IN THE SUPREME COURT OF IOWA

NO. 17-1979

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33 CARPENTERS CONSTRUCTION, INC.,

Plaintiff/ Counterclaim Defendant/Appellant/Cross-Appellee

vs.

THE CINCINNATI INSURANCE COMPANY,

Defendant/Counterclaim Plaintiff/Appellee/Cross-Appellant.

APPEAL FROM DISTRICT COURT OF MUSCATINE COUNTY
THE HONORABLE MARY E. HOWES (Cross-Appeal)
THE HONORABLE HENRY W. LANTHAM II (Appeal)
SCOTT COUNTY DISTRICT COURT CASE NO. LACE128760

APPELLEE/CROSS-APPELLANT'S FINAL BRIEF

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ISSUES PRESENTED FOR REVIEW

I. Whether the District Court correctly held Cincinnati Insurance Company was entitled to Summary Judgment because 33 Carpenters effectively acted as a public adjuster and thus the assignment between Whigham and 33 Carpenters was invalid?

Iowa Cases:

Bank of the West v. Kline, 782 N.W.2d 453 (Iowa 2010)
Bartlett Grain Co., LP v. Sheeder, 829 N.W.2d 18 (Iowa 2013)
Davis, Brody, Wisniewski v. Barrett, 115 N.W.2d 839 (Iowa 1962)
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State ex rel. Turner v. Koscot Interplanetary, Inc., 191 N.W.2d 624 (Iowa 1971)
United Suppliers, Inc. v. Hanson, 876 N.W.2d 765 (Iowa 2016)

Iowa Code:
Iowa Code § 522C.2
Iowa Code § 522C.6
Iowa Code §555A.5
Iowa Admin. Code r. 191-55.14(1)

Other Authorities:
Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co., 185 So. 3d 638, (Fla. Dist. Ct. App. 2016), *reh'g denied* (Mar. 9, 2016)
Fla. Stat. § 626.854(15)
Wm. Moore et al., *Moore's Federal Practice* § 205.05 (Matthew Bender 3d ed.2001)

ISSUES PRESENTED FOR REVIEW ON CROSS APPEAL

I. Whether the District Court erred in denying Cincinnati Insurance Company's Application to Terminate Expedited Civil Action Rule Application

Iowa Cases:
City of Sioux City v. Freese, 611 N.W.2d 777 (Iowa 2000)
Jack v. P & A Farms, Ltd., 822 N.W.2d 511 (Iowa 2012)
Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp., 606 N.W.2d 359 (Iowa 2000)
Iowa Dep't of Transp. v. Soward, 650 N.W.2d 569 (Iowa 2002)
Dubuque Policemen's Protective Ass'n v. City of Dubuque, 553 N.W.2d 603 (Iowa 1996)

Other Authorities:
Iowa Rule of Civil Procedure 1.281(1)(a)
Iowa Rule of Civil Procedure 1.1101 et seq.
22A Am.Jur.2d *Declaratory Judgments* § 1

ROUTING STATEMENT

This case should be transferred to the Iowa Court of Appeals pursuant to Iowa Rule of Appellate Procedure 6.1101(3)(a) as the issues presented in the appeal present the application of existing legal principles. The issues presented in the cross-appeal only need addressed if the district court is reversed on the appeal and the case is remanded to the district court. The cross-appeal issues are matters of first impression regarding the interpretation of a relatively new rule of civil procedure. However, because this case should be determined by affirming the district court's order on the main appeal, the cross-appeal is unnecessary and therefore the entire case should be transferred to the Iowa Court of Appeals.

STATEMENT OF THE CASE

The Cincinnati Insurance Company (hereinafter "Cincinnati") agrees with 33 Carpenter's statement of the case but adds the following procedural history relevant to the cross-appeal. 33 Carpenters filed this action as an expedited civil action pursuant to Iowa Rule of Civil Procedure 1.281. (App. 3 ¶ 4). On April 5, 2017, Cincinnati filed its answer and asserted a counterclaim for declaratory relief. (App. 7-15). The counterclaim alleges an actual controversy exists between the parties regarding the legal effect of the assignment, which can be set to rest by declaratory judgment pursuant to Iowa Rules of Civil Procedure 1.1101 et. seq. (App. 14 ¶ 23). On May 15, 2017, Cincinnati filed an application to terminate the

expedited civil action rule application pursuant to Iowa Rule of Civil Procedure 1.281(1)(g)(2). 33 Carpenters resisted, and after a hearing, on July 14, 2017, the district court denied Cincinnati's application to terminate the expedited civil action rule application.

STATEMENT OF FACTS

Cincinnati largely agrees with most of 33 Carpenters' recitation of the facts with the following corrections and additions. Contrary to 33 Carpenter's position, the assignment at issue in this litigation can be found at Summary Judgment Exhibit A. (Not included in Appendix).

33 Carpenters is a contractor specializing in exterior remodeling and storm repairs including roof repair, roof replacement, and roof maintenance. (App. 25 ¶ 4; App. 108-114). Additionally, 33 Carpenter's advertised its "public adjusting" services on its website by employing a six step process in assisting its customers with insurance claims:

> Step 1. **Contact 33 Carpenters for a free comprehensive storm damage evaluation and assessment.**
> Step 2. **Contact your insurance company to file a claim.** Inform your insurance company that your home was impacted by recent severe storms and your home was inspected by a licensed general contractor and areas of your home are damaged.
> Step 3. **Inform us when the insurance adjuster will be coming out to assess the damage on your home or property.** We will meet personally with your insurance adjuster, as an ADVOCATE on YOUR behalf, and discuss the work that needs to be completed to repair your home to its original beauty and value. Your insurance

adjuster will submit a report that will list the work that needs to be completed and a copy will be sent to you.

Step 4. **Send us a copy of the summary report put together by your insurance company**. Included in the summary report will be itemized costs of the work that needs to be performed. We will work directly with your insurance company to ensure that all damaged areas of your home will be included on the report.

Step 5. **We will meet with you to make product selections.** Our entire team has a vast and comprehensive knowledge about all home exterior products and we are happy to help you in the decision making process regarding product selection and color options. We will work with your schedule to determine the best day to start the necessary repairs to your home.

Step 6. **Payment**. We will provide you and your insurance company with a copy of the invoice when the work is completed. You may be required to get your mortgage company to endorse the check from the insurance company before payment can be submitted to us for the work completed to your home. You are responsible for your insurance deductible and any agreed upon upgrades.

(App. 25¶ 5; App. 115-118).

33 Carpenters filed this lawsuit on March 13, 2017. (Pet.). When Cincinnati spoke with Whigham one week later, Whigham had no knowledge of the lawsuit. (App. 28 ¶ 21-22; App. 119-121). Whigham also indicated 33 Carpenters told him the assignment form was a standard practice and that clients routinely sign it. (App. 28 ¶ 22; App. 119-121).

ARGUMENT

I. STANDARD OF APPELLATE REVIEW AND ERROR PRESERVATION

Cincinnati agrees with 33 Carpenters that the general question of the validity of the purported assignment has been preserved for appellate review. However, as discussed below, whether the court (rather than the Iowa Insurance Commission) has the authority to enforce Iowa Code Chapter 522C has not been preserved for appellate review.

The Court reviews grants of summary judgment for correction of errors at law. *McKee v. Isle of Capri Casinos, Inc.*, 864 N.W.2d 518, 525 (Iowa 2015). "Summary judgment is appropriate when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law." *Rosauer Corp. v. Sapp Dev., L.L.C.,* 856 N.W.2d 906, 908 (Iowa 2014). The court views the record in the light most favorable to 33 Carpenters as the nonmoving party. *See Shelby Cnty. Cookers, L.L.C. v. Util. Consultants Int'l, Inc.,* 857 N.W.2d 186, 189 (Iowa 2014).

Additionally, Cincinnati filed its counterclaim as a declaratory judgment action. The district's holding on Cincinnati's summary judgment motion culminated in a ruling declaring the parties' respective rights under the insurance contract between Cincinnati and Whigham through the determination of the

validity of the assignment agreement between 33 Carpenters and Whigham as Cincinnati's insured. Although Cincinnati styled its motion as one for summary judgment, Iowa Rules of Civil Procedure 1.1101 and 1.1102 also permit the court to entertain a motion for declaratory ruling regarding whether the purported assignment to 33 Carpenters is valid. Iowa Rule of Civil Procedure 1.1101 expressly provides courts "shall declare rights, status, and other legal relations whether or not further relief is or could be claimed." When a court determines declaratory relief is in fact appropriate, a party cannot successfully resist a motion seeking a declaratory ruling by arguing there is another available remedy. *See* Iowa R. Civ. P. 1.1101. In addition to this general rule, the specific rule regarding the construction and interpretation of contracts governs the present dispute. In pertinent part, Iowa Rule of Civil Procedure 1.1102 states that "[a]ny person interested in . . . [a] written contract . . . may have any question of the construction or validity thereof or arising thereunder determined, and obtain a declaration of rights, status, or legal relations thereunder." Accordingly, in addition to the authority vested by Iowa Rule of Civil Procedure 1.981 (summary judgment), the district court possessed the authority to render a declaration of these parties' rights regarding the purported assignment.

To determine the proper standard of review for a declaratory judgment finding, the Court considers the pleadings, the relief sought, and the nature of the

case to determine whether the declaratory judgment action is legal or equitable. *Van Sloun v. Agan Bros.*, 778 N.W.2d 174, 178 (Iowa 2010) (citing *Passehl Estate v. Passehl*, 712 N.W.2d 408, 414 (Iowa 2006)). If there are no evidentiary objections and when the parties file motions normally made in legal actions, the action is one of law. *Id.* (citations omitted). This is particularly true when the relief requested is a court declaration regarding obligations under a contract. *Id.* Here, the action is one of law and the review is for errors of law.

II. THE DISTRICT COURT CORRECTLY HELD THE PURPORTED ASSIGNMENT OF WHIGHAM'S INSURANCE CLAIM TO 33 CARPENTERS WAS INVALID

The district court correctly found the purported assignment of Whigham's insurance claim to 33 Carpenters must be deemed invalid because it violates Iowa's licensure requirement for public adjusters. This decision must be affirmed as it is consistent with longstanding Iowa law, and contrary to Appellant's position, it was within the power of the district court to make that determination, not the Iowa Insurance Commission. These arguments will be addressed in turn.

A. The District Court did not Err in Finding the Assignment Was Not Valid

The District Court was correct in ruling in Cincinnati's favor on its counterclaim for declaratory relief and against 33 Carpenters on its direct claims

because the purported assignment of Whigham's insurance claim to 33 Carpenters is invalid because it violates Iowa's licensure requirement for public adjusters.

Under Iowa law, a valid contract must consist of an offer, acceptance, and consideration. *Bartlett Grain Co., LP v. Sheeder*, 829 N.W.2d 18, 24 (Iowa 2013) (citations omitted). In addition, "[t]he general rule is an agreement that is contrary to the provisions of any statute or intends to be repugnant to general common law policy is void." *Staff Mgmt. v. Jimenez*, 839 N.W.2d 640, 650 (Iowa 2013) (citing *Reynolds v. Nichols & Co.*, 12 Iowa 398, 403 (1861)). "Contracting parties are presumed to contract in reference to the existing law, which becomes part of the contract." *United Suppliers, Inc. v. Hanson*, 876 N.W.2d 765, 780 (Iowa 2016) (quoting *In re Receivership of Mt. Pleasant Bank & Trust Co.*, 426 N.W.2d 126, 134 (Iowa 1988)). "It is well-established Iowa law that contracts made in contravention of a statute are void, and Iowa courts will not enforce such contracts." *Bank of the West v. Kline*, 782 N.W.2d 453, 462 (Iowa 2010). The Iowa Supreme Court has held the "general rule appears to be that a contract made in the course of a business or occupation for which a license is required by one who has not complied with such requirement is unenforceable where the statute expressly so provides, or where it expressly or impliedly, as a police regulation, prohibits the conduct of such business without compliance." *Davis, Brody, Wisniewski v. Barrett*, 115 N.W.2d 839, 841 (Iowa 1962) (citations omitted); *see*

also Hoxsey v. Baker, 246 N.W. 653, 655 (Iowa 1933) (holding it is "well settled that where the law requires a person who practices a profession such as medicine or pharmacy to obtain a license," a plaintiff cannot recover under a contract for services unless he has a license to perform those services); *Food Mgmt., Inc. v. Blue Ribbon Beef Pack, Inc.*, 413 F.2d 716, 724–25 (8th Cir. 1969) (applying Iowa law and finding contracts contravening Iowa architectural and professional engineering registration statutes are unenforceable). Where a statute addresses the protection of health, safety, morals, and welfare of the people, all contracts are subject to that statute. *State ex rel. Turner v. Koscot Interplanetary, Inc.*, 191 N.W.2d 624, 630 (Iowa 1971).

By acting as an advocate during Cincinnati's adjustment of Whigham's insurance claim, 33 Carpenters effectively acted as a public adjuster. Iowa Code Chapter 522C governs the licensing of public adjusters. The Iowa Code defines a "public adjuster" as any person who for compensation or any other thing of value acts on behalf of an insured by doing any of the following:

> A. *Acting for or aiding an insured in negotiating for or effecting the settlement of a first-party claim for loss or damage to real or personal property of the insured.*
>
> b. Advertising for employment as a public adjuster of first-party insurance claims or otherwise soliciting business or representing to the public that the person is a public adjuster of first-party insurance claims for loss or damage to real or personal property of an insured.

> c. Directly or indirectly soliciting business investigating or adjusting loss, or advising an insured about first-party claims for loss or damage to real or personal property of the insured.

Iowa Code § 522C.2(7)(a)–(c) (2017) (emphasis added). Iowa Code section 522C.4 provides "[a] person shall not operate as or represent that the person is a public adjuster in this state unless the person is licensed by the commissioner in accordance with this chapter." A person who acts as a public adjuster without proper licensure commits a serious misdemeanor. *Id.* at § 522C.6(2).

Although Iowa Code Chapter 522C does not expressly provide a contract made by one who neglected to obtain a license is unenforceable, the implication is clear where the penalties for non-licensure include from its most lenient, the probation, suspension, revocation, or refusal to issue or renew a license or a civil penalty from the state commissioner of insurance, up to a conviction of a serious misdemeanor for willful violations. Such measures strongly indicate the legislature seeks to prevent the conduct of such noncompliance, and therefore, courts should not enforce their agreements.

True to the marketing statement on its website, 33 Carpenters acted as an advocate on behalf of Whigham from the onset of his insurance claim. Though the storm occurred on March 15, 2016, for reasons known only to Whigham and 33 Carpenters, it was not until almost seven months later, October 6, 2016, that 33 Carpenters helped report the claim to Cincinnati. (App. 26 ¶¶ 7-8; App. 119-121).

On February 21 and 22, 2017, Austin Nelsen continued 33 Carpenters advocacy by advising Cincinnati it was necessary to replace all the siding and gutters due to a matching issue. (App. 27 ¶ 14; App. 119-121; App. 122-134). Cincinnati re-opened its file. (App. 27 ¶ 15; App. 120 ¶ 9). 33 Carpenters inspected the siding and provided Cincinnati photos of why it believed the siding needed replaced. (App. 27 ¶ 16; App. 120 ¶ 10; App. 122-134). 33 Carpenters was informed by Cincinnati that Cincinnati would address any differences directly with its insured, Whigham. (App. 27 ¶ 17; App. 120 ¶ 11; App. 122-134).

Nelsen sent multiple e-mails to Cincinnati demanding inspection times and arguing the siding did not match. (App. 27 ¶ 18; App. 120 ¶ 12; App. 122-134). Nelsen sent an e-mail to Whigham stating:

> Ok. [Cincinnati representative] Mr. Tessen has had a difficult time communicating with me. We need to determine how Cincinnati intends to make you whole. Our suggestion is to remove and replace the siding, fascia, soffit, gutters and downs. That is the only way to make your home look like it did prior to the event. Please advise.

(App. 27 ¶ 19; App. 120 ¶ 13; App. 122-134).

33 Carpenters maintains a contractor license, but it does not have a public adjuster's license nor does any of its employees hold a public adjuster's license. (App. 26 ¶ 6; App. 17 ¶ 16). 33 Carpenters advertises on its website that it will advocate on the insured's behalf with the insurance adjuster, and it will work directly with the insurance company to ensure that all damaged areas of the home

are included. (App. 25-26 ¶ 5; App. 115-118). In February, 2017, 33 Carpenters informed Cincinnati that it represented Whigham regarding his insurance claim. (App. 27 ¶ 14; App. 120; App. 122-134). 33 Carpenters attempted to aid Whigham in negotiations with Cincinnati to "determine how Cincinnati is going to make [Whigham] whole." (App. 27 ¶ 19; App. 120; App. 122-134). 33 Carpenters also, on its own, investigated the status of the siding and demanded it be present at Cincinnati's site inspection. (App. 27 ¶ 16; App. 120; App. 122-134).

By undertaking these actions, 33 Carpenters acted as a public adjuster as that term is defined in Iowa Code section 522C.2. 33 Carpenters did so without the requisite license. 33 Carpenters, therefore, violated Iowa Code section 522C.4 by acting as an unlicensed public adjuster. As a consequence, the assignment must be deemed invalid under Iowa law because it would effectively allow 33 Carpenters to operate as a public adjuster without the license required under Iowa Code chapter 522C.

A Florida appellate court recently analyzed a substantially similar issue. *Bioscience W., Inc. v. Gulfstream Prop. & Cas. Ins. Co.*, 185 So. 3d 638, 641–42 (Fla. Dist. Ct. App. 2016), *reh'g denied* (Mar. 9, 2016). In *Bioscience* the district court granted summary judgment to Gulfstream Property and Casualty Insurance Company holding its insured was precluded from assigning the benefits of her homeowner's insurance to Bioscience, an emergency water mitigation company,

without first receiving Gulfstream's consent. The appellate court reversed and found the plain language of the policy merely prohibited the insured's unilateral assignment of the entire policy, not a financial benefit derived from that policy, and Florida law prohibits an insurer from restricting an insured's unilateral post-loss assignment on a benefit derived form that policy. *Id.* at 639. What is relevant to the analysis in this case, however, was the argument presented before the Florida court that the assignment of benefits to Bioscience violated section 626.854(16) Florida Statutes (2012), a public adjusting statute. *Id.* at 641. Specifically, Gulfstream contended the assignment to Bioscience impermissibly adjusted the insurance claim, contrary to the statute's mandate. The Court, however, found there was no evidence Bioscience adjusted the claim. Bioscience provided emergency, post-loss water removal services to the insured's home at her request, it did not determine the amount due under the policy. *Id.* Also, the text of section 626.854(15) expressly permits a contractor, like Bioscience, to "discuss or explain a bid for construction or repair of covered property with the residential property owner who has suffered loss or damage covered by a property insurance policy" if that contractor "is doing so for the usual and customary fees applicable to the work to be performed as stated in the contract between the contractor and the insured." *Id.* (quoting Fla. Stat. § 626.854(15)). The Florida Court rejected Gulfstream's argument and found the assignment was acceptable.

The facts and law in this case are different than those in front of the Florida court. Unlike the contractor in *Bioscience*, 33 Carpenters has adjusted the insurance claim contrary to the statute's mandate. In its own words, it advocates on behalf of the insured with the insurer. It completed its own inspection and then attempted to negotiate with Cincinnati. Moreover, unlike Florida, Iowa does not have the code section allowing for contractors to explain what was going on with the repair; though it is clear 33 Carpenters went beyond explaining what was done. The two factors relied upon by the Florida Court are not present in this case, supporting the Iowa district court's opinion. Summary judgment was properly granted.

33 Carpenters argues it owned Whigham's claim in its entirety after October 10, 2016, and thus, any attempt by 33 Carpenters to communicate with Cincinnati after October 10 was an attempt to negotiate its own claim, rather than an attempt to adjust or negotiate Whigham's claim. The timing is irrelevant. The assignment still contemplates 33 Carpenters will advocate on behalf of Whigham as Whigham still own the home. This is evidence by the fact that long after October 10, 33 Carpenters sent an e-mail to Whigham indicating they needed to determine how Cincinnati intended on making Whigham whole. (App. 27 ¶ 19; App. 120; App 122-134).

33 Carpenters relatedly contends its conduct prior to Whigham's assignment of his insurance claim to 33 Carpenters did not violate the public adjuster licensure requirements of Iowa Code Chapter 522C. This conduct ignores the representations of 33 Carpenters in the marketing materials on its website as well as the conduct of Tony McClannahan when he reported an insurance claim to Cincinnati on behalf of Whigham and requested to be present at all insurance inspections. More importantly, however, it ignores the requirements for contracts involving the provision of public adjusting services imposed by the Iowa Administrative Code. Iowa Code Chapter 522C authorized the Insurance Commissioner to adopt rules concerning, among other things, contracts between public adjusters and insureds as well as required disclosures for licensed public adjusters. The Insurance Commissioner, accordingly, promulgated the following rules which are implicated by 33 Carpenters' conduct in the present matter:

> **191-55.14(1)** Public adjusters shall ensure that all contracts for their services are in writing and contain the following terms:
> a. Legible full name of the adjuster signing the contract, as specified in division records;
> b. Permanent home state business address and telephone number;
> c. *Public adjuster license number*;
> d. *Title of "Public Adjuster Contract"*;
> e. Insured's full name, street address, insurance company name and policy number, if known or upon notification;
> f. Description of the loss and its location, if applicable;
> g. Description of services to be provided to the insured;
> h. Signatures of the public adjuster and the insured;
> i. Date contract was signed by the public adjuster and date the contract was signed by the insured;

j. *Attestation language stating that the public adjuster is fully bonded pursuant to state law*; and

k. *Full salary, fee commission, compensation or other considerations the public adjuster is to receive for services.*

191-55.14(2) *The contract may specify that the public adjuster shall be named as a co-payee on an insurer's payment of a claim.*

a. If the compensation is based on a share of the insurance settlement, the exact percentage shall be specified.

b. Initial expenses to be reimbursed to the public adjuster from the proceeds of the claim payment shall be specified by type, with dollar estimates set forth in the contract. Any additional expenses shall be approved by the insured.

c. Compensation provisions in a public adjusting contract shall not be redacted in any copy of the contract provided to the division. Such a redaction shall constitute a dishonest practice in violation of paragraph 55.12(1)"i."

...

191-55.14(4) A public adjuster shall provide the insured a *written disclosure* concerning any direct or indirect financial interest that the public adjuster has with any other party who is involved in any aspect of the claim, other than the salary, fee, commission or other consideration established in the written contract with the insured, including but not limited to any ownership of, other than as a minority stockholder, or any compensation expected to be received from, any construction firm, salvage firm, building appraisal firm, motor vehicle repair shop, or any other firm that provides estimates for work, or that performs any work, in conjunction with damage caused by the insured loss on which the public adjuster is engaged. The term "firm" shall include any corporation, partnership, association, joint-stock company or person.

191-55.14(5) *A public adjuster contract may not contain any contract term that*:

a. Allows the public adjuster's percentage fee to be collected when money is due from an insurance company, but not paid, or that allows a public adjuster to collect the entire fee from the first check issued by an insurance company, rather than as a percentage of each check issued by an insurance company;

b. *Requires the insured to authorize an insurance company to issue a check only in the name of the public adjuster*;

c. Imposes collection costs or late fees; or

d. Precludes a public adjuster from pursuing civil remedies.

191-55.14(6) *Prior to the signing of the contract, the public adjuster shall provide the insured with a separate disclosure document regarding the claim process as set forth in Appendix I.*

191-55.14(9) *The public adjuster shall give the insured written notice of the insured's rights as provided in Iowa Code chapter 555A, and the insured may rescind the contract as provided in Iowa Code chapter 555A. The contract shall not be construed to prevent an insured from pursuing any civil remedy after the three-business-day revocation or cancellation period.*

191-55.17(4) *A public adjuster shall not have a direct or indirect financial interest in any aspect of the claim, other than the salary, fee, commission or other consideration established in the written contract with the insured, unless full written disclosure has been made to the insured as set forth in subrule 55.14(4).*

191-55.17(6) *The public adjuster shall abstain from referring or directing the insured to obtain needed repairs or services in connection with a loss from any person, unless disclosed to the insured*:

a. *With whom the public adjuster has a financial interest*; or

b. From whom the public adjuster may receive direct or indirect compensation for the referral.

191-55.17(12) *A public adjuster shall not enter into a contract or accept a power of attorney that vests in the public adjuster the effective authority to choose the persons who shall perform repair work.*

191-55.17(13) *A public adjuster may not agree to any loss settlement without the insured's knowledge and consent.*

191-55.18(2) *A person shall not accept a commission, service fee or other valuable consideration for investigating or settling claims in this state if that person is required to be licensed under this chapter and is not so licensed.*

APPENDIX I
DISCLOSURE DOCUMENT
REGARDING THE CLAIM PROCESS

(1) Property insurance policies obligate the insured to present a claim to the insured's insurance company for consideration. There are three types of adjusters that could be involved in that process. The definitions of the three types are as follows:

(a) "Company adjusters" means the insurance adjusters who are employees of insurance companies. They represent the interests of the insurance companies and are paid by the insurance companies. They will not charge the insureds fees.

(b) "Independent adjusters" means the insurance adjusters who are hired on a contract basis by insurance companies to represent the insurance companies' interests in the settlement of claims. They are paid by the insurance companies. They will not charge the insureds fees.

(c) "Public adjusters" means the insurance adjusters who do not work for any insurance companies. They work for insureds to assist in the preparation, presentation and settlement of claims. The insureds hire them by signing contracts agreeing to pay them fees or commissions based on a percentage of the settlements, or other method of compensation.

(2) The insured is not required to hire a public adjuster to help the insured meet the insured's obligations under the policy, but has the right to do so.

(3) The insured has the right to initiate direct communications with the insured's attorney, the insurer, the insurer's adjuster, the insurer's attorney or any other person regarding the settlement of the insured's claim.

(4) The public adjuster is not a representative or employee of the insurer.

(5) The salary, fee, commission or other consideration is the obligation of the insured, not the insurer.

(6) An insured may contact the Iowa Insurance Division with questions about insurance law toll-free from within Iowa at (877)955-1212 or through the Division's Web site at www.iid.state.ia.us.

Iowa Admin. Code r. 191-55.14 (emphasis added).

The provisions of Rule 191-55.14(9) specifically address the voidability of a contract for public adjusting services. This administrative rule requires a public adjuster to give an insured written notice of the right of cancellation and reciprocal notice requirements set forth in Iowa Code sections 555A.2 and 555A.3. The failure of a public adjuster to provide the insured with the requisite notice voids the contract. Iowa Code § 555A.5. The courts in other jurisdictions interpreting similar statutory language have found a vendor or contractor's failure to obtain a public adjuster's license voided its agreement with the insured. *Building Permits Consultants Inc. v. Mazur*, 19 Cal. Rptr. 3d 562 (Cal. Ct. App. 2d, Div. 3, 2004); *Gross v. Reliance Ins. Co. of New York*, 462 N.Y.S.2d 776 (Sup. Ct. 1983); *Zarrell v. Herb Gutenplan Assoc., Inc.*, 44 N.Y.S.2d 39 (Sup. Ct. 1981).

In short, 33 Carpenters engaged in public adjusting conduct from the onset of its relationship with Whigham. The assignment to 33 Carpenters also fails to address a number of requirements for public adjusting contracts imposed by the Iowa Administrative Rules. Regardless, permitting an assignment to avoid licensure requires runs contrary to public policy. Thus, any argument by 33 Carpenters that the timing of its actions somehow exempts it from the licensure requirements of Iowa Code Chapter 522C lacks merit.

The district court did not commit an error of law when it determined the purported assignment of Whigham's insurances claim to 33 Carpenters is invalid

because it violates Iowa's licensure requirement for public adjusters. The district court should be affirmed in its entirety.

B. The District Court Had Jurisdiction and the Ability to Hear These Arguments Regardless of the Powers of the Iowa Insurance Commission

33 Carpenters argues if it contravened Iowa law during this "limited exchange" (despite the fact a cursory review of the court docket indicates this practice is not limited to Whigham[1]), the Iowa Insurance Commission is the proper body to regulate such behaviors and it alone may enforce the provisions of Iowa Code Chapter 522C. This issue was not decided by the district court, and thus, has not been preserved for appellate review. Alternatively, it has no merit.

1. This issue was not preserved for appellate review.

Error preservation rules require a party seeking to appeal an issue presented to, but not considered by, the district court to call to the attention of the district court its failure to decide the issue. *Meier v. Senecaut*, 641 N.W.2d 532, 540 (Iowa

[1] Noteworthy, the events of this lawsuit (assignment from an insured and then file a lawsuit against the insurer) is not an isolated event. Currently pending in the Scott County District Court are at least five other cases with the same relationship. *33 Carpenters Construction Inc. v. Celina Mut. Ins. Co.*, LACE128748 (D. Scott Cnty. filed March 10, 2017); *33 Carpenters Construction Inc. v. QBE Ins.*, LACE128747 (D. Scott Cnty. filed March 10, 2017); *33 Carpenters Construction Inc. v. American Family Home Ins. Co.*, LACE128759 (D. Scott. Cnty. filed March 13, 2017); *33 Carpenters Construction Inc. v. The Travelers Home and Marine Ins. Co.*, LACE128751 (D. Scott. Cnty. filed March 13, 2017); *33 Carpenters Construction Inc. v. West Bend Mut. Ins. Co.*, LACE 128750 (D. Scott. Cnty. filed March 10, 2017) (consolidation of four law suits).

2002) (citations omitted). The claim or issue raised does not actually need to be used as the basis for the decision to be preserved, but the record must at least reveal the court was aware of the claim or issue and litigated it. *Id.* (citing Wm. Moore et al., *Moore's Federal Practice* § 205.05 [1], at 205–55 (Matthew Bender 3d ed. 2001); *see Linge v. Ralston Purina Co.*, 293 N.W.2d 191, 195–96 (Iowa 1980) (issue not preserved where it was not specifically addressed in the district court ruling and the record and ruling did not infer the issue was decided)).

In *Meier v. Senecaut*, Senecaut III properly raised a jurisdictional issue, but this was not the only issue raised in Senecaut's motion. Therefore, the denial of that motion to dismiss by the district court would not necessarily mean the jurisdictional issue was considered. *Id.* at 540. The Supreme Court found the record failed to reveal that the district court considered the jurisdictional issue through other means: no record of the hearing on the motion existed and the district court did not address the issue in the written ruling. *Id.* The district court confined its ruling to other issues. *Id.* at 540–41 (citing *Sandeblute v. Farm Bureau Mut. Ins. Co.*, 343 N.W.2d 457, 466 (Iowa 1984) (an alternative argument set forth in a motion not specifically addressed by the district court ruling on the motion was not preserved for review). The Supreme Court found the record failed to show the jurisdiction claim was considered by the district court and Senecaut III

failed to call to the attention of the district court its failure to consider the issue and give it an opportunity to pass upon it. *Id.* at 541. The issue was therefore waived. *Id.*

Meier v. Senecaut is directly applicable here. 33 Carpenters raised before the district court whether it has jurisdiction or whether the Iowa Insurance Commission had the sole authority to enforce Iowa Code Chapter 522C. The district court did not address the issue in its written ruling on the motion. Like *Meier*, it is immaterial it was a jurisdictional issue. 33 Carpenters should have called to the district court's attention to its failure to address the issue and give it an opportunity to pass upon it. 33 Carpenters' failure to do so resulted in a waiver of this argument and it is not preserved for appellate review.

2. *Alternatively, the district court had jurisdiction and authority to analyze whether this assignment was valid.*

Alternatively, if this issue was preserved for appellate review, the district court had the authority to determine whether the assignment was valid. Contrary to 33 Carpenters' position that Cincinnati attempted to invalidate the underlying contract between 33 Carpenters and Whigham, Cincinnati sought to invalidate the assignment. The statute provides the Iowa Insurance Commission the authority to punish those who violate the requirements of Iowa Code chapter 522C with a civil penalty. Cincinnati did not request the district court punish 33 Carpenters. Additionally, Section 522C.6(2) provides a person who wilfully violates the

requirements of 522C is guilty of a serious misdemeanor. The Iowa Insurance Commission could not find a person guilty of a criminal offense, the matter of whether the statute was violated constituting a criminal offense would have to be determined by a district court. The jurisdiction of the district court is further supported by the previously cited cases in which the Court invalidated contracts in situations a license was required. *See Davis, Brody, Wisniewski*, 115 N.W. 2d at 841 (implicitly holding the court had jurisdiction to invalidate a contract despite there being a licensing board); *Food Mgmt., Inc.*, 413 F.2d at 724–25 (same).

Moreover, 33 Carpenters is the party who brought this suit in the district court. It was well within Cincinnati's right to raise the defense that the purported assignment was not valid in the venue it had been hailed into. Contrary to 33 Carpenter's position, Chapter 522C and 507A do not have to provide for negating assignments that are contrary to statutory provisions: Iowa case law already does.

Cincinnati does not ask this Court to impose any of the sanctions authorized by Iowa Code Chapter 522C.6 for violation of the public adjusting licensure requirements. Rather, Cincinnati relies on the law of Iowa that contracts made in contraventions of statutes are void, and Iowa courts will not enforce such contracts. Whether any penalties or sanctions, as authorized by Iowa Code Chapter 522C.6 or otherwise, are appropriate under the circumstances of this case are left to the discretion of the Insurance Commissioner.

CROSS-APPEAL ARGUMENT

I. STANDARD OF APPELLATE REVIEW AND ERROR PRESERVATION

Because this is an action at law, the scope of review is for correction of errors at law. Iowa R. App. P. 6.907. The question regarding whether this case should have been removed from the expedited track is a question of interpretation of the rules of civil procedure. The Iowa Rules of Civil Procedure have the force and effect of law. *City of Sioux City v. Freese*, 611 N.W.2d 777, 779 (Iowa 2000) (citing *Fisher v. Davis*, 601 N.W.2d 54, 60 (Iowa 1999)). Therefore, the rules are interpreted in the same manner as statues and the review is for correction of errors at law. *Id.*

Regarding error preservation, this interlocutory ruling is reviewable by an appellate court on appeal from the final judgment. *Johnson v. Iowa State Highway Comm'n*, 134 N.W.2d 916, 918 (Iowa 1965). Cincinnati filed a timely notice of cross-appeal on December 18, 2017.

II. THE DISTRICT COURT'S DECISION NOT TO TERMINATE THE APPLICATION OF THE EXPEDITED CIVIL ACTION RULES RESTED ON AN ERRONEOUS INTERPRETATION OF IOWA RULE OF CIVIL PROCEDURE 1.281

Should this Court determine the district court erred in granting Cincinnati's motion for summary judgment, it should find the district court erred in not removing this action from the expedited civil action track provided in Iowa Rule of

Civil Procedure 1.281 and remand to the district court for proceedings without the application of Rule 1.281.

In interpreting a rule of civil procedure, the Supreme Court focuses on the language of the rule itself. *City of Sioux City*, 611 N.W.2d at 779; *Jack v. P & A Farms, Ltd.*, 822 N.W.2d 511, 515 n. 5 (Iowa 2012) ("We acknowledge that the Iowa Rules of Civil Procedure are promulgated by this court in consultation with the Iowa Supreme Court Advisory Committee on Rules of Civil Procedure. Nonetheless, we apply ordinary canons of statutory construction in interpreting these rules."). The Court is to "look to both the language and the purpose behind the statute." *Jack*, 822 N.W.2d at 515 (quoting *Iowa Comprehensive Petroleum Underground Storage Tank Fund Bd. v. Mobil Oil Corp.*, 606 N.W.2d 359, 363 (Iowa 2000)). The Court also considers "relevant statutes together and try to harmonize them." *Id.* (quoting *Iowa Dep't of Transp. v. Soward,* 650 N.W.2d 569, 571 (Iowa 2002)). "If the legislature has not defined words of a statute, we may refer to prior decisions of this court and others, similar statutes, dictionary definitions, and common usage." *Id.* at 516.

Iowa Rule of Civil Procedure 1.281(1)(a) sets forth the eligibility requirements for an expedited civil action:

> Rule 1.281 governs "expedited civil actions" in which the relief sought is a monetary judgment **and** in which all claims (other than compulsory counterclaims) for all damages by or against any one party total $75,000 or less, including damages of any kind, penalties,

> prefiling interest, and attorney fees, but excluding prejudgment interest accrued after the filing date, postjudgment interest, and costs.

(emphasis added).

This rule requires the sole relief sought must be a money judgment and the relief sought must be below a monetary threshold. Because Cincinnati filed a compulsory counterclaim seeking something other than monetary relief, the case is not eligible for expedited case processing. Iowa Rule of Civil Procedure 1.281(1)(g)(2).

33 Carpenters filed its Petition at Law as an expedited civil action pursuant to Rule 1.281 on March 13, 2017, alleging Cincinnati breached a policy of insurance causing damage. On April 5, 2017, Cincinnati filed its answer and asserted a counterclaim for declaratory relief alleging an actual controversy exists between the parties regarding the legal effect of the assignment to 33 Carpenters, which can be set to rest by a declaratory judgment pursuant to Iowa Rules of Civil Procedure 1.1101 et. seq. The counterclaim is a compulsory counterclaim that has been made in good faith. Iowa Rule of Civil Procedure 1.281(1)(a) provides a claim can proceed as an expedited civil action if "the sole relief sought is a money judgment."

Iowa Rule of Civil Procedure 1.281(1)(g)(2) provides a party may apply to terminate the application of Rule 1.281 when "A party has in good faith filed a compulsory counterclaim that seeks relief other than that allowed under Rule

1.281(1)(a)." Here, the counterclaim for declaratory relief is a good-faith, compulsory counterclaim that does not request a money judgment, as such, this action cannot proceed under Rule 1.281.

Moreover, allowing a declaratory judgment action to proceed under the expedited track does not allow for each rule to fulfill the intended purposes. Rule 1.281(4)(e) provides a court in trying an expedited civil action without a jury is not required to provide findings of fact and conclusion of law and can instead render judgment on a general verdict, special verdicts, or answers to interrogatories that are accompanied by relevant legal instructions that would be used if the action were being tried to a jury. The comment to Rule 1.281(4)(e) provides "The rule is intended to conserve judicial time and resources by giving the court discretion to dispense with findings of fact and conclusions of law and instead render a verdict as if the court were sitting as a 'jury of one.'" This is inconsistent with the purpose of declaratory judgments. In general, "the purpose of the declaratory judgment is to resolve uncertainties and controversies before obligations are repudiated, rights are invaded, or wrongs are committed." *Dubuque Policemen's Protective Ass'n v. City of Dubuque*, 553 N.W.2d 603, 607 (Iowa 1996) (citing 22A Am.Jur.2d *Declaratory Judgments* § 1, at 670. Allowing the court to render a verdict as a jury of one without explaining its reasoning is inconsistent with the purpose of declaratory judgments.

Both the plain language of Iowa Rule of Civil Procedure 1.281 and the purpose of declaratory judgments supports finding the district court erred in allowing this matter to proceed under the expedited rules. Should this matter be remanded to the district court, it should be remanded with instructions to remove the matter from the application of Rule 1.281.

CONCLUSION

In summary, the district court correctly held 33 Carpenters engaged in public adjusting conduct from the onset of its relationship with Greg Whigham. The district court did not commit an error of law when it determined the purported assignment of Whigham's insurances claim to 33 Carpenters is invalid because it violates Iowa's licensure requirement for public adjusters. It should be affirmed in its entirety.

Alternatively, if this matter should be reversed and remanded to the district court, it should be remanded with instructions that it must be removed from the application of Iowa Rule of Civil Procedure 1.281 due to Cincinnati's compulsory counterclaim for non-money damages.

REQUEST FOR ORAL ARGUMENT

Cincinnati requests the opportunity to present oral argument on the issues raised by this appeal and cross-appeal.

CERTIFICATE OF COMPLIANCE WITH TYPEFACE REQUIREMENTS AND TYPE-VOLUME LIMITATION

This brief complies with the typeface requirements and type-volume limitation of Iowa Rs. App. P. 6.903(1)(d) and 6.903(1)(g)(l) or (2) because:

[x] this brief has been prepared in a proportionally spaced typeface using Times New Roman in 14 point and contains 6,691 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(l).

/s/ Catherine M. Lucas
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CERTIFICATE OF FILING AND SERVICE

The undersigned certifies a copy of Defendant/Counterclaim Plaintiff/Appellee/Counter-Appellant's Final Brief was filed with the Clerk of the Iowa Supreme Court via EDMS and served upon the following persons by EDMS on the 5th day of April, 2018.

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ATTORNEY'S COST CERTIFICATE

I hereby certify that the cost of printing the foregoing Final Brief was the sum of $ N/A (EDMS).

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