IN THE SUPREME COURT OF IOWA

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

DEBRA EMMERT,
Appellant,

v.

LINCOLN SAVINGS BANK,
Appellee.

APPEAL FROM THE IOWA DISTRICT COURT FOR BLACK HAWK COUNTY

THE HONORABLE LINDA FANGMAN AND DAVID ODEKIRK

APPELLEE LINCOLN SAVINGS BANK'S RESISTANCE TO APPELLANT'S APPLICATION FOR FURTHER REVIEW

/s/ Jeffrey W. Courter AT0001740
/s/ David T. Bower, AT0009246
/s/ Roy R. Leaf, AT0014886
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: jwc@nyemaster.com
dbower@nyemaster.com
rleaf@nyemaster.com
ATTORNEYS FOR APPELLEE LINCOLN SAVINGS BANK

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STATEMENT OF THE CASE

The sole issue presented in this application for further review involves a question of law:[1] Whether Iowa Rule of Civil Procedure 1.972(3) requires that a notice of intent to file written application for default be sent directly to the party claimed to be in default when that party is represented by counsel? Although this precise issue has never been addressed by this Court, the Court of Appeals issued a well-reasoned decision consistent with the text and history of the Rule, other Rules of Civil Procedure, and an attorney's obligation to refrain from communicating directly with an opposing party known to be represented by counsel about the matter at issue. Further review of this decision is not warranted.

STATEMENT OF THE FACTS

Lincoln Savings Bank ("**LSB**") lent almost $5 million to Debra D. Emmert ("**Debra**"), her estranged husband Dale T. Emmert, and certain corporate entities under the Emmerts' control. The promissory notes

[1] For the reasons discussed below, the second question presented by Debra for further review is not properly before the Court and should not be considered.

pursuant to which LSB extended the funding were secured by liens on substantially all of the assets of the Emmerts and their corporate entities, including real estate in Cedar Falls and Coralville. The Emmerts and the corporate entities eventually defaulted on the notes and, despite entering into forbearance agreements and pursuing other strategic alternatives, were unable to repay LSB. LSB subsequently filed both a Replevin Action and a Foreclosure Action in the Iowa District Court for Black Hawk County, and obtained default judgments in both actions, including against Debra.[2]

The Replevin Action was filed on May 2, 2019, and the collateral at issue was eventually sold at a public sale. (App. 20-78, 468). The Foreclosure Action was filed on July 24, 2019, and sought foreclosure on LSB's mortgages on certain real property owned by the Emmerts (and

[2] The Replevin Action was filed in the Iowa District Court for Black Hawk County, case number LACV137426, as is not at issue in this appeal. The Foreclosure Action was filed in the Iowa District Court for Black Hawk County, case number EQCV138057.

other corporate entities) under the notes granted by various security agreements. (App. 95-219).

Phil Brooks appeared as attorney of record for Debra in the Replevin Action, accepted service of the Petition on her behalf in the Foreclosure Action, (App. 79), and continued to actively negotiate on her behalf in both proceedings. (See, e.g., App. 470-72, 480-88, 502-08).

Following Debra's default in the Foreclosure Action, LSB's counsel sent—via U.S. Mail—a Notice of Intent to File Written Application for Default to Brooks, as attorney for Debra, pursuant to Iowa R. Civ. P. 1.972(3). (App. 386, 390-91). As Debra took no action, the district court entered an order granting LSB's application for default. (App. 383-91, 392-94). Subsequently, on December 2, 2020, the district court entered a Foreclosure Judgment Entry and Decree foreclosing LSB's mortgages on, among other things, a condominium owned by Debra in Coralville. (App. 408, ¶ IX). On December 16, 2020, Debra filed the present notice of appeal, which was routed to the Court of Appeals. (App. 425-26).

DISPOSITION OF THE CASE IN THE COURT OF APPEALS

In her appeal, Debra argued, among other things, that the notice of intent to file written application for default sent to Brooks was improper under Rule 1.972(3) because it was not sent to both Debra and Brooks. On this issue, the Court of Appeals affirmed the district court's Foreclosure Judgment Entry and Decree, holding that because Debra was represented by Brooks, service of the notice on Brooks was proper.

In particular, the Court of Appeals held that Rule 1.972(3) "provides mutually exclusive notice requirements depending on whether a party is represented or not." (Decision at 17). In so holding, it looked to the plain language of the Rule, the use of "notice" in the singular in another, related Rule (Iowa R. Civ. P. 1.972(2)), and also relied on Iowa Rule of Professional Conduct 32:4.2(a), which prohibits a party's attorney from communicating directly with an opposing party known to be represented by counsel. (Decision at 13–18). Because Debra was represented by Brooks, the Court of Appeals held that service upon Brooks, as her counsel, complied with Rule 1.972(3). (Decision at 18).

Nevertheless, on May 23, 2022, Debra filed her Application seeking further review of the Court of Appeals decision.

ARGUMENT

I. DEBRA'S SECOND QUESTION PRESENTED FOR REVIEW IS NOT PROPERLY BEFORE THIS COURT AND SHOULD NOT BE CONSIDERED.

Only Debra's first question presented for review is properly before this Court on appeal: "Whether the ten day notice of default required by Iowa R. Civ. P. 1.972 is required to be sent to both the litigant and the litigant's counsel." (Application at 2). As it relates to the second question—"Whether an attorney who has not filed an appearance and has informed opposing counsel that he will not be involved in litigation is the person who can appropriately be sent [an] Iowa R. Civ. P. 1.972 notice"—the Court of Appeals properly concluded that it lacked jurisdiction to consider this issue, and dismissed Debra's second appeal. (Decision at 11–13, 20).

As the Court of Appeals held, Debra deprived the district court of jurisdiction upon the filing of her December 16, 2020 notice of appeal.

(Decision at 11). Her belated claim that attorney Brooks never, in fact, represented her in the foreclosure proceedings "was first made to the district court in her January 29, 2021 motion to set aside—more than one month after she filed her first appeal." (Decision at 13, n. 7). As a result, the only issue the Court of Appeals considered was Debra's "alternative argument" that "even if she was represented by counsel, rule 1.972 requires that both she and counsel be given notice of the intent to file for default." (Id.). Accordingly, Debra's second question presented for review is not properly before this Court, is not addressed herein, and should not be considered. (Decision at 13 ("Therefore, we limit our consideration to those issues that arose before Debra filed her second appeal.").

II. THE COURT SHOULD SUMMARILY DENY DEBRA'S APPLICATION BECAUSE SHE HAS NOT ESTABLISHED ANY GROUND FOR GRANTING FURTHER REVIEW UNDER IOWA R. APP. P. 6.1103(1)(B).

For an application for further review to be granted, the party seeking further review must allege precisely and in what manner the Court of Appeals has done any of the following:

(1) entered a decision in conflict with a decision of this court or the court of appeals on an important matter;

(2) decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court;

(3) decided a case where there is an important question of changing legal principles; or

(4) the case presents an issue of broad public importance that the supreme court should ultimately determine.

Iowa R. App. P. 6.1103(1)(b)(1)–(4).

Debra contends that the issue presented for review has not been, but should be, settled by this Court, and also suggests that this issue is of broad public importance that this Court should ultimately determine.[3] She concludes by suggesting the Court of Appeals' decision "creates more problems than it solves", and requests that this Court create a "bright line" rule. (Application at 18–19).

[3] Debra does not contend that the Court of Appeals "entered a decision in conflict with a decision of this court or the court of appeals on an important matter", or "decided a case where there is an important question of changing legal principles". Iowa R. App. P. 6.1103(1)(b)(1), (3).

Debra is correct that this Court has not addressed the precise issue presented, namely, whether Rule 1.972(3) should be read in the conjunctive or the disjunctive (*i.e.*—an "and" or an "or")—a fact recognized by the Court of Appeals. (Decision at 15 ("Neither party points to, and we have not found, case law specifically interpreting this rule.")). LSB agrees that the issue presented "has not been" settled by this Court. However, as set forth below and in the Court of Appeals' well-reasoned decision, Debra's arguments that the issue "should be" settled by this Court (*i.e.*—the Court of Appeals' decision was incorrect) are unpersuasive.

III. IOWA RULE OF CIVIL PROCEDURE 1.972(3) UNAMBIGUOUSLY PROVIDES MUTUALLY EXCLUSIVE ROUTES TO SEND NOTICE OF DEFAULT.

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

judgment to send a default notice to the party in default or their attorney, if represented by counsel.

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

> *a. To the party.* A copy of the notice of intent to file written application for default shall be sent by ordinary mail to the last known address of the party claimed to be in default. No other notice to a party claimed to be in default is required.
>
> *b. Represented party.* When a party claimed to be in default is known by the party requesting the entry of default to be represented by an attorney, whether or not that attorney has formally appeared, a copy of notice of intent to file written application for default shall be sent by ordinary mail to the attorney for the party claimed to be in default. This rule shall not be construed to create any obligation to undertake any affirmative effort to determine the existence or identity of counsel representing the party claimed to be in default.

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

suggest notice sent to counsel for a "represented party" is somehow insufficient.

Further, as noted by the Court of Appeals, the text of Rule 1.972(2) is inconsistent with Debra's proposed interpretation. (Decision at 17–18). That Rule uses the singular form of the word "notice" throughout, making clear only one notice (depending on the status of the party in default) is required. For example, any application for entry of default must include certification that "written notice of intention to file the written application for default was given" and a "copy of the notice shall be attached." Iowa R. Civ. P. 1.972(2) (emphasis added).

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

requirements depending on whether a party is represented or not." (Decision at 17).

IV. EVEN IF THE LANGUAGE OF RULE 1.972(3) IS AMBIGUOUS, RULES OF STATUTORY CONSTRUCTION RESOLVE THE AMBIGUITY IN FAVOR OF A MUTUALLY EXCLUSIVE NOTICE PROVISION.

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

Court rules are subject to the same rules of statutory construction as statutes. *State v. Luckett*, 387 N.W.2d 298, 301 (Iowa 1986). The courts' goal when interpreting a statute "is to give effect to the legislature's intent, as expressed by the language used in the statute." *Lange v. Iowa Dep't of Revenue*, 710 N.W.2d 242, 247 (Iowa 2006). Legislative intent is gleaned from what the rule maker said "rather than what it should or might have said." Iowa R. App. P. 6.904(3)(m).

A. Rule 1.972(3) in light of other Rules of Civil Procedure.

When interpreting a statute, courts must reconcile two statutes dealing with the same subject matter. *State v. Harrison*, 325 N.W.2d 770, 772 (Iowa Ct. App. 1982). Further, courts must not construe a rule or statute to give undue influence to one section at the exclusion of the other. *Id.*; *see also State v. Boggs*, 741 N.W.2d 492, 503 (Iowa 2007) ("In construing statutes, it is also important to read the text of the statute in light of its overall context.").

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

every document in an action, unless ordered otherwise by the court, must be made upon the attorney of record.

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

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

As held by the Court of Appeals, Debra's proposed interpretation of Rule 1.972(3) would also lead to a conflict with an attorney's ethical obligations and, thus, could not have been the intention of the drafters. Courts are to consider the "consequences of a particular construction" when interpreting an ambiguous statute. Iowa Code § 4.6(5); *Boggs*, 741

N.W.2d at 503. This Court refuses to interpret statutes in a way which leads to "impractical and illogical consequences." *Olsen v. Jones*, 209 N.W.2d 64, 67 (Iowa 1973).

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

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

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

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

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

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

Despite these ethical obligations, Debra argues that the drafters actually intended for attorneys to send notices of default to both the party in default and their attorney, even though the drafters omitted any language in Rule 1.972(3) stating as much. Given the ethical consequences for attorneys who violate the Iowa Rules of Professional Conduct, the drafters would, no doubt, have expressly authorized communication with a represented party in the context of default judgments. The fact they did not makes clear that such a result was not intended. Instead, as the plain language of the statute makes clear, notice is required to either the party, if they are unrepresented, or the attorney, if the party is represented.[4]

[4] Debra's suggestion that the Court of Appeals' decision "creates more problems than it solves" is unfounded. Here, in deciding the only issue on appeal, the Court of Appeals *assumed* that Brooks was her attorney in the very matter at issue. (Decision at 13, n. 7 (noting that the only issue considered was Debra's argument that "even if she was represented by counsel, rule 1.972 requires that both she and her counsel be given notice of intent to file for default.")

C. The legislative history of Rule 1.972.

The legislative history of Rule 1.972(3) also demonstrates that the drafters intended to provide mutually exclusive options of sending notice of default. "In construing a statute, it is important to consider the state of the law before the statute was enacted and the evil it was designed to remedy, and it is the business of courts to so construe the statute as to suppress the mischief and advance the remedy." *Appleby v. Farmers State Bank*, 56 N.W.2d 917, 921 (Iowa 1953) (internal citations and quotations omitted). Further, to glean legislative intent "it is fair to consider both the words used and deleted in companion subsections, in addition to the circumstances involved." *City of Nevada v. Slemmons*, 59 N.W.2d 793, 795 (Iowa 1953).

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

defaulting party or, if represented, the defaulting party's attorney. *Id.* at 753. There was, however, a local custom in Polk County of providing notice to the attorney of the party alleged to be in default or to an attorney known to regularly represent the defaulting party. *Id.* at 754. The *Central National* plaintiff did not send any notice to the party in default or their known attorney. *Id.* Default judgment was entered and the party in default moved to set the default aside, which the trial court granted. *Id.* at 752. The party seeking default appealed and the Iowa Supreme Court reversed the district court, finding that the default should have been granted. *Id.* at 756.

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

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

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

The differences are illustrative and help give meaning to Rule 1.972. The drafters' deletion of the word "and" signals an intention to depart from the Pennsylvania rule's requirements, just as the expansion of the requirement to send to any "known" counsel in the matter signals the intention of the drafters to reach beyond just attorneys of record in the matter. Further, the enactment of Rule 1.972 remedied the problems noted by the Court in *Central National*—a party's receipt of notice of a default directly if they are unrepresented, and through their counsel if they are represented. Through either route, the issue the *Central National* Court noted—the possibility of no notice to a party—was remedied.[5]

[5] Debra also challenges was she calls the "lack of accurate certifications". (Application at 9–10). That challenge is based on her belated claim that Brooks was not, in fact, her attorney—an issue the Court of Appeals held was not an issue on appeal. (Decision at 11–13). In any event, as noted in the decision, "there is no dispute that the Bank did, in fact, give Attorney Brooks notice as it claimed in the certifications." (Id. at 18).

CONCLUSION

Debra's Application is much less about the bases for this Court's discretionary further review of the Court of Appeals' decision, and much more a thinly-veiled attempted to relitigate the issue decided against her. For the reasons stated herein, further review of the Court of Appeals' May 11, 2022 decision is not supported by Iowa R. App. P. 6.1103. The Court should summarily deny Debra's request for further review.

Dated: June 2, 2022

Respectfully submitted,

/s/ Jeffrey W. Courter AT0001740
/s/ David T. Bower, AT0009246
/s/ Roy R. Leaf, AT0014486
NYEMASTER GOODE, P.C.
700 Walnut, Suite 1600
Des Moines, IA 50309
Telephone: 515-283-3100
Facsimile: 515-283-8045
Email: jwc@nyemaster.com
dbower@nyemaster.com
rleaf@nyemaster.com

ATTORNEYS FOR APPELLEE LINCOLN SAVINGS BANK

ATTORNEY'S COST CERTIFICATE

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

/s/ David T. Bower

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/s/ David T. Bower

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I hereby certify that on June 2, 2022, I electronically filed the foregoing with the Clerk of the Supreme Court of Iowa using the Iowa Electronic Document Management System, which will send notification of such filing to the counsel below:

Greg Geerdes
105 Iowa Ave., Suite 234
Iowa City, Iowa 52240
Telephone: 319-341-3304
Facsimile: 319-341-3306
Email: geerdeslaw@peoplepc.com

ATTORNEY FOR APPELLANT
DEBRA EMMERT

/s/ David T. Bower