IN THE SUPREME COURT OF IOWA

SUPREME COURT NO. 20-1663

LINCOLN SAVINGS BANK v. SIMPSON FURNITURE COMPANY, et al

Appeal from the Iowa District Court for Black Hawk County
The Honorable Linda Fangman and David
Odekirk, Judges

APPELLANT'S FINAL REPLY BRIEF
AND
REQUEST FOR ORAL ARGUMENT

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on the 20th day of August, 2021 I electronically filed this document with the Clerk of the Supreme Court of Iowa. I certify that all participants in this appeal are registered electronic filing users and that service will be accomplished by this electronic filing.

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REPLY TO STATEMENT OF THE CASE

A. Important Facts. A crucial fact in this appeal involves the role of Phillip Brooks who was the attorney who represented Debra Emmert ("Ms. Emmert") in the replevin action filed by Lincoln Savings Bank. ("LSB"). LSB in its recital of facts misrepresents the role of Brooks. Specifically, Brooks attempted to negotiate a resolution of the foreclosure issues on behalf of Ms. Emmert. However, he informed LSB in writing that he would not be involved if the matter was not resolved and adversarial action was taken by LSB. (Brooks Email; App. p. 492) A second important fact is that Ms. Emmert contends that her signature on at least some of the documents in question was forged. (Transcript; App. p. 521-525) Therefore, Ms. Emmert has a meritorious defense in this matter.

B. Routing Statement. LSB contends that this matter should be transferred to the Court of Appeals. Ms. Emmert disagrees. The resolution of this appeal involves the interpretation of Iowa R. of Civ. Proc. 1.972(3) which has not previously been reviewed by this court. This appeal also involves the applicability of Iowa R. of Civ. Proc. 1.442(1) to cases in which an amended petition is filed after a default has been entered. In this context this rule has also not previously been reviewed. Finally, this case involves the interpretation of Iowa R. Civ. Proc. 1.305 (12) which also has not been

the subject of a previous appeal. Accordingly, the Supreme Court should retain this case.

REPLY ARGUMENT

I. The Rule 1.972 Notice of Default Issue

A. Error Preservation. LSB agrees that error has been preserved on this issue. (LSB Proof Brief p. 28)

B. Standard of Review. LSB agrees that the standard of review for this issue is errors at law. (LSB Proof Brief p. 28)

C. Reply Argument. LSB's brief discusses Attorney Brooks' involvement in detail. However, LSB mischaracterizes Brooks' role in the foreclosure action. Brooks told LSB's counsel in writing that if the dispute between Ms. Emmert and LSB could not be resolved through negotiation he could not represent Ms. Emmert in litigation. (Brooks email; Trans. p. 492) Brooks and LSB then continued their attempt to negotiate a settlement. These efforts failed and LSB filed its foreclosure petition. Then, true to his word, Mr. Brooks did not file an appearance or otherwise participate in the litigation beyond signing and filing the acceptance of service. Brooks was not then

Ms. Emmert's litigation counsel because under Iowa law an attorney who engages in settlement discussions is not considered to be the attorney if litigation proves necessary. See, Kirby v. Holman, 23 NW2d 664, 673 (Iowa 1947) Further, it is the filing of an appearance which marks the beginning of representation in litigation as under Iowa R. Civ. Proc. 1.404(1) until an appearance is filed an attorney will not be informed of developments in the litigation by either counsel or the court. Accordingly, the trial court erred when it concluded that Brooks represented Ms. Emmert in the foreclosure litigation.

Further, as explained in Ms. Emmert's initial brief, under a long line of Iowa cases an attorney who represents a party in one matter is not considered the attorney for this party in other matters. Beauchamp v. Iowa District Court, 328 NW2d 527, 528 (Iowa 1983), In Re: Marriage of Meyer 285 NW2d 10, 11 (Iowa 1979); Arthur v. Iowa District Court, 553 NW2d 325, 327 (Iowa 1996). Therefore, the fact that Brooks represented Ms. Emmert in the replevin action does not mean that he also represented her in the foreclosure action. Remarkably, LSB in its brief has entirely failed to address this line of Iowa authorities even though they are precisely on point.

Further, as explained in Ms. Emmert's initial brief even if Brooks could be considered Ms. Emmert's counsel the clear wording of Iowa R. of Civil Proc. 1.972 and the policy underlying this rule mandate that notice be given to both opposing counsel and the opposing party. This is particularly obvious in light of the principle that no part of a rule should be deemed superfluous and that all portions of the rule are instead presumed to have a purpose. Miller v. Westfield Insurance Company, 606 NW2d 301, 305 (Iowa 2000) Therefore, Rule 1.972 should be construed as requiring notice to both party and counsel.

Finally, LSB contends that it would be unethical for its counsel to serve Rule 1.972 notice to a party opponent and to the opponent's counsel. (LSB Brief p. 38) However, LSB was mistaken when it assumed that Brooks was Ms. Emmert's counsel in the litigation because he had not filed an appearance. Therefore, there was no reason why LSB could not communicate with Ms. Emmert regarding the foreclosure. Secondly, the ethical rule against communicating with an opposing party (I.R. Prof. Conduct 32:4:2(a)) contains an express exception for communication which is authorized by law. Rule 1.972 is clearly such an authorization and permits the sending

of the rule – required default notice to the opposing party. Finally Rule 1.972 does not involve the sort of "behind the back" communication which is intended to circumvent the involvement of an opposing attorney and to thereby allow counsel to take unilateral advantage of another lawyer's client. Instead, the notice to be sent is for the benefit of the opposing party and not for any nefarious benefit of the lawyer who sends it. Indeed the purpose of requiring Rule 1.972 notice to be sent to both opposing counsel and the opposing party is to keep opposing counsel fully "in the loop" of communication.

Therefore for these reasons and for the reasons cited in Ms. Emmert's initial brief this court should determine that LSB failed to comply with Rule 1.972 and determine that the judgment entered against her was void.

II. The Service of Process Issues.

A. Error Preservation. The parties agree that error has been preserved on this issue. (LSB Brief p. 44)

B. Standard of Review. The parties are in agreement that the standard of review on this issue is for errors at law when interpreting rules of civil procedure and de novo when constitutional issues are involved. (LSB Brief p. 44) .

C. Reply Argument. The issue of proper service arises on two occasions in this case. First, it arises as part of the commencement of the case. Secondly it arises after LSB amended its petition after Ms. Emmert was previously found to be in in default.

1. The Initial Service of Process.

LSB argues that Brooks' signing of an acceptance of service is a "consent to service" under Rule 1.305(12). (LSB Brief p. 44) However, this rule by its express terms only applies if a party is "suable under a common name." Therefore, under this rule if an individual plaintiff was doing business as a corporation, a partnership or under a trade or fictitious name a consent to service would be binding upon all these differently named parties.

However since there is no issue of Ms. Emmert being "suable under a common name" this rule is not applicable to the present case.

Further, it is the undersigned's experience that acceptances of service are prepared for the signature of the opposing party and not for signing by an attorney. This is especially true when the other attorney has informed the Plaintiff, as Brooks did, that he will not be involved in the litigation. Indeed, as explained in Beauchamp and other Iowa cases cited previously an attorney is not the appropriate person to serve or to give an acceptance of service.

2. Service of the Amended Petition.

LSB does not dispute that it filed an amended petition adding over $100,000 in debt that it sought to collect from Ms. Emmert and the foreclosure of another mortgage. (Amended Petition; App. p. 237) In this circumstance Iowa R. of Civ. Proc. 1.442(1) could not be more clear: LSB was required to obtain personal service of the amended petition on Ms. Emmert by one of the means authorized in Iowa R. of Civ. Proc. 1.305.

LSB claims that by mailing notice of the amended petition to Mr. Brooks that it somehow complied with this rule. However, Rule

1.305 does not authorize service by mail and therefore LSB's strained excuse for its noncompliance fails. Further, since Brooks never filed an appearance in the foreclosure Brooks was not entitled or authorized under Rule 1.404(1) to receive any notice.

Finally, LSB seeks to blame Brooks for its own failure to provide Ms. Emmert with proper notice. (LSB Brief p. 46-47) However, Brooks cannot be faulted for not responding to an improper service or other notice. Indeed, it was LSB's obligation to make proper service on Ms. Emmert and it can only blame itself for its failure to do so.

3. The Waiver Argument.

LSB contends that Ms. Emmert has waived the personal jurisdiction issue by not timely raising the same. However, a judgment obtained without proper Rule 1.972 notice or without obtaining statutorily compliant or constitutionally sufficient service is void and can be challenged at any time. Accordingly no waiver has occurred. Dolezal v. Bockes Brothers, Farms Inc. 602 NW2d 348, 353 (Iowa 1999), Dimmit v. Cambell, 151 NW2d 562, 565 (Iowa 1967). Further, Ms. Emmert did not file a prejudgment motion or answer before judgment was entered against her and

therefore LSB's contention that she did so without raising this issue is erroneous.

Therefore, as explained above and in Ms. Emmert's initial brief it should be determined that LSB's services on Ms. Emmert met neither statutory nor constitutional requirements and the judgment entered against her be set aside.

III. The Failure to Set Aside the Default Issue.

A. Error Preservation. LSB concedes that error has been preserved on this issue. (LSB Brief p. 49)

B. Standard of Review. LSB agrees that the standard of review for the interpretation of rules is for errors at law. (LSB Brief p. 49)

C. Reply Argument.

There is no more appropriate case in which to set aside a default judgment than one in which this default has been obtained without first providing the party claimed to be in default with proper service. Otherwise, our system of fair notice and unbiased judicial determination will be upended. Specifically, instead of providing fair notice a plaintiff will have every incentive to provide improper service, gets its default judgment

without giving the defendant a chance to be heard, and then bank on the fact that it may well be harder for a defendant to set aside a default than it would be for that same defendant to prevail in the litigation. Accordingly, the trial court erred when it failed to set aside the default in this matter. See, Halverson v. Hageman, 92 NW2d 569, 574 (Iowa 1958)

IV. The Multiple Executions Issues.

Iowa Code §626.3 is neither long nor complex and states in full as follows:

§626.3 Only one execution shall be in existence at the same time.

There is nothing ambiguous about this language – it means what it says. Nevertheless, LSB claims that the above section really applies only to general executions. However, the Iowa legislature obviously knows the difference between special and general executions and if it wanted to make §626.3 applicable only to general executions it would have done so. Further, §626.3 is a debtor protection statute and not a "let the creditor grab whatever it wants as quickly as it can" statute. Therefore, the interpretation which LSB would like to give §626.3 flies in the face of this statute's purpose which is to reduce the number of collection actions which a debtor need face at one time, to avoid the risk of multiple executions resulting in "over collection" by an overly aggressive creditor, and to avoid the other

stigma and financial harm that is involved with sheriff's sales and other collection actions. Obviously these risks exist with both general and special executions and the legislative therefore wisely made §626.3 applicable to both. Accordingly, the existence of multiple executions makes both executions obtained by LSB and the Black Hawk County sheriff's sale based on the same invalid. Luke v. First National Bank of Creston, 228 NW 230, 233 (Iowa 1938)

LSB also seeks to excuse its non-compliance with §626.3 by claiming that Ms. Emmer has not been harmed by its actions. (LSB Brief p. 56) However, §626.3 does not contain a "no harm no foul" provision. Therefore, whether or not Ms. Emmert suffered harm is not relevant. Further, Ms. Emmert was in fact harmed by the multiple executions as her Johnson County homestead was levied on at the same time as the sale of the Black Hawk County property was in process. This subjected Ms. Emmert to the stigma of having her name and property published for all to see. (Executions, etc.; App. p. 427-451) Further, LSB by the public filing of two preacipes and the obtaining of two executions informed prospective bidders at the first sale that the value of the first property sold would not likely be sufficient to satisfy the entire debt. If LSB had not made this public disclosure the first sale could have paid off the entire debt, including

the debt on Ms. Emmert's homestead. And at the same time the stigma of a pending sheriff's sale of her Johnson County property lessened Ms. Emmert's ability to sell this property. Finally, this court has already determined that under §626.3 multiple executions of either type are invalid. Specifically, in Merritt v. Grover, 10NW 879 (Iowa 1888) this court ruled that two executions arising after the foreclosure of a mortgaged property, one of which was special and one general, were both invalid because of the violation of the identically-worded predecessor to Code §626.3.

Finally, the district court erred when it concluded that this issue is moot. As Merrit, Luke, and the clear language of the statute make clear the Black Hawk County sale is void and should be set aside. Further, LSB's wrongful execution and other actions have caused Ms. Emmert the emotional distress and other damages which §626.3 was designed to prevent. Accordingly, LSB's violation of the statute is not a moot point.

CONCLUSION AND REQUESTED RELIEF

This case demonstrates the need for a plaintiff to read and comply with the rules of civil procedure and illustrates the unfairness to a party when his or her opponent fails to do so. Because LSB blatantly failed to follow these rules Deborah Emmert request that all judgments entered against her be set aside and that she have other relief as deemed appropriate.

REQUEST FOR ORAL ARGUMENT

Appellant requests to be heard at oral argument in this matter.

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1. This reply brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

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The undersigned states that there were no costs associated with the preparation of this document.

Dated this 20th day August, 2021

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