples, and/or Goerdt committed fraud, negligence, and/or conversion against the Shallas (and that the Banks are vicariously liable for Goerdt's conduct) related to or stemming from Clinton missing the Buyback Option deadline or other oral promises made by Goerdt in connection with an agreement to loan money, with scant evidence of support in the record or Iowa

[2] The District Court granted Peoples' summary judgment motion regarding the $25,000 conversion claim alleged against Peoples, and it does not appear to be an issue on Appeal here. (App. 597.) Similarly, the District Court granted summary judgment in favor of Peoples and Goerdt on the Shallas' claims for "cross-petition liability" (Count III) and "aiding and abetting" (Count VII), and which does not appear to be an issue on Appeal here by the Shallas. (App. 597.) Accordingly, no further briefing of these issues is necessary.

law. The following key events support affirming the District Court's various Orders and Jury Verdict in favor of County Bank, Peoples, and Goerdt:

B. The 2014 Farm Foreclosure of Clinton's Farm.

On February 10, 2014, a foreclosure decree was entered against Clinton in favor of Washington State Bank concerning Clinton's Farm. (App. 1078-1088.) Shortly after the foreclosure decree was entered, the Kochs approached Clinton about purchasing his Farm to avoid a sheriff's sale. (App. 288-289.) On April 15, 2014, the Kochs and Clinton entered into a "Debt Settlement Agreement" (App. 1096-1102), and the Kochs obtained the Shallas' Farm. (App. 1090-1095, 1104-1107.)

C. The Debt Settlement Agreement, Its Key Terms, And The Shallas' Admissions Relating To The Same.

Under the Debt Settlement Agreement, the Shallas delivered a deed in lieu of foreclosure for the Farm, and in exchange the Kochs granted Clinton an exclusive option (the "Buyback Option") to repurchase the Farm for the amount the Kochs paid to Washington State Bank, approximately $497,000, plus certain other costs and fees incurred by the Kochs. (App. 1097, 1099-1100.) The Debt Settlement Agreement executed by the Kochs and Clinton provided the following Buyback Option terms:

> 7. Option to Repurchase. Pursuant to Iowa Code § 654.19, upon Shalla and his spouse's execution and delivery of the Deed referred to in paragraph 6 above, Kochs shall grant an option, exclusive to Shalla, to purchase the Conveyed Real Estate, as

> specifically described in paragraph 6 above, said option upon the following terms and conditions: . . .
>
> (c) Option Period. The purchase option granted hereunder shall be contingent upon the satisfaction of the conditions as hereinafter set forth in paragraph 7(d) and shall be exercisable only upon [Clinton] Shalla giving to Kochs, *not later than August 15, 2015, written notice of his intent to exercise the option and close the purchase by October 15, 2015*, said written notice to be accompanied by an irrevocable commitment for the financing of the Purchase Price as provided for hereunder. *Upon [Clinton] Shalla's failure to either give the notice of intent to exercise the option by August 15, 2015, or the failure to close said purchase by October 15, 2015, then, in either of such events, the option shall terminate and thereafter shall be null and void*.

(*See* App. 1099-1100 (¶ 7(c)) (emphases added).)

The Shallas have made numerous key admissions about the Debt Settlement Agreement that are dispositive to the issues here: (1) Clinton acknowledged that he reviewed the Debt Settlement Agreement before he signed it. (App. 1539 (Trial Transcript-Day 4, p. 159, ln 4-6); App. 265-271, 290, 294); (2) Michelle acknowledged that she did not review the Agreement until after it was signed. (App. 1577-1578 (Trial Transcript-Day 5, p. 44-45); App. 319); (3) Clinton acknowledged that under the Debt Settlement Agreement it was *his* (and his alone) obligation to exercise the Buyback Option. (App. 1540 (Trial Transcript-Day 4, p. 160, ln 2-4); App. 294); (4) Clinton admitted that he had no written communications with the Kochs about exercising the Buyback Option (written notice required per its terms) before it terminated on August 15, 2015. (App. 1540-1541 (Trial Transcript-Day 4, p.

160-61); App. 291-292); (5) Clinton admitted that he *never* discussed with Goerdt exercising the Buyback Option, its expiration date, or whether Goerdt was going to assist him in exercising the Buyback Option. (App. 1541-1543 (Trial Transcript-Day 4, p. 161-163); App. 298-299); (6) Indeed, Clinton admitted he did not exercise the Buyback Option by its deadline. (App. 1540-1543 (Trial Transcript-Day 4, pp. 160-163)); (7) The purpose of Clinton's communications with Goerdt (while Goerdt was employed at Peoples) was to "secure financing" for the Farm – not to exercise the Buyback Option. (App. 1541 (Trial Transcript-Day 4, pp. 161); App. 298-299); and (8) the Shallas have conceded that any agreements Goerdt allegedly made with them to obtain financing were oral and not written. (App. 1538-1544 (Trial Transcript-Day 4, p. 158-164); App. 1582-1584 (Trial Transcript-Day 5, p. 52-54); App. 300-301, 321.)

D. The Shallas (Not Goerdt, Peoples, Nor County Bank) Failed To Exercise The Buyback Option By The Required Deadline, But the Shallas Persisted to Buy the Farm Anyway.

As set forth above, the Buyback Option had to be exercised by August 15, 2015. Despite this clear deadline (*which only the Shallas knew about*), Clinton failed to give the required written notice to the Kochs by the deadline of his intent to exercise the Buyback Option. In fact, Clinton admitted he made no efforts to contact the Kochs before the Buyback Option period expired after

the signing of the Debt Settlement Agreement in April of 2014. (App. 1540-1541 (Trial Transcript-Day 4, p. 160-61).) Again, Clinton never discussed exercising the Buyback Option or its deadline with Goerdt (or Peoples or County Bank). (App. 1541-1543 (Trial Transcript-Day 4, p. 161-63); App. 298-299.)

Accordingly, after August 15, 2015, Clinton – due to his own neglect – was no longer entitled to repurchase the Farm at the lower purchase price, and, as a result, Clinton decided to negotiate a new purchase price with the Kochs. (App. 1544-1546 (Trial Transcript-Day 4, p. 164-166); App. 1099-1100; App. 1114.) Clinton made no effort to seek the advice of an attorney after August 15, 2015, and admitted he could have but did not. (App. 1543-1545, 1550-1551 (Trial Transcript-Day 4, p. 163-65, 173-74).) Rather, Clinton proceeded to negotiate a new purchase price with the Kochs through Goerdt. (App. 1545-1546 (Trial Transcript-Day 4, p. 165-66).) Clinton conceded that Goerdt was not a lawyer, was not his lawyer, nor any lawyer working at Peoples was Clinton's personal lawyer. (App. 1543-1545, 1550-1551 (Trial Transcript-Day 4, p. 163-65, 173-74).)

Ultimately, Clinton and the Kochs agreed to a buyback price of approximately $1.25 million on December 10, 2015 memorialized in a written purchase agreement. (App. 1114 (¶ 2); App. 310.)

Prior to the execution of the Purchase Agreement, Clinton alleges Goerdt told him to withdraw $12,000 in cash from his account and give it to Goerdt so Goerdt could use the cash to pay the Shallas' accountant's and implement dealership's past due bills on or about November 25, 2015. Clinton asserts Goerdt did not do this (and claims Goerdt converted the money for his own use). Goerdt denies this. (App. 1270 (p. 105, ln 11-17).)[3]

Shortly after the Purchase Agreement was executed, Goerdt left employment at Peoples and started employment at County Bank in January 2016. (App. 1268 (p. 99, ln 20-23).) On January 25, 2016, the Shallas received a loan from County Bank (not Peoples) to finance the Purchase Agreement to buy back the Farm from the Kochs. On that same date, County Bank issued a cashier's check on behalf of the Shallas for $30,405.80 payable to Peoples. (App. 277-280, 311-314.) Clinton claims that Goerdt had told him to obtain $25,000 cash from the proceeds of the cashier's check. (App. 160 (¶¶ 28-29).) Clinton claims he then gave the cash to Goerdt so Goerdt could cover incidental closing costs for the loan. (*Id.*) Clinton asserts that Goerdt did not do this (and alleges Goerdt converted the money for his personal uses). Goerdt denies receiving this money from Clinton. (App. 1257-1258 (pp. 55-59).)[4]

[3] Ultimately, the Jury, after weighing the evidence, found in favor of Goerdt on this issue. (App. 806.)

[4] Ultimately, the Jury, after weighing the evidence, found in favor of Goerdt on this issue. (App. 807.)

E. The Shallas Failed To Pay Their Farm Loan, Resulting In A Second Foreclosure Action Against Them.

After obtaining their $1.3 million loan from County Bank, the Shallas made only one payment on it, and then stopped paying off the loan. (App. 83-84 (¶¶ 13-16); App. 873-898.) At the same time, they completed at least $164,112.50 worth of renovations of their home. (App. 1571-1572 (Trial Transcript – Day 5, pp. 28-29).) Goerdt was terminated from County Bank's employ in or about May 2016. (App. 1009.) Eventually, County Bank credited the Shallas in the amount of $27,218 in relation to the criminal allegations surrounding Goerdt. (App. 741-742 (¶¶ 1-10); App. 1044; App. 1049.) The Shallas continued to fail to pay the loan they agreed to.[5] (App. 83-84 (¶¶ 13-16); App. 873-898.)

On March 28, 2018, two years after the Shallas' last payment, County Bank filed this Action against the Shallas for their failure to pay the loan they executed and agreed to pay for the buyback of the Farm. In response, on July 25, 2018 (*more than two years after the Shallas' dealings with Goerdt*) the Shallas filed counterclaims against County Bank and third-party claims against Peoples and

[5] The Shallas' financial issues are all their own making, and predate their dealings with County Bank, Peoples, and/or Goerdt. For instance, Clinton admitted at trial that, despite making income, he has not filed or paid income taxes since 2014 – *over 7 years*. (App. 1523-1525 (Trial Transcript – Day 4, p. 136-38).) The Shallas have a federal tax lien against them. (App. 1028-1032.)

Goerdt, alleging negligence, fraud, and conversion (among other claims not subject to this Appeal).

F. Ample Discovery Was Conducted by the Parties, Including By The Shallas.

Following the assertion of counterclaims and third-party claims by the Shallas and County Bank's, Peoples', and Goerdt's filing of answers and defenses to the same, the Parties engaged in extensive discovery which included but is not limited to initial disclosures, interrogatories, document productions, and a half dozen depositions. The Parties' discovery deadline was December 27, 2019. (App. 868 (¶ 4); and App. 639-641 (¶¶ 1-4).) The Shallas did not file any motion prior to the expiration of the discovery deadline that they needed additional time to conduct discovery, except a request to take Goerdt's deposition following his criminal sentencing before responding to summary judgment motions. (App. 341-343 (¶¶ 1-10, 13); and App. 865.)

G. Partial Summary Judgment Was Granted Against The Shallas, Foreshadowing The Ultimate Outcome At Trial.

On June 25, 2019, Peoples moved for partial summary judgment on Counts IV (negligence) and Counts V (fraudulent misrepresentation), among other claims. (App. 213-217; App. 331-333.) On June 28, 2019, Goerdt joined Peoples' summary judgment motion on the same legal and factual bases. (App. 331-333.) On July 29, 2019, County Bank filed its motion for summary judgment. (App. 345-347.)

On May 28, 2021, during a court status conference, Shallas' counsel raised the possibility of wanting to conduct additional discovery before filing a resistance to summary judgment, to which counsel objected. At that time, the Court advised Shallas' counsel to file a motion (pursuant to Iowa Civ. P. 1.981(6)) on this issue, which Shallas declined to do. Instead, on June 21, 2021, the Shallas moved forward with filing their Resistance to the pending summary judgment motions filed by County Bank, Peoples, and Goerdt. (App. 400-402; App. 403-420; App. 478-492.) Accordingly, the Shallas' Resistance conceded the Shallas did not find any additional discovery was necessary (as nowhere in their briefing did the Shallas assert they needed additional discovery nor did they submit the required Iowa R. Civ. P. 1.981(6) affidavit regarding the same). (*Id.*)

On August 25, 2021, this Court entered an Order granting partial summary judgment to Peoples and Goerdt on the following claims:

(1) The Shallas' Count III against Peoples and Goerdt alleging "cross petition liability", asserting Peoples and Goerdt are liable for County Bank's claim against the Shallas (App. 584, 597);

(2) The Shallas' Count V (fraudulent misrepresentation) only as to Michelle Shalla's claim in connection with the Buyback Option (*id.*, at 593, 597);

(3) The Shallas' Count VI (conversion) only as to the claim of conversion against Peoples in the $25,000 transaction (*id.*, at 594-595, 597), and

(4) The Shallas' Count VII (aiding and abetting) against Peoples (*id.*, at 594-595, 597).

Nevertheless, the Court (initially) denied County Bank's, Peoples', and Goerdt's summary judgment motions as to the following claims: (1) the Shallas' counterclaims Counts I and II against County Bank alleging fraudulent misrepresentation and nondisclosure and conversion, respectively (App. 595-597); and (2) the Shallas' Counts IV (negligence) and V (fraudulent misrepresentation) as to Clinton's claim in connection with the Buyback Option (App. 584-593, 597).

On September 9, 2021, Peoples filed a 1.904 Motion to Reconsider, Amend, or Enlarge ("1.904 Motion"), seeking a reconsideration of the Court's denial of summary judgment on Counts IV (negligence) and V (fraudulent misrepresentation) alleged against Peoples and Goerdt. (App. 614-624; App. 633-638.).

Around this same time, the Shallas – two years after the discovery deadline had lapsed – untimely moved to extend case deadlines (supposedly for more time to take additional discovery), which Peoples resisted. (App. 600-611; 9/30/21 Shallas' Proposed Trial and Discovery Plan (Dkt. #D0150), pp.

1-3; App. 867-871; and App. 639-642.) Ultimately, the District Court, in its discretion, entered an order denying the Shallas' extension motions because the "interests of justice are not served by further extending deadlines" as the case "has been on file for an extended time period" and adopted the reasoning set forth in Peoples' Resistances. (App. 645; App. 867-871; and App. 639-642.)

Then, on December 9, 2021, the Court granted Peoples 1.904 Motion, entering summary judgment against the Shallas' claims on Counts IV (negligence) and Count V (fraudulent misrepresentation) that were asserted against Peoples and Goerdt as follows:

> No written "loan agreement" exists between the Bank [Peoples] and the Shallas. However, the facts set out above demonstrate that Goerdt, while employed with the Bank, made an oral promise to the Shallas to loan money to them to cover the option contract with the Koch's . . . Oral promises are generally enforceable as contracts. An oral promise or contract to loan money or to finance a transaction is a "credit agreement" under Iowa Code Section 535.17(5)(c) . . . Generally, the statute of frauds bars claims based upon credit agreements, which are not written . . . Here, the oral credit agreement, the agreement to secure financing and a loan for the Koch option agreement, was not written. *The statute of frauds thus bars evidence of the oral credit agreement. . . . the court concludes that counts IV [negligence] and V [fraudulent misrepresentation] are based upon oral promises made in connection with the credit agreement. . . . the Bank is granted summary judgment against both of the Shallas on counts IV [negligence] and V [fraudulent misrepresentation].*

(App. 649-655 (emphasis added).)[6] Following the Court's 12/9/21 Order, the Action proceeded to Trial, which was set to begin September 13, 2022.

H. The Matter Proceeds To Trial, and County Bank, Peoples, and Goerdt Largely Prevail On All Issues.

On September 12, 2022, just prior to trial and upon stipulated motion by the Shallas and Peoples and the Court's approval of the same, the Shallas' conversion claims against Peoples were severed from the upcoming Trial. (App. 773-776; App. 777-778.)

Beginning on September 13, 2022, a five-day jury trial was conducted on the Shallas' counterclaim Counts I and II against County Bank and the Shallas' third-party claim Counts IV, V, and VI against Goerdt. County Bank also conducted its foreclosure action against the Shallas in equity before this Court in the same proceeding.

On September 20, 2022, following the close of the Shallas' case-in-chief, County Bank moved for directed verdict on the Shallas' counterclaim Counts I (fraud) and II (conversion) and Chris Goerdt moved for directed verdict on the

[6] The Court's 12/9/21 Order did not reference whether summary judgment on Counts IV (negligence) and Counts V (fraudulent misrepresentation) was explicitly granted in favor of Goerdt, who joined Peoples' summary judgment motion, and was Peoples' President and made the oral promises to Clinton in connection with the credit agreement on behalf of Peoples. These claims against Goerdt proceeded to Trial, and the District Court granted directed verdict in favor of Goerdt on Counts IV (negligence) and V (fraudulent misrepresentation). (App. 804.)

Shallas' third-party claims Counts IV (negligence), V (fraud), and VI (conversion). After careful consideration, this Court granted directed verdict for County Bank on Counts I and II, dismissing the fraud, vicarious liability, and conversion claims of the Shallas. (App. 813.) County Bank also moved for equitable relief on its foreclosure action, which the Court granted. (App. 815-822.)

Likewise, after careful consideration, this Court also granted directed verdict for Goerdt on Counts IV (negligence) and V (fraud). (App. 804.) The Shallas' Count VI (conversion) against Goerdt proceeded to the Jury for its determination and verdict.

The Jury heard closing arguments and considered the Shallas' remaining conversion claim against Goerdt (Count VI). (App. 793-794.) After careful consideration of the evidence, the Jury found in favor of the Shallas on one allegation of conversion, finding Goerdt committed conversion by misappropriating $5,800 of the Shallas' money and awarded them that amount in actual damages. The Jury found in favor of Goerdt on the other allegations of conversion and thus did not award other damages, including punitive damages, for the Shallas. (App. 806-809; App. 795; and App. 810-811.)

On September 22, 2022, following the entry of judgment in favor of the County Bank and Goerdt, Peoples moved to enforce the 9/12/22 Stipulation between Peoples and the Shallas, requesting this Court dismiss the remaining

conversion claim against Peoples. (App. 823-830.) Peoples' and the Shallas' Stipulation specified that a jury finding in favor of Goerdt on the $12,000 conversion claim would preclude recovery by the Shallas, and that the Shallas cannot recover on the $5,800 conversion from Peoples. (App. 825-826, 828.)

On September 28, 2022, the Court granted Peoples' Motion to Enforce the 9/12/22 Stipulation between the Shallas and Peoples, dismissing the remaining claim against Peoples. (App. 831-832.)

On October 5, 2022, the Shallas filed a sprawling Motion for New Trial against County Bank, Peoples, and Goerdt, seemingly requesting a new trial on all issues decided by the District Court, including summary judgment orders through trial and jury's verdict. (App. 834-837.)

On October 7, 2022, County Bank filed its Resistance to the Shallas' Motion for a New Trial. (App. 839-842.) On October 14, 2022, Goerdt filed his Resistance. (App. 843-859.) That same day, the District Court entered its Order denying the Shallas' Motion for a New Trial. (App. 860.)

On November 10, 2022, the Shallas filed their Notice of Appeal, which is now pending before this Court and to the issues that will now be addressed, below. (App. 862-864.)

ARGUMENT

I. The District Court Did Not Err in Granting Summary Judgment nor Directed Verdict in Favor of Peoples and Goerdt on Shallas' Fraud and Negligence Claims Pursuant to Iowa Code § 535.17.

The District Court properly granted summary judgment to Peoples and directed verdict to Goerdt on the Shallas' claims of negligence and fraud because those claims are barred by Iowa Code § 535.17, as the Shallas' claims relate to oral statements made in connection with a credit agreement that were not in writing. Contrary to the Shallas' contentions to narrowly interpret Iowa Code § 535.17, the statute, the legislature, and many courts (in Iowa and other jurisdictions) support a broad, inclusive interpretation of Iowa Code § 535.17 that bars claims both in tort and in contract regarding credit agreements that are not in writing. Accordingly, the District Court's decisions in favor of Peoples and Goerdt at summary judgment and directed verdict, respectively, were correct as a matter of law and should be affirmed.

A. Error Preservation and Scope and Standard of Review.

Goerdt does not dispute the Shallas preserved error on this issue. Summary judgment rulings are reviewed for corrections of errors at law. *See, e.g., Susie v. Family Health Care of Siouxland, P.L.C.*, 942 N.W.2d 333, 336 (Iowa 2020) (affirming district court's grant of summary judgment in favor of defendants); *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 720 (Iowa 1998)

(affirming district court's grant of summary judgment in favor of bank pursuant to Iowa Code § 535.17 on the claim that bank orally represented to customer that it would honor customer overdrafts); *Raccoon Valley State Bank v. Gratias*, No. 04-1854, 2006 WL 3798902, at *2, *4 (Iowa Ct. App. Dec. 28, 2006) (unpublished) (affirming district court's grant of summary judgment in favor of bank and determination that Section 535.17 barred defendants' misrepresentation (tort) counterclaim). Summary judgment is appropriate when no disputed issue of material fact exists and the moving party is entitled to judgment as a matter of law. *Id.* "The resistance must set forth facts which constitute competent evidence showing a prima facie claim. By requiring the resister to go beyond generalities, the basic purpose of summary judgment is achieved: to weed out '[p]aper cases and defenses' in order 'to make way for litigation which does have something to it.'" *Slaughter v. Des Moines University College of Osteopathic Medicine*, 925 N.W.2d 793, 808 (Iowa 2019) (*quoting Thompson v. City of Des Moines*, 564 N.W.2d 839, 841 (Iowa 1997)).

Similarly, the standard of review for directed verdicts is for correction of errors at law. *Dettmann v. Kruckenberg*, 613 N.W.2d 238, 250–51 (Iowa 2000) (affirming district court's grant of summary judgment in favor of defendants' on plaintiff's negligence claims). In such cases, the Court reviews the evidence presented in the light most favorable to the nonmoving party to determine whether a fact question was generated. *Id.* (citing *Mensink v. American Grain*, 564

N.W.2d 376, 379 (Iowa 1997)). Where substantial evidence does not exist to support each element of a plaintiff's claim, the court may sustain the motion. *Dettmann, 613 N.W.2d at 250-51* (citing *Olson v. Nieman's Ltd.,* 579 N.W.2d 299, 313 (Iowa 1998)). "Evidence is substantial if reasonable minds could accept it as adequate to reach the same findings." *Id.* In other words, the District Court's directed verdict ruling will be upheld if the evidence in the record, viewed in the light most favorable to the nonmoving party, supports the trial court's ruling. *Schmitt v. Koehring Cranes, Inc.*, 798 N.W.2d 491, 494 (Iowa Ct. App. 2011).

B. The Shallas' Claims are Barred by Iowa Code § 535.17, as the Iowa Legislature Made Clear Iowa Code § 535.17 Must Be Applied Expansively.

The Shallas desire a narrow interpretation of Iowa Code § 535.17, citing selectively to statutory language and legislative history to contend that Iowa Code § 535.17 only applies to contract claims. The Shallas' contentions are misplaced, as Iowa Code § 535.17 is to be broadly interpreted and applied, as the legislature and courts (in Iowa (including the District Court) and other jurisdictions interpreting similar statutes) have correctly decided, as set forth below.

The plain language of the statute controls its interpretation. *Estate of Ryan v. Heritage Trails Assocs., Inc.*, 745 N.W.2d 724, 730 (Iowa 2008) ("When the

statute's language is plain and its meaning clear, we look no further.") (citing *State v. Snyder*, 634 N.W.2d 613, 615 (Iowa 2001). Moreover, a statute must be read as a whole. *Porter v. Harden*, 891 N.W.2d 420, 425 (Iowa 2017) ("Statutes need to be read as a whole, both in initially determining whether ambiguity exists, and, later in construing the statute."). Contrary to the Shallas' proffered interpretation, Iowa Code § 535.17 shows the statute's broad definitions and inclusive language. For example, Iowa Code § 535.17, provides that:

> A credit agreement is not enforceable in contract law by way of action or defense by any party unless a writing exists which *contain all the material terms of the agreement* and is signed by the party against whom enforcement is sought.

Iowa Code § 535.17(1) (emphasis added). Iowa Code § 535.17(5)(b) is broad and includes precisely the type of alleged oral promise on which the Shallas premise their claims:

> "Contract" means 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 on instruments and similar documents or on the contract doctrine of promissory estoppel.

Iowa Code § 535.17(5)(b). Likewise, the definition is equally broad and applicable here:

> "Credit agreement" means 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.

Iowa Code § 535.17(5)(c). Subsection 5(b) validates that any "promise" to extend credit, the breach of which gives rise to a claim, is subject to the requirements of § 535.17(1), whether the claim is characterized as a negligent or fraudulent promise to make a loan, an intentional interference with other contracts by refusing to make a loan, or a breach of a traditional common law "contract" to make a loan, *i.e.*, an accepted offer with consideration. *E.g.*, *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 720 (Iowa 1998) (affirming district court's grant of summary judgment under § 535.17 on the claim that bank orally represented to customer that it would honor customer overdrafts); *Raccoon Valley State Bank,* 2006 WL 3798902, at *2, *4 (affirming district court's grant of summary judgment and determination that Section 535.17 barred misrepresentation claim). The plain language in defining "contract", "credit agreement" and other terms used in the statute so broadly clearly means that a lender and its employees commonly have a number of obligations that can be construed as "promises" during the lending process. Moreover, "contract" being broadly defined demonstrates the clear meaning that all promises made by a lender as part of the lending process are part of a "credit agreement." In other words, a lender's interactions are not just limited to loaning money but includes other ancillary services subject to Iowa Code § 535.17's protections.

Further, Iowa Code § 535.17(5)(a) is also broad and inclusive, which states that an "action" – to which the § 535.17 requirements apply – "includes

petition, complaint, counterclaim, cross-claim, or *any other pleading or proceeding to enforce affirmatively any right or duty or to recover damages for the nonperformance of any duty*." *Id.* (emphasis added); *Raccoon Valley State Bank*, 2006 WL 3798902, at *1, *4 (affirming summary judgment, dismissing bank customer's misrepresentation (tort) counterclaim against bank based on oral statement modifying written credit agreement).[7]

Subsections 535.17(6) and (7) make clear that Iowa Code § 535.17 is to be broadly interpreted and applied expansively:

> 6. This section shall be interpreted and applied purposively to ensure that contract actions and defenses on credit agreements are supported by clear and certain written proof of the terms of such agreements to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements.
>
> 7. This section entirely displaces principles of common law and equity that would make or recognize exceptions to or otherwise limit or dilute the force and effect of its provisions concerning the enforcement in contract law of credit agreements or modifications of credit agreements. However, this section does not displace any additional or other requirements of contract law, which shall continue to apply, with respect to the making of enforceable contracts, including the requirement of consideration or other basis of validation.

[7] Similar to *Raccoon Valley*, the Shallas' claim that Goerdt promised to "take care of" financing or other actions in connection with securing financing for their repurchase of the Farm is an "action" to "enforce affirmatively any right or duty to recover damages for the nonperformance of any duty." *Id.*

Iowa Code § 535.17(6) & (7). Accordingly, the Iowa legislature made clear that § 535.17 must be applied expansively by expressly providing this statute "entirely displaces the principles of common law and equity that would make or recognize exceptions to otherwise limit or dilute the force and effect of its provisions . . . ." *Id.* at § 535.17(7). Further, the statute directs courts to interpret and apply the code section "purposively" in order "to protect against fraud and to enhance the clear and predictable understanding of rights and duties under credit agreements." *Id.* at § 535.17(6). Indeed, the Iowa Supreme Court has held "Iowa Code section 535.17(6) controls over any ambiguity in the provisions of section 535.17 and clearly requires any alleged credit agreements must be in writing to be enforceable . . .." *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 722 (Iowa 1998).

Further, the legislative history supports the broad application Iowa Code § 535.17, contrary to the Shallas' contention that the legislative history intended a narrow interpretation of the statute. *See Kay-Decker v. Iowa State Bd. Of Tax Review*, 857 N.W.2d 216, 223 (Iowa 2014) ("If the statute is unambiguous, we look no further than the statute's express language. If, however, the statute is ambiguous, we inquire further to determine the legislature's intent in promulgating the statute.") (internal quotations omitted). While Goerdt does not believe there is any ambiguity in the statute (nor the caselaw) in its applicability to contract and tort claims to justify looking at the legislative

history, even if there was, the legislative history cited by Shallas does not support their contentions. As described above, Subsection 5(b) contains a broad definition of "contract" and Subsections 6 and 7 also contains broad language and instruction to apply the statute "purposively." Thus, the language of Section 535.17 seemingly offers more protection to lenders than the earlier draft legislation proposed in House File 677.

C. Iowa Courts Have Broadly Applied Iowa Code § 535.17 In Accord With the Statute, And Courts In Other Jurisdictions Have Done The Same With Similar Statutes.

Pursuant to the statute's express intent to apply it "purposively", Iowa courts have consistently and broadly applied Iowa Code § 535.17. The statute not only applies to the specific promise to make a loan, but also to any ancillary promises or activities made in connection with the promise to make a loan, thus requiring a writing to be enforceable under Iowa Code § 535.17. *E.g.*, *Clinton Nat. Bank v. Saucier*, 580 N.W.2d 717, 722 (Iowa 1998) (affirming summary judgment in favor of the bank on a customer's counterclaim that alleged the bank breached an oral agreement to honor the customer's overdrafts, because even assuming the bank made oral statements to its customer that it would honor overdrafts, such statements were "immaterial" because payment of an overdraft is subject to Section 535.17 and any ancillary statements made by the bank to honor overdrafts must be in writing to be

enforceable); *Raccoon Valley State Bank*, 2006 WL 3798902, at *4 (holding a customer's misrepresentation claims against the bank – alleging the bank orally agreed to accept a certain amount of money that modified the agreed-to payoff amount in a written credit agreement – was barred under Section 535.17, as the alleged oral agreement by a bank to accept a lesser payoff amount (an ancillary activity to a loan agreement) was not enforceable unless it was in writing); *Gieger v. Peoples Trust and Savings Bank*, No. 18-1428, 2019 WL 4678179, at *4-6 (Iowa Ct. App. Sept. 25, 2019) (Unpublished) (affirming judgment in favor of defendant bank under Section 535.17, finding that the bank employee's (Goerdt's) alleged oral statements agreeing to assist a customer with ancillary matters to an agreement to secure financing (like obtaining appraisals) were subject to the statute, and all the bank employee's (Goerdt's) alleged promises or misrepresentations were unenforceable because none were in writing).

In *Gieger,* the Iowa Court of Appeals held that oral statements made by a bank representative (Goerdt) to assist a customer with obtaining appraisals were unenforceable pursuant to Iowa Code § 535.17. *Gieger,* 2019 WL 4678179, at *4-6. The Court in *Gieger* held the alleged promises were made in relation to or connection with a credit agreement. *Id.* at *5-6. In its holding and review of the authority, the Court in *Gieger* also recognized a key point:

> The *majority of the cases* hold that a credit agreement statute of frauds *bars all actions* based upon an alleged oral credit agreement,

> *regardless of the theory of recovery asserted*. The reasoning behind these decisions is that to accept such allegations as affording recovery, grounded in concepts other than breach of contract, *simply provides an easy avenue for resourceful attorneys to circumvent the credit agreement statute, thus defeating the legislative intent to prohibit claims stemming from hard to defend oral representations*.

Id. at *5 (quoting *Horseshoe Entertainment L.P. v. Gen. Elec. Capital Corp.*, 990 F. Supp. 737, 743 (E.D. Mo. 1997)). In recognizing that key point, the Court further held that Iowa Code § 535.17 "applies broadly" and recognized that it applies "even to an action upon an agreement with a creditor to enter into a new credit agreement . . . *regardless of whether the present cause of action is labeled* as a breach of contract, *misrepresentation, fraud, deceit*, promissory estoppel, *its substance is that of an action upon an agreement by a bank to loan money*." *Id.* at *5 (quoting *Ohio Valley Plastics, Inc. v. Nat'l City Bank*, 687 N.E.2d 260, 264–65 (Ind. Ct. App. 1997)). Accordingly, the Court in *Geiger* held "[w]e find this rationale persuasive and conclude the district court did not err in declining to allow the plaintiffs' end run by arguing their claims are torts." *Id.* at *6. To these claims against a lender made in connection with an oral agreement to lend money, the Court in *Geiger* held "the provisions of section 535.17 applies." *Id.* at *6.

For their part, the Shallas almost entirely ignore *Gieger* and its persuasive nature on the issues (tacitly recognizing, if re-confirmed here, it is dispositive against the Shallas' fraud and negligence claims), and only state that *Gieger* was "wrongly decided" by the Iowa Court of Appeals and the appellate courts

never examined the legislative history of Iowa Code § 535.17 (which is inaccurate, as the Court in *Geiger* recognized the legislative intent of the credit agreement statute of frauds (*id.* at *5)), without any further explanation why *Gieger* was "wrongly decided."[8]

Similarly, courts in *other* jurisdictions, with similar credit agreement statutes of frauds, have also applied those statutes expansively, and those courts have focused on the importance of an entire agreement between a bank and its customer be in writing to be enforceable. *E.g.*, *Whitney Bank v. SMI Companies Global, Inc.*, 949 F.3d 196, 205 (5th Cir. 2020) (applying Louisiana law, holding the purpose of the Louisiana Credit Agreement Statute "is to prevent potential borrowers from bringing claims against lenders based on oral agreements."); *Twiford Enterprises, Inc. v. Rolling Hills Bank and Trust*, Case No. 20-CV-28-F, 2020 WL 5248561, at *7-8 (D. Wyo. Aug. 5, 2020) (applying Iowa law and applying the rationale of *Gieger*, granting summary judgment in favor of defendant bank relating to plaintiff's fraud and negligence claims, as the claims were not enforceable under Iowa Code § 535.17 statute of frauds because the claims "depend upon oral representations in relation to an agreement by a bank to loan money"); *Ramsey v. Oklahoma*, No. 08-CV-0239-CVE-SAJ, 2008 WL

[8] To the extent the Shallas are attempting to save the development of an argument for their Reply brief, this is improper and deprives the appellees of any opportunity to respond on the merits, and therefore the Shallas' argument is waived. *See* Iowa R. App. P. 6.903(2)(g)(3); *Villa Magana v. State*, 908 N.W.2d 255, 260 (Iowa 2018); *Goodenow v. City Council*, 574 N.W.2d 18, 27 (Iowa 1998).

4936316, at *5-6 (N.D. Okla. Nov. 17 2008) (applying Oklahoma law and granting defendant's motion to dismiss by Oklahoma's credit agreement statute of frauds to plaintiffs' tort claims, finding the alleged oral agreements for advisory services were made in connection with a loan agreement, not in writing and thus unenforceable, finding "the oral agreement contained conditions that plaintiffs believe were part of the underlying credit agreement and *plaintiffs may not attempt to isolate the oral agreement from the credit agreement to avoid application of the statute of frauds*") (emphasis added); *Horseshoe Entertainment L.P.*, 990 F. Supp. 737, 741 (applying Missouri law, holding the "goal of credit agreement statutes was to prevent bank customers from bringing baseless lender liability claims against banks alleging breaches of undocumented side agreements between customers and one or more bank officers.") (internal citations omitted); *Avanti Med. Group, LLC v. BMO Harris Bank, N.A.*, 25 N.E.3d 691, 694 (Ill. App. Ct. 2014 (applying Illinois law; "There is no limitation as to the type of actions by a debtor which are barred by the [Illinois Credit Agreement] Act, so long as the action is in any way related to a credit agreement . . . [and] [t]he bar applies regardless of whether the claims arise out of contract or tort law.") (internal quotations and citations omitted).

D. The District Court Correctly Granted Summary Judgment and Directed Verdict in Favor of Peoples and Goerdt, Respectively, that Iowa Code § 535.17 Applies, Barring the Shallas' Fraud and Negligence Claims.

The District Court got it right: it correctly analyzed and applied Iowa Code § 535.17 and case law authority to the Shallas' asserted fraud and negligence claims, finding the statute barred these claims because the claims "are based upon oral promises Goerdt **made in connection with the credit agreement**." (App. 648 (emphasis in original).) The District Court held:

> No written "loan agreement" exists between the Bank [Peoples] and the Shallas. However, the facts set out above demonstrate that Goerdt, while employed with the Bank, made an oral promise to the Shallas to loan money to them to cover the option contract with the Koch's . . . Oral promises are generally enforceable as contracts. An oral promise or contract to loan money or to finance a transaction is a "credit agreement" under Iowa Code Section 535.17(5)(c) . . . Generally, the statute of frauds bars claims based upon credit agreements, which are not written . . . Here, the oral credit agreement, the agreement to secure financing and a loan for the Koch option agreement, was not written. *The statute of frauds thus bars evidence of the oral credit agreement. . . . the court concludes that counts IV [negligence] and V [fraudulent misrepresentation] are based upon oral promises made in connection with the credit agreement. . . . the Bank is granted summary judgment against both of the Shallas on counts IV [negligence] and V [fraudulent misrepresentation].*

(App. 649-655 (emphasis added).) The District Court arrived at this conclusion because of its review of *Geiger*, *Twiford Enterprises,* and *Ramsey* (described above) and these cases' persuasive holdings and language that Iowa Code § 535.17 and similar credit agreement statute of frauds applied equally to tort claims. (App.

648.) The District Court stated that it "is persuaded by the reasoning in these two cases [*Twiford Enterprises and Ramsey*] that [the Shallas' fraud and negligence claims] depend on oral promises allegedly made by Goerdt to assist the Shallas' in exercising the Koch option [Buyback Option] and these promises were made in connection with or in relation to a credit agreement to secure financing." (App. 652.) The District Court also analyzed the holding of *Gieger*, finding its holding persuasive. (App. 652.) Accordingly, the District Court held that "*Gieger* means that the statute of frauds bars" the Shallas' tort claims, and granted summary judgment in favor of Peoples. (App. 654.) Upon the same basis as its 12/9/21 Order, the Court later granted directed verdict in favor of Goerdt on the Shallas' fraud and negligence claims at trial (and after the close of the Shallas' case-in-chief). (App. 804.)

E. The Undisputed Facts Do Not Support the Shallas, and the District Court's Grant of Summary Judgment and Directed Verdict in Favor of Peoples and Goerdt Was Appropriate On These Claims.

The following facts are undisputed as it relates to Goerdt, the Shallas, and their communications (or lack of communications) relating to securing financing and/or exercise of the Debt Settlement Agreement's Buyback Option:

- Goerdt testified that his job was to help Clinton Shallas obtain financing. (App. 1260 (p. 67, ln 9-13).) Clinton conceded the purpose of his

communications with Goerdt (while Goerdt was employed at Peoples) was to "secure financing" for the Farm – not to exercise the Buyback Option. (App. 1541 (Trial Transcript-Day 4, p. 161); App. 298-299.)

- No written loan agreement exists between the Peoples and the Shallas (App. 649.) The Shallas have conceded that any agreements Goerdt allegedly made with them to obtain financing were oral and not written. (App. 1538-1544 (Trial Transcript-Day 4, p. 158-164); App. 1582-1584 (Trial Transcript-Day 5, p. 52-54); App. 300-301, 321.)
- Goerdt, while employed at Peoples, made an oral promise to the Shallas to loan money to them to buy their Farm from the Kochs, and Goerdt made affirmative steps to fulfill that promise. (App. 649.)
- Clinton acknowledged that he reviewed the Debt Settlement Agreement, including the Buyback Option and its deadline, before he signed it. (App. 1539 (Trial Transcript-Day 4, p. 159); App. 265-271, 290, 294.)
- Michelle acknowledged that she did not review the Debt Settlement Agreement until after it was signed. (App. 1577-1578 (Trial Transcript-Day 5, p. 44-45); App. 319.)
- Clinton acknowledged that under the Debt Settlement Agreement it was *his* (and his alone) obligation to exercise the Buyback Option. (App. 1540 (Trial Transcript-Day 4, p. 160); App. 294.)

- Clinton admitted that he had no written communications with the Kochs about exercising the Debt Settlement Agreement's Buyback Option (written notice required by its terms) before it terminated on August 15, 2015. (App. 1540-1541 (Trial Transcript-Day 4, p. 160-61); App. 291-292.)
- Clinton admitted that he *never* discussed with Goerdt exercising the Buyback Option, its expiration date, or whether Goerdt was going to assist him in exercising the Buyback Option. (App. 1541-1543 (Trial Transcript-Day 4, p. 161-163); App. 298-299.)
- Clinton admitted he did not exercise the Buyback Option by its deadline. (App. 1540-1543 (Trial Transcript-Day 4, pp. 160-163).)

Accordingly, it is undisputed that Goerdt's alleged oral statements to the Shallas relating to the Buyback Option were made in connection with a promise to loan money, and therefore the Shallas cannot prevail here. *E.g.*, *Twiford Enterprises, Inc.*, 2020 WL 5248561, at *7-8; *Gieger,* 2019 WL 4678179, at *4-6; *Raccoon Valley State Bank*, 2006 WL 3798902, at *4. To construe the undisputed facts in this case in any other way would undermine the rights and protections afforded to banks/lenders and bank employees under Section 535.17, and the narrow interpretation that the Shallas advocate for exposes lenders and their employees to the very claim Section 535.17 is designed to

protect against – an action (in tort or contract or otherwise) based on ill-defined claims related to a promise to loan money that was never put in writing. *Id.* The vague oral statements and implied promises the Shallas claim Goerdt made relating to the Buyback Option deadline and other ancillary matters related to the Buyback Option are perfect examples of statements that create the very risk of fraud and uncertainty that Section 535.17 was enacted to avoid.

Further, looking beyond the prohibitions of Section 535.17 which bar the Shallas' claims, the Shallas's negligence claim is not legally cognizable under Iowa law because the Shallas only allege economic loss. *E.g.*, *Neb. Innkeepers, Inc. v. Pittsburg-Des Moines Corp.*, 345 N.W.2d 124, 126 (Iowa 1984) ("The well-established general rule is that a plaintiff who has suffered only economic loss due to another's negligence has not been injured in a manner which is legally cognizable or compensable."); *Annett Holdings, Inc. v. Kum & Go, L.C.*, 801 N.W.2d 499, 504-05 (Iowa 2011) (reaffirming the scope and breadth of the economic loss rule, noting exceptions that are inapplicable here). The Shallas also cannot find success recasting their negligence claim as "negligent misrepresentation" – which "does not apply when a defendant directly provides information to a plaintiff in the course of a transaction between the two parties, which information harms the plaintiff in the transaction with the defendant." *Sturm v. Peoples Tr. & Sav. Bank*, 713 N.W.2d 1, 5 (Iowa 2006)

(citing *Sain v. Cedar Rapids Cmty. Sch. Dist.*, 626 N.W.2d 115, 126 (Iowa 2001); *see also Haupt v. Miller*, 514 N.W.2d 905, 910 (Iowa 1994) ("In defining this tort (negligent misrepresentation) a differentiation has been made between the person engaged in the business or profession of supplying guidance to others and those commercial transactions where the parties are dealing at arm's length."). Nor can the Shallas succeed on their fraud claim concerning their allegations that Goerdt promised to assist them with exercising the Buyback Option by its August 15, 2015 deadline, as such a claim is not only barred by Section 535.17, but is not factually supported in anyway because the Shallas have repeatedly admitted that neither of them ever discussed the Buyback Option with Goerdt before its expiration nor did Goerdt make any representations to the Shallas concerning it (as he did not know about it).

Accordingly, for the reasons stated above, the District Court's grant of summary judgment and directed verdict in favor of Peoples and Goerdt, respectively, should be affirmed.

II. The District Court Did Not Abuse Its Discretion in Denying Shallas' Motion to Extend Case Discovery Deadlines and Other Attempts to Re-Open Discovery.

The District Court properly denied the Shallas' attempts to re-open and conduct additional discovery after the discovery deadline had expired. Contrary to the Shallas' allegations, the Parties did not have an agreement to

extend discovery past the case deadline, except as to take Goerdt's deposition following his criminal sentencing. Moreover, the Shallas did not raise they needed additional discovery during summary judgment briefing pursuant to Iowa R. Civ. P. 1.981(6), nor have the Shallas demonstrated what additional discovery they believe they required to prove up their sprawling claims. Accordingly, the District Court's decision, specifically its November 7, 2021 Order enforcing the set case deadlines and denying additional discovery, was appropriate and not an abuse of discretion.

A. Error Preservation and Scope and Standard of Review.

This Court reviews the District Court's decisions regarding case deadlines, including discovery, for an abuse of discretion. *E.g., Dillon v. Ruperto*, No. 09-0600, 2010 WL 2383517, at *2 (Iowa Ct. App. June 16, 2010) (unpublished) (holding trial court did not abuse discretion in denying further discovery, stating "[a] court has broad discretion in ruling on a motion to extend a discovery deadline."); *Moser v. Thorp Sales Corp.,* 312 N.W.2d 881, 891 (Iowa 1981) ("Discovery matters are committed to the sound discretion of the trial court, and are reviewable only upon an abuse of that discretion."). Only where the trial court exercises its broad discretion "on clearly untenable grounds or to an unreasonable extent" will the appellate court find an abuse of discretion. *Dillon*, 2010 WL 2383517, at *2.

Goerdt does not concede that the Shallas preserved error on this issue.

B. The District Court Did Not Abuse its Discretion by Enforcing Case Deadlines, Including the Discovery Deadline.

The Shallas persist in their claim that the District Court's denial to extend pretrial deadlines deprived the Shallas the opportunity to take additional discovery. This claim is entirely unsupported by the record: the Shallas' counterclaims/third party claims were first asserted in July 2018. The Shallas did not move to extend pretrial deadlines until August 2021 – about two years *after* the discovery deadline had expired under the Trial Scheduling Order and *after* the Parties' summary judgment filings had been briefed and submitted to this Court.

In fact, in their 6/21/21 Summary Judgment Resistance (or supplemental Resistance pleadings)[9] to County Bank's, Peoples', and Goerdt's summary judgment motions, the Shallas did not request additional discovery nor did the Shallas submit the required 1.981(6) affidavit for a continuance to seek additional discovery to respond to the pending summary judgment motions.[10] *E.g.*, Iowa R. Civ. P. 1.981(6) (when a party is unable to "present by

[9] *See* App. 400-492; App. 525-528; App. 570-571.)

[10] On July 28, 2019, the Shallas moved to suspend proceedings in connection to the pending Motion for Summary Judgment until after they had an opportunity to depose Goerdt, stating they "are unable to resist the pending Motion [for Summary Judgment] because they need to depose Third Party Defendant Chris Goerdt." (App. 342 (¶ 4).) Therein, the Shallas made no mention of additional discovery beyond Goerdt's deposition that they needed nor any agreement with counsel for the same. The Court granted this request on December 20, 2019,

affidavit facts essential to justify the opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."); *Bitner v. Ottumwa Cmty. Sch. Dist.*, 549 N.W.2d 295, 302 (Iowa 1996) (affirming lower court's denial of motion to continue summary judgment resistance deadline to conduct additional discovery, holding "[t]he failure to file a rule [1.981(6)] affidavit is sufficient grounds to reject the claim that the opportunity for discovery was inadequate."); *Davisson v. Gwartney*, No. 22-1051, 2023 WL 2396769, at *3 (Iowa Ct. App. Mar. 8, 2023) (final publication decision pending) (affirming district court's grant of summary judgment and rulings on discovery, holding plaintiff failed to file required Iowa R. Civ. P. 1.981(6) affidavit spelling out the alleged need for discovery and plaintiff also failed to identify why affiant examination was necessary).[11] The Shallas' failure to do so is dispositive here. *Id.* Rather than do this required step, the Shallas simply submitted Resistances to County Bank's, Peoples', and Goerdt's summary judgment motions without raising the issue until *after* the

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and Goerdt's deposition was thereafter taken on May 18, 2021. On June 21, 2021, the Shallas filed their Resistance without raising their alleged need for additional discovery.

[11] A party who seeks a continuance to conduct additional discovery under Rule 1.981(6) must submit an affidavit stating: (1) what facts are sought and how they are to be obtained, (2) how those facts are reasonably expected to create a genuine issue of material fact, (3) what effort the affiant has made to obtain them, and (4) why the affiant was unsuccessful in those efforts. *Bitner*, 549 N.W.2d at 302. The Shallas have never done this.

briefings had been submitted to the Court.[12] Therefore, the Shallas failure to timely conduct discovery within case deadlines is entirely of their own making.

Even so, the District Court did not abuse its discretion by denying the Shallas' attempts to re-open the discovery deadline that had long-lapsed. *E.g.*, *Bitner*, 549 N.W.2d at 302 (holding that even if plaintiff had supplied a Rule 1.981(6) (then Rule 237(f)) affidavit, "it would not be an abuse of discretion for the court to deny his request", as extensive discovery occurred before the motion for summary judgment was filed, plaintiff deposed relevant witness, plaintiff was "aware of factual circumstances relating to his" claims, and he "had a full opportunity to conduct discovery prior to the summary judgment hearing"); *Dillon,* 2010 WL 2383517, at *2 (holding trial court did not abuse discretion in denying further discovery); *Davisson,* 2023 WL 2396769, at *1-3 (holding no abuse of discretion by trial court's denial of discovery and request for discovery continuance); *Olson*, 579 N.W.2d at 205 (holding a district court's decision to deny a party's request to extend pretrial deadlines "was well within its broad discretion"). Here, the District Court itself recognized the "interests of justice are not served by" re-opening the discovery deadline nearly two years after it had closed – the Shallas never objected to or moved to continue the discovery deadline (except for the limited request to suspend summary

[12] While the Shallas raised the discovery issue contemporaneously, the Shallas also never submitted a Rule 1.981(6) affidavit (or equivalent) in resistance to Peoples' successful Rule 1.904 Motion to Reconsider, Amend, or Enlarge.

judgment proceedings until the deposition of Goerdt) *before* it closed on December 27, 2019. (App. 645; App. 865.)

The Shallas contend the Parties had an agreement regarding discovery and the District Court failed to enforce it, prejudicing them. This is not supported by the record. The only discovery "agreement" the Parties had was to conduct Goerdt's deposition after his criminal sentencing, which did occur as agreed upon on May 18, 2021. (App. 1243-1244.) The Parties also agreed (and the Court ordered) to postpone the summary judgment proceedings/rulings until after Goerdt's deposition. (App. 865; App. 649.) In its December 20, 2019 Order, however, the Court never reset the pretrial deadlines, including the discovery deadline. (App. 865.) There is and never was an agreement (or Court order) that additional discovery (except for Goerdt's deposition) was to occur after the discovery deadline closed on December 27, 2019.

Further, the Shallas' persistence in claiming – before, during, and after trial – that they needed "additional discovery" against Defendants and were prevented from obtaining such discovery by the District Court (both before and during trial) is misplaced for another reason: the Shallas have continually failed to identify or make a showing (similar to an evidentiary offer of proof) on exactly what discovery they needed to aid their claims and/or how the lack

of such discovery adversely impacted their claims against Defendants.[13] Once more in this Appeal, the Shallas claim – without submitting evidence or testimony akin to an offer of proof – that the District Court's order enforcing the case's discovery deadlines "substantially prejudiced" them, but they never explain or demonstrate how. As a result, the Defendants, the District Court, and this Court are left to guess the discovery that the Shallas require to apparently succeed on their claims.[14]

Instead, the Shallas blame Goerdt's criminal matter and delay in taking his deposition to justify their own failure in not taking the discovery they needed before the case deadline. The Shallas conveniently overlook that they served written discovery on the Parties and received fulsome responses to the same. The Shallas concede they were able to take or agree to take depositions of several witnesses and the Parties, including Goerdt, before the discovery

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[13] In Iowa, an offer of proof is required for evidentiary matters. *E.g.*, *Eisenhauer ex rel. T.D. v. Henry Cnty. Health Ctr.*, 935 N.W.2d 1, 17 (Iowa 2019) ("The purpose of an offer of proof is to give the trial court a more adequate basis for its evidentiary ruling and to make a meaningful record for appellate review ...."; *State v. Lacey*, 968 N.W.2d 792, 806 (Iowa 2021) (holding no offer of proof was made, finding "[w]ithout an offer of proof, we can do no more than speculate about the substance of [Defendant's] testimony.") The Shallas making a similar showing would have been instructive, but they did not.

[14] This point is underscored by the Shallas' unsubstantiated claim that "[i]t 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" underlying their claims, including their vicarious liability claim. The Shallas offer nothing to support this contention, and the record is otherwise clear on this point. (Trial Transcript–Day 5, pp. 143-145.)

deadline. (Shallas' Am. Fin. Br., p. 72-73.) Finally, the Shallas overlook the fact that Goerdt's criminal matter in no way prevented (except the postponement of Goerdt's deposition) the Shallas' ability to conduct other discovery of Peoples, County Bank, or other fact witnesses before the December 27, 2019 discovery deadline. In other words, the Shallas' failure to conduct discovery before the discovery deadline was their own making.

For these reasons, the Shallas have not been deprived a fair trial based on the Court's denial to extend pretrial deadlines, including discovery. Accordingly, the Shallas' have not met their high burden to prove the Court abused its discretion regarding its November 7, 2021 Order.

III. Whether the District Court Erred in its Application of the Principles of Vicarious Liability/Respondeat Superior to County Bank Based on the Actions of its Officer Goerdt.

The Shallas' contend the District Court erred in in its application of vicarious liability / respondeat superior principles against County Bank, which granted directed verdict in favor of County Bank on this claim. This appealed issue applies to claims against County Bank only, not Goerdt. Accordingly, Goerdt is not going to address the merits of the Shallas' legal assertions.

Goerdt, however, disputes numerous alleged facts asserted by the Shallas, as many of them are inaccurate, misleading, inflammatory, and/or irrelevant to this Appeal (or even to this dispute entirely). Further, many of the

Shallas' assertions are not supported by the record and are speculation and conjecture at best. Goerdt has addressed the relevant factual issues elsewhere in this brief, and for the sake of brevity, will not repeat them here.

IV. A New Trial Should Not Be Granted, as the Verdict Did Not Fail to Effectuate Substantial Justice.

The District Court properly denied the Shallas' Motion for New Trial, as the Shallas have failed to carry their heavy burden to establish the District Court abused its discretion. Accordingly, the District Court's denial of the Shallas' Motion for New Trial was appropriate.

A. Error Preservation and Scope and Standard of Review.

Goerdt does not dispute that the Shallas preserved error on this issue. Under Iowa R. Civ. P. 1.1004, an aggrieved party may have an adverse verdict, decision, or report or some portion thereof vacated and a new trial granted if certain circumstances existed at the time of trial that materially affected the movant's substantial rights. Iowa R. Civ. P. 1.1004. These certain circumstances include:

- Irregularity in the proceedings of the court, jury, master, or prevailing party; or any order of the court or master or abuse of discretion which prevented the movant from having a fair trial. Iowa R. Civ. P. 1.1004(1).

- Misconduct of the jury or prevailing party. Iowa R. Civ. P. 1.1004(2).
- Accident or surprise which ordinary prudence could not have guarded against. Iowa R. Civ. P. 1.1004(3).
- Excessive or inadequate damages appearing to have been influenced by passion or prejudice. Iowa R. Civ. P. 1.1004(4).
- Error in fixing the amount of the recovery, whether too large or too small, in an action upon contract or for injury to or detention of property. Iowa R. Civ. P. 1.1004(5).
- That the verdict, report or decision is not sustained by sufficient evidence, or is contrary to law. Iowa R. Civ. P. 1.1004(6).
- Material evidence, newly discovered, which could not with reasonable diligence have been discovered and produced at the trial. Iowa R. Civ. P. 1.1004(7).
- Errors of law occurring in the proceedings, or mistakes of fact by the court. Iowa R. Civ. P. 1.1004(8).
- On any ground stated in rule 1.1003, the motion specifying the defect or cause giving rise thereto. Iowa R. Civ. P. 1.1004(9).

None of these circumstances exist here, as set forth below.

Further, as the moving party, the Shallas carry the heavy burden of establishing good cause requiring a new trial. *Oldis v. John Deere Waterloo Tractor*

Works, Inc., 147 N.W.2d 200, 203 (1966) ("In all proceedings to set aside rulings by the trial court such as default judgments . . . motions for new trial . . . and vacation or modification of judgments . . . the burden to show good cause is placed upon the movant.") (emphases added); *see also Kehm v. Procter & Gamble Co.*, 580 F. Supp. 890, 896 (N.D. Iowa 1982) ("The burden of providing the propriety of a new trial is, of course, on the moving party.").

As summarized in *Thornberry v. State Board of Regents*, 186 N.W.2d 154, 161 (Iowa 1971): "Verdicts should not be set aside lightly and the court, in granting a new trial, must be sure there exists sufficient cause to support the exercise of such discretion. A litigant is entitled to a fair trial, but only one." *See also Fry v. Blauvelt*, 818 N.W.2d 123, 128 and 134 (Iowa 2012) (The Iowa Supreme Court is "reluctant to interfere with a jury verdict or the district court's consideration of a motion for new trial made in response to the verdict." – affirming denial of new trial, holding that movant "has not shown the district court committed any error in its decisions during the trial that substantially prejudiced [its] rights to a fair trial"); *Condon Auto Sales & Serv., Inc. v. Crick*, 604 N.W.2d 587, 594 (Iowa 1999) (holding Iowa courts generally "are reluctant to interfere with a jury verdict"); *Jacobsen v. Gamber*, 86 N.W.2d 147 (Iowa 1957) (reversing grant of new trial as abuse of discretion). "A judgment should not be reversed and litigation prolonged unless error appears which we may reasonably suppose affected the result to the prejudice of the losing party."

McKlveen v. Townley, 7 N.W.2d 186, 187 (Iowa 1942); *Baysinger v. Haney,* 155 N.W.2d 496, 499 (Iowa 1968); *Jones v. Univ. of Iowa,* 836 N.W.2d 127, 140 (Iowa 2013) ("It is well-settled that nonprejudicial error is never ground for reversal on appeal) (citations omitted). "A district court abuses its discretion if it rests its ruling on 'clearly untenable or unreasonable grounds.'" *Fry*, 818 N.W.2d at 128.

In other words, "if a jury's award is within the evidence we will not disturb it." *Tullis v. Merrill*, 584 N.W.2d 236, 241 (Iowa 1998). And courts will reduce or set an award aside only if it:

(1) is flagrantly excessive or inadequate; or

(2) is so out of reason as to shock the conscience or sense of justice; or

(3) raises a presumption it is a result of passion, prejudice or other ulterior motive; or

(4) is lacking in evidentiary support.

Tullis, 584 N.W.2d at 241; *see also Henneman v. McCalla*, 148 N.W.2d 447, 459 (Iowa 1967) (affirming jury verdict). Iowa courts place "the most emphasis on whether there is evidentiary support for the verdict." *Estate of Pearson ex rel. Latta v. Interstate Power & Light Co.*, 700 N.W.2d 333, 345 (Iowa 2005). "We thus will uphold an award of damages 'so long as the record discloses a reasonable basis from which the award can be inferred or approximated.'" *Benson v. Webster*, 593 N.W.2d 126, 131 (Iowa 1999); *Estate of Hagedorn v. Peterson*,

690 N.W.2d 84, 87-88 (Iowa 2004) (holding "to show an abuse of discretion, the complaining party must show the court exercised its discretion 'on grounds clearly untenable or to an extent clearly unreasonable' . . . As used in this context '[u]nreasonable' means not based on substantial evidence."); *Taylor v. Chicago, M.. & St. P. Ry. Co.*, 80 Iowa 431 (1890) (stating that a new trial would not be granted on the ground that the verdict is not warranted by the evidence, when the evidence is conflicting).

Accordingly, to establish the propriety of a new trial, the Shallas must clearly establish "prejudicial error has crept into the record or that substantial justice has not been done." *Kehm,* 580 F. Supp. at 896. This Court must determine, as a prerequisite to granting a new trial on any ground, that any alleged error affected the Shallas' "substantial rights." *Id.* at 896-97; *Reener v. Hill & Williams Bros.*, 502 N.W.2d 26, 27 (Iowa Ct. App. 1993) (affirming district court's denial of new trial, stating "[a]n aggrieved party may be granted a new trial for errors of law or mistakes of fact only if they materially affect the party's 'substantial rights.'"). As set forth below, none of the foregoing circumstances exist nor have the Shallas carried their heavy burden to support their contentions that the District Court erred in denying their Motion for a New Trial because, in their opinion, the verdict failed to effectuate substantial justice.

B. The Trial Court Did Not Abuse its Discretion Nor Were the Shallas Prejudiced by its Orders.

As described in Sections I and II, above, the District Court's Orders (1) granting summary judgment and directed verdict in favor of Peoples and Goerdts on the Shallas' fraud and negligence claims vis-à-vis the Iowa Code § 535.17 and (2) enforcing the case discovery deadlines were both consistent with Iowa law and the Court's well-reasoned discretion. *E.g.*, *Twiford Enterprises, Inc.*, 2020 WL 5248561, at *7-8; *Gieger,* 2019 WL 4678179, at *4-6; *Raccoon Valley State Bank*, 2006 WL 3798902, at *4; *Dillon,* 2010 WL 2383517, at *2; *Davisson,* 2023 WL 2396769, at *1-3; *Olson*, 579 N.W.2d at 205 (Iowa 1998). The Shallas advance nothing demonstrating otherwise nor do they show how they were prejudiced by these decisions.

C. The Verdict Did Not Fail to Effectuate Substantial Justice.

The Jury's 9/20/22 Verdict also did not fail to effectuate substantial justice. The Jury heard all the evidence put forward by the Shallas, including evidence in support of their third-party conversion claims against Goerdt. Upon its review of all the evidence and claims, the Jury found in favor of the Shallas only as to the $5,800 and found in favor of Goerdt on all others. (App. 806-807.) Contrary to the Shallas' contentions, nothing in the verdict lends support to the Shallas' assertion that the Jury did not carefully consider the claims and evidence against Goerdt. Rather the Jury, it in its wisdom and fact-

finding role, reviewed the evidence and determined their verdict accordingly. The Shallas are merely dissatisfied with the Jury's Verdict and the District Court's Orders ruling against them. This Court should not disturb the Jury's Verdict nor the District Court's Orders. *E.g.*, *Thornberry*, 186 N.W.2d at 164; *Condon Auto Sales & Serv., Inc.*, 604 N.W.2d at 594.

CONCLUSION

For all the reasons stated herein and in the record, the District Court's Orders at issue and the Jury's Verdict should be affirmed.

STATEMENT REGARDING ORAL ARGUMENT

Goerdt does not believe oral argument is necessary, and therefore requests nonoral submission.

Dated: July 25, 2023

/s/ Ryan S. Fisher

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/s/ Ryan S. Fisher — July 25, 2023
Ryan S. Fisher — Date

CERTIFICATE OF SERVICE AND FILING

I certify that on July 25, 2023, I served the foregoing Revised Final Brief of Third Party Defendant-Appellee Chris Goerdt by electronically filing the document with EDMS, which will notify all parties of the electronic filing.

/s/ Ryan S. Fisher

COST CERTIFICATE

I, the undersigned, hereby certify that the true cost of producing the necessary copies of the foregoing Revised Final Brief of Third Party Defendant-Appellee Chris Goerdt is $N/A and that the amount has been paid in full by Appellees.

/s/ Ryan S. Fisher
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