
IN THE
SUPREME COURT OF IOWA

Supreme Court No. 18-0509
Carroll County No. CVCV039749

LOREN DANNER AND PAM DANNER,
Petitioners-Appellants,

v.

CARROLL COUNTY BOARD OF ADJUSTMENT,
Respondent-Appellee.

Appeal from the Iowa District Court for Carroll County
The Honorable Kurt J. Stoebe, Judge

FINAL BRIEF FOR APPELLEE

And

REQUEST FOR NON-ORAL SUBMISSION

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PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on January 24, 2019, I served this document on all other parties to this appeal electronically through the Iowa Supreme Court’s EDMS system.

I further certify that on January 24, 2019, I filed this document electronically with the Clerk of the Supreme Court, Iowa Judicial Branch Building, 1st Floor, 1111 East Court Avenue, Des Moines, Iowa 50319, by EDMS.

Respectfully submitted,

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STATEMENT OF THE ISSUES PRESENTED FOR REVIEW

- I. WHETHER THE COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING AS IT IS UNABLE TO REACH THE MERITS OF THIS APPEAL BECAUSE THERE IS NO AGENCY RECORD TO REVIEW BECAUSE THE DANNER'S FAILED TO TRANSFER OR FILE THE AGENCY RECORD WITH THE DISTRICT COURT AND NO RECORD WAS MADE OF THE DISTRICT COURT PROCEEDINGS.

Cases:

Alvarez v. IBP, Inc., 696 N.W.2d 1 (Iowa 2005)

Jensen v. City Council of Cambridge, No. 09-0697, 2010 Iowa App. LEXIS 573 (Iowa Ct. App. June 16, 2010)

Iowa Court Rules:

Iowa R. App. P. 6.801

- II. WHETHER THE COURT SHOULD AFFIRM THE DISTRICT COURT BECAUSE RES JUDICATA DOES NOT APPLY TO THIS CASE BECAUSE IT IS BETWEEN DIFFERENT PARTIES ON DIFFERENT ISSUES.

Cases:

Israel v. Farmers Mut. Ins. Asso., 339 N.W.2d 143 (Iowa 1983)

Iowa Court Rules:

Iowa R. App. P. 6.903(2)(g)(1)

Other Authorities:

A. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 43 (1969)

ROUTING STATEMENT

The reasons listed in Iowa R. App. P. 6.1101(3)(a)-(b) support this case being transferred to the court of appeals.

STATEMENT OF THE CASE

Nature of the Case. This appeal is a challenge to the Carroll County Board of Adjustment's decision to deny granting the Danners a variance from county zoning restricting the airspace surrounding the Arthur Neu Airport after the Danner's built a grain leg that intruded into the airport's protected airspace.

Course of Proceedings. After noticing the grain leg construction, the Carroll Airport Commission filed suit to force removal of the grain leg. *See Carroll Airport Commission v. Danner*, EQCV039422, Iowa Dist. Ct. filed June 16, 2017, appellate no. 17-1458. The Danners also applied to the Carroll County Board of Adjustment for a variance from the zoning regulations that applied to the airspace. The Carroll County Board of Adjustment decided March 9, 2017, and memorialized by letter dated March 13, 2017, to deny the Danner's request for a variance. App. at 23-24. On April 6, 2017, the Danners filed a petition for judicial review in the Iowa District Court for Carroll County. App. at 5-8. A telephonic hearing was held on the petition for judicial review on February 15, 2018, and an Order affirming the decision of the board

of adjustment was filed on February 23, 2018. No record was made during the district court's telephonic hearing. The Danners filed their notice of appeal on March 23, 2018. The combined certificate filed the same day ordered transcripts from the board of adjustment hearings but not the district court proceedings, because, as stated above, no record was made during the district court hearing on February 15, 2018. On July 13, 2018, Justice Zager entered an Order requesting a statement from the Danners on whether the transcripts of the board of adjustment proceeding were part of the record for the appeal. In response to the Order, the Danners withdrew their request for transcripts and the deputy clerk filed the notice of briefing schedule.

Disposition Below. The Iowa District Court for Carroll County on February 15, 2018, affirmed the Carroll County Board of Adjustment's decision to deny the variance requested by the Danners.

STATEMENT OF THE FACTS

The facts stated in the Danner's brief come from Case No. EQCV039422, Appellate No. 17-1458. While the factual recitation stated in the Danner's brief appears to be accurate based on the prior proceedings, no facts have been established in this case, because no record was created in this case and there is nothing for the appellate court to review.

ARGUMENT

The Danners present one issue for review. However, Appellants do not state whether error has been preserved on the issue they have raised as required by Iowa R. App. P. 6.903(2)(g)(1). Further, the agency record never became part of the district court record and there is no district court record. There is simply nothing for Iowa's appellate courts to review in this case.

I. THE COURT SHOULD AFFIRM THE DISTRICT COURT'S RULING AS IT IS UNABLE TO REACH THE MERITS OF THIS APPEAL BECAUSE THERE IS NO AGENCY RECORD TO REVIEW BECAUSE THE DANNER'S FAILED TO TRANSFER OR FILE THE AGENCY RECORD WITH THE DISTRICT COURT AND NO RECORD WAS MADE OF THE DISTRICT COURT PROCEEDINGS.

In *Alvarez v. IBP, Inc.*, 696 N.W.2d 1 (Iowa 2005), the Iowa Supreme Court was confronted with a similar situation to the one here. Maria Alvarez filed a petition for judicial review to challenge a deputy workers' compensation commissioner's decision denying her benefits in the district court and then appealed to the Iowa Supreme Court. *Id.* at 2. However, the Iowa Supreme Court was unable to reach the merits of the appeal, because the agency record was not part of the record before the district court or the Iowa Supreme Court. *Id.*

The *Alvarez* court noted this issue was dispositive of the appeal, because "the appellate courts cannot consider materials that were not before

the district court when that court entered its judgment.” *Id.* at 3; *see* Iowa R. App. P. 6.801 (“Only the original documents and exhibits filed in the district court case from which the appeal is taken, the transcript of proceedings, if any, and a certified copy of the related docket and court calendar entries prepared by the clerk of the district court constitute the record on appeal.”). Further, a party could not avoid the implications of Iowa R. App. P. 6.801 even if a party’s included portions of the agency record in the appendix. *Alvarez*, 696 N.W.2d at 3.

The Court went on to hold that since there was no agency record, there was nothing for the appellate court to review and reviewing the district court’s ruling, which was part of the record, was not possible without a record of what occurred at the agency level and the proper remedy for such an omission was affirmance of the district court’s ruling. *Id.* at 3-4.

A similar conclusion was reach by the Iowa Court of Appeals, albeit in a slightly different context. In *Jensen v. City Council of Cambridge*, No. 09-0697, 2010 Iowa App. LEXIS 573, *1 (Iowa Ct. App. June 16, 2010), a city resident challenged a city ordinance he disagreed with after being denied an exemption from the ordinance. An appeal, Court of Appeals noted the agency record was not properly before the court and thus it had nothing to review. *Id.* at *6. Then Judge Mansfield disagreed with the court’s analysis on this point

and attempted to distinguish the case from *Alvarez* as that case dealt with state agency action, which he saw as different from city council decisions since they were normally reviewed by certiorari. *Id.* at *8 (Mansfield, J., concurring in the judgment).

However, this line of reasoning does not need to be explored further in this case, because the Danners chose to challenge the Carroll County Board of Adjustment's decision through judicial review proceedings instead of certiorari proceedings. The Danners have not provided the agency record for review and have withdrawn their request for it. Without the agency record, the appellate courts have nothing to review in this case. *See Alvarez*, 696 N.W.2d at 3-4; *Jensen*, No. 09-0697, 2010 Iowa App. LEXIS 573, at *6. Accordingly, the district should be affirmed.

II. THE COURT SHOULD AFFIRM THE DISTRICT COURT BECAUSE RES JUDICATA DOES NOT APPLY TO THIS CASE BECAUSE IT IS BETWEEN DIFFERENT PARTIES ON DIFFERENT ISSUES.

A. Error Preservation. Appellants have failed to state whether error was preserved on these issues as required by Iowa R. App. P. 6.903(2)(g)(1). Should the Court reach the merits of this appeal, error was preserved on this issue when the district court considered and ruled on this issue.

B. Merits. The only argument the Danners have raise in their brief relates to res judicata. “For several years [the Iowa Supreme Court] has used the terms ‘claim preclusion’ and ‘issue preclusion’ in place of the generic historical term, res judicata.” *Israel v. Farmers Mut. Ins. Asso.*, 339 N.W.2d 143, 146 (Iowa 1983). “Res judicata as claim preclusion applies when a litigant has brought an action, an adjudication has occurred, and the litigant is thereafter foreclosed from further litigation on the claim.” *Id.* (citing A. Vestal, *Preclusion/Res Judicata Variables: Parties*, 50 Iowa L. Rev. 43 (1969)). Under res judicata, (“[a]n adjudication in a former suit between the same parties on the same claim is final as to all matters which could have been presented to the court for determination.” *Id.*

Here, res judicata used as claim preclusion does not apply to this case, because this case is not between the same parties as the prior action on appeal. *See id.* (noting the prior proceedings must be between the same parties on the same claim). The prior proceeding on appeal, No. 17-1458, is between the Carroll Airport Commission and the Danners, while this proceedings is between the Danners and the Carroll County Board of Adjustment. Further, even considering res judicata in the generic sense, the claims are not same either. *Id.* (noting referring to res judicata in a generic sense requires a review of issue preclusion principles). The prior case relates to a nuisance action filed

by the Carroll Airport Commission, while this action is a challenge to a denial of a variance. Accordingly, the district court should be affirmed, because res judicata does not apply, nor was the board's decision arbitrary or capricious.

CONCLUSION

The Court should affirm the district court, because there is no agency record properly before the Court to review. Further, should the Court reach the merits of this appeal, res judicata does not apply to this case, because this case is between different parties on different issues. Accordingly, the district court should be affirmed.

Respectfully submitted,

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REQUEST FOR NON-ORAL SUBMISSION

Appellee request the appeal be submitted without argument.

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**CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME
LIMITATION, TYPEFACE REQUIREMENTS, AND TYPE-STYLE
REQUIREMENTS**

This brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) because this brief contains 1,462 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1). Further, 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 2013 in 14 point Times New Roman font.

/s/ Aaron W. Ahrendsen 1-24-19
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COST CERTIFICATE

I, Aaron W. Ahrendsen, certify that the actual cost of printing Appellee’s brief in final form was \$0.00 due to electronic filing.

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