

IN THE SUPREME COURT OF IOWA

Case No. 17-1979

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33 CARPENTERS CONSTRUCTION, INC.,

Appellant/Cross-Appellee/Plaintiff/Counterclaim Defendant,

v.

THE CINCINATTI INSURANCE COMPANY,

Appellee/Cross-Appellant/Defendant/Counterclaim Plaintiff.

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Appeal from the Honorable Mary E. Howes of the Iowa District Court  
in and for Scott County

Scott County District Court Case No. LACE128760

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FINAL REPLY BRIEF/CROSS-APPELLEE'S BRIEF  
33 CARPENTERS CONSTRUCTION, INC.

April 28, 2018

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### **Cases**

*City of Sioux City v. Freese*, 611 N.W.2d 777 (Iowa 2000)

### **Statutes**

### **Other Authorities**

Iowa R. Civ. P. 1.281

Iowa R. Civ. P. 1.413

Laurie Kratky Doré, *If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms*, 63 *Drake L. Rev.* 401 (2015)

## **Statement of Issues Presented for Review**

- I. Whether the District Court erred in denying The Cincinnati Insurance Company's Application to terminate the application of the Expedited Civil Action Rule.

## **Routing Statement**

Pursuant to Iowa R. App. P. 6.1101(2)(c), this case is appropriate for retention by the Iowa Supreme Court, as it seemingly presents a substantial issue of first impression.

## **Statement of the Case**

33 Carpenters Construction, Inc. (hereinafter: “33 Carpenters”) a Bettendorf, Scott County, Iowa based storm restoration contractor, agreed to provide exterior repair work to the Bettendorf, Scott County, Iowa residence of Gregg Whigham (hereinafter: “Whigham”) following from a hail and windstorm that struck that area on March 15, 2016. As consideration, 33 Carpenters agreed with the homeowner to provide all materials and labor necessary for any exterior repairs, in exchange for any proceeds they were otherwise to receive from their home insurance policy paid relative to the event from The Cincinnati Insurance Company (hereinafter: “Cincinnati”). Cincinnati is the Ohio Corporation that provided insurance coverage for the residence during the relevant period. On October 6, 2016, the homeowner and a 33 Carpenters representative placed an initial telephone call to Cincinnati to notify them of the claim. As part of its contract with the homeowner, 33 Carpenters then accepted a post-loss assignment of his claim on October 10, 2016. Thereafter, on a date uncertain, 33 Carpenters began

repairing the residence. In February 2017 a dispute arose between the parties to this case concerning the scope of the claim. In March 2017, with the dispute still unresolved, 33 Carpenters filed suit, claiming that Cincinnati had breached the insurance policy. (Petition, App. 3-6). On August 3, 2017, Cincinnati filed a Motion for Summary Judgment, claiming that 33 Carpenters' contract with the homeowner contravenes Iowa's licensure requirement for public adjuster, and was thus invalid, necessitating dismissal of the suit. (Defendant/Counterclaim Plaintiff's Motion for Summary Judgment, App. 21-23). The matter was heard before the Honorable Henry W. Latham II of the District Court of Scott County, on November 9, 2017, who granted Cincinatti's Motion via written ruling issued on November 28, 2017. (Order Granting Summary Judgment, App. 135-139). Thereafter 33 Carpenters filed a Notice of Appeal on December, 5, 2017. (Notice of Appeal, App. 140). Cincinnati filed a Notice of Cross Appeal concerning the Expedited Civil Action Rule matter on December 18, 2017. (Notice of Cross Appeal, App. 141).

## Statement of the Facts

Cincinnati issued an insurance policy to homeowner Whigham concerning his residence located at 5577 Kristi Lane, Bettendorf, Scott County, Iowa, Policy Number H01 0480531. The policy provided coverage for direct physical loss to the residence and other covered loss caused by or resulting from a covered cause of loss. (Dft.'s Summ. J. Ex. B, App. 30-104). Generally, "damage from a storm is a covered cause of loss." (Defendant/Counterclaim Plaintiff's Statement of Undisputed Material Facts p. 1, App. 24). It is undisputed that this policy was in effect on March 15, 2016, when a hail and windstorm wrought widespread damage in the Quad Cities area, including to the Whigham home. At an unspecified time later in 2016, 33 Carpenters first came into contact with Whigham. On October 6, 2016, Tony McClannahan, a 33 Carpenters representative and Whigham phoned a representative of Cincinnati to first "report the storm damage to the aluminum siding along the south-side of the Whigham's home and that some shingles flew off." (Dft.'s Summ. J. Ex. G p. 1, App. 119). McClannahan purportedly "advised Cincinnati that 33 Carpenters was the contractor working with the insured and that he would attend the insurance inspection." *Id* p. 2, App. 120). Importantly, this was the entirety of the October 6 exchange, as retold by Cincinnati's claim representative in a later sworn

statement. The Cincinnati representative never asserts that McClannahan advocated or negotiated the Whigham claim during this brief telephone conversation.

Sometime during this period, 33 Carpenters agreed with Whigham to perform the repairs to his residence in exchange for the proceeds of the insurance claim. While Cincinnati insists that this agreement between 33 Carpenters and Whigham violates Iowa law concerning public adjusting, the actual complete contract between 33 Carpenters and Whigham does not appear in the District Court record.

On October 10, 2016, 33 Carpenters received an “Assignment of Claim and Benefits” from Whigham for his insurance claim with Cincinnati, Claim No. 2763806. (Petition p. 4, App. 6). 33 Carpenters thereafter commenced work on the Whigham residence, on a date uncertain. Later in February 2017, a dispute arose concerning the proper scope of the repairs. Austin Nelson, Co-Owner of 33 Carpenters, advised Cincinnati it was necessary to replace all the siding and gutters due to a matching issue. (Defendant/Counterclaim Plaintiff’s Statement of Undisputed Material Facts p. 4, App. 25; Dft.’s Summ. J. Ex. H, App. 122-134). Cincinnati re-opened its file as a response. *Id.* 35 Carpenters inspected the siding and provided Cincinnati photographs to demonstrate why the siding needed replaced. *Id.*

Cincinnati refused to negotiate with 33 Carpenters, and inexplicably insisted on attempting to address any disagreement with Whigham. *Id.* During this period, Nelson of 33 Carpenters admittedly sent several emails to Cincinnati representatives, amongst other contacts. *Id.* Unable to resolve the matter informally, and concerned over an unknown potential contractual limitations period, 33 Carpenters filed suit on March 13, 2017 alleging a breach of the insurance contract by Cincinnati. (Petition, App. 3-6).

Again, on August 3, 2017, Cincinnati filed a Motion for Summary Judgment, claiming that 33 Carpenters' contract with the homeowner contravenes Iowa's licensure requirement for public adjuster, and was thus invalid, necessitating the dismissal of the suit. (Defendant/Counterclaim Plaintiff's Motion for Summary Judgment, App. 21-23). The matter was heard before the Honorable Henry W. Latham II of the District Court of Scott County, on November 9, 2017, who granted the Motion via written ruling issued on November 28, 2017. (Order Granting Summary Judgment, App. 135-139). Thereafter 33 Carpenters filed a Notice of Appeal on December 5, 2017, and Cincinnati filed a Notice of Cross Appeal on December 18, 2017. (App. 140-141). 33 Carpenters largely accepts Cincinnati's Statement of Facts as it relates to its Cross Appeal.



## Argument

**Argument:** The District Court correctly denied The Cincinnati Insurance Company's Motion to terminate application of the Iowa Expedited Civil Action Rule by filing an extended Answer masquerading as a Counterclaim for Declaratory Judgment.

### Error Preservation, Scope of Review, and Standard of Review

33 Carpenters agrees with Cincinnati's representations concerning error presentation, scope of review, and standard of review on Cross Appeal.

The Scott County District Court properly denied Cincinnati Insurance Company's request to terminate application of the Expedited Civil Action ("ECA") rule pursuant to Iowa R. Civ. P. 1.281, for the Counterclaim it presented does not necessitate abandoning the ECA by a plain reading of that provision, and because to permit otherwise strikes at the core public policy behind the adoption of the ECA by the Iowa Supreme Court.

33 Carpenters, as stated its Petition and its Alternative Expedited Civil Action Certificate filed on March 13, 2017, seeks a money judgment against Cincinnati in the amount of \$75,000 or less. (Petition, App. 3-6). On April 5, 2017, Cincinnati Insurance Company filed an Answer denying 33 Carpenter's allegations. (Answer, App. 7-15). At the same time, Cincinnati also alleged a Counterclaim for Declaratory Judgment, asserting that the 33

Carpenters is operating as an unlawful public adjuster, does not possess an insurable interest in the premises, and asking the District Court to construe the rights and duties of the parties via a Declaratory Judgment action. *Id.* On April 25, 2017, 33 Carpenters filed an Answer to Cincinnati's Counterclaim. (Plaintiff/Counterclaim Defendant's Answer, App. 16-20). Later on May 15, 2017, Cincinnati filed an Application for Termination of Expedited Civil Action, asserting that its Counterclaim necessitates removing this action from the streamline procedure offered by Iowa R. Civ. P. 1.281. (Defendant's Application to Terminate Expedited Civil Action Rule Application, App. 143-145).

Pursuant to Iowa R. Civ. P. 1.281(1)(g), termination of the ECA can be accomplished in **only two ways**, including when:

- (1) The moving party makes a specific showing of substantially changed circumstances sufficient to render the application of this rule unfair; or
- (2) A party has in good faith filed a compulsory counterclaim that seeks relief other than that allowed under rule 1.281(1)(a).

Cincinnati attempted to utilize the second subsection to override 33 Carpenter's unilateral election to abide by the ECA, for neither party argued the presence of substantially changed circumstances.

Iowa R. Civ. P. 1.281(a) limits the scope of the simplified civil procedure to suits in which “the sole relief sought is a money judgment and in which all claims (**other than compulsory counterclaims**) for all damages by or against any one party total \$75,000 or less.” (Emphasis added). Only two categories of claims are expressly excluded from the ECA, domestic relations and small claims. Iowa. R. Civ. 1.281(1)(b). By Cincinnati’s own admission, its Counterclaim “is a compulsory counterclaim.” (Defendant’s Application to Terminate Expedited Civil Action Rule, App. 143-145).

In interpreting the Rules of Civil Procedure, the Iowa Supreme Court focuses “on the language of the rule itself.” *City of Sioux City v. Freese*, 611 N.W.2d 777, 779 (Iowa 2000). Because the above rule explicitly includes compulsory counterclaims, a plain reading of this rule indicates that the counterclaim does not necessitate overriding the 33 Carpenter’s election to proceed via ECA. Further, the relief sought in the Declaratory Judgment action, that the District Court determine if the alleged assignment from Whigham to 33 Carpenters is valid, is an issue in 33 Carpenters’ own case in chief, and can be decided via a Summary Judgment Motion, or if factual issues are present, by the trier of fact. For those reasons, the Counterclaim for Declaratory Judgment is merely masquerading as an extension of

Cincinnati's Answer, and is of questionable merit pursuant to Iowa R. Civ. P. 1.413.

Importantly, to allow otherwise is to permit Cincinnati (and other similarly situated Defendants in the future) to evade the purpose of the Expedited Civil Action Rule, which is to offer expanded “access to the courts by reducing the time and expense otherwise associated with civil adjudication.” Laurie Kratky Doré, *If You Build It, Will They Come? Designing Iowa's New Expedited Civil Action Rule and Related Civil Justice Reforms*, 63 *Drake L. Rev.* 401, 417–18 (2015). The ECA is intended to “make it more economical to litigate cases to conclusion (especially when \$75,000 or less is at stake [as in instance]), and enable more Iowans to have access to justice.” *Id.* at 419.

The novel Iowa ECA Rule, which is the product of a five-year long inquiry by the Iowa Supreme Court, incorporates elements of both voluntary and compulsory approaches. It is “voluntary because it allows plaintiffs to elect into the system by “certifying” that they are seeking only monetary relief and that all claims asserted “by or against any one party” do not exceed \$75,000. It is also mandatory because once the plaintiff opts in, the ECA provisions govern the suit through judgment unless the court subsequently terminates the expedited action for one of two limited reasons.

**A defendant cannot unilaterally veto the plaintiff's decision to utilize the ECA process**, and a plaintiff who files an Expedited Civil Action cannot, without dismissing the suit altogether, exit the procedure without leave of court.” *Id.* at 427 (2015) (Emphasis Added).

If Defendants are permitted to simply present a Counterclaim that mirrors an element of the Plaintiff’s case to evade the ECA, the public policy aims of the Iowa Supreme Court are flouted, for the speed and efficiency is greatly and unnecessarily diminished.

If the reviewing Court determines that the case should be remanded to the District Court for additional proceedings, they should continue under the ECA requirements.

### **Conclusion**

The Iowa District Court in and for Scott County improperly granted the Motion for Summary Judgment brought by Cincinnati, for 33 Carpenters Construction Inc. did not violate any Iowa code provisions in contracting for a valid post-loss assignment and thereafter negotiating its own claim directly with the insurer. Thus the reviewing Court should overturn the District Court's earlier grant of Summary Judgment, and remand this matter to the Scott County District Court for further proceedings, which should continue under the Expedited Civil Action Rule.

### **Request for Oral Submission**

Appellants request to be heard in oral argument in this appeal upon submission of the case either to the Supreme Court of Iowa or Iowa Court of Appeals.

### **Certificate of Cost**

I hereby certify that the cost of printing this document was \$2.00.

### **Certificate of Compliance**

1. This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 2,499 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).
2. This brief complies with the typeface requirements of Iowa R. App. P.

6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2016 for Macintosh in 14 point Times New Roman style.

Signature: s/ Kyle J. McGinn

Date: April 28, 2018

### **Certificate of Service**

I hereby certify that on the 28th day of April, 2018, I served this document by electronic filing via Iowa Appellate EDMS to:

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I further certify that on the 28<sup>th</sup> day of April 2018, I filed this document via Iowa Appellate EDMS to the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1111 East Court Avenue, Des Moines, Iowa 50319.

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