

IN THE IOWA SUPREME COURT

NO. 18-0509

LOREN DANNER and PAN DANNER,

Plaintiffs/Appellants,

VS.

CARROLL COUNTY BOARD OF ADJUSTMENT OF CARROLL COUNTY, IOWA,

Defendant/Appellee

APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR CARROLL COUNTY, IOWA
Case No. CVCV039749
THE HONORABLE KURT J. STOEBE

**FINAL BRIEF OF APPELLANTS
LOREN DANNER AND PAN DANNER**

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TABLE OF CONTENTS

Table of Contents..... 2

Table of Authorities..... 3

Statement of Issues Presented for Review..... 4

Routing Statement..... 5

Statement of the Case..... 5

Statement of Facts..... 6

ARGUMENTS

I. UNDER PRINCIPLES OF RES JUDICATA, THE SUCCESS OF THIS APPEAL RISES AND FALLS WITH THE APPEAL IN THE INITIAL CASE. CONSEQUENTLY, DANNERS ASSERT THAT IF THE SUPREME COURT ACCEPTS FURTHER REVIEW IN CARROLL AIRPORT COMMISSION OPERATING THE ARTHUR N. NEU MUNICIPAL AIRPORT IS ACCEPTED AND REVERSED, THIS ACTION WOULD BE REVERSED AS WELL. 7

Conclusion..... 9

Request for Oral Argument..... 10

Certificate of Filing..... 10

Certificate of Service..... 11

Certificate of Compliance..... 11

TABLE OF AUTHORITIES

Cases:

Amalgamated Cotton Garment & Allied Industries Fund v.
JBC Co., 608 F. Supp. 158 (W. D. Pa. 1984)..... 8

B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc.,
242 N.W.2d 279 (Iowa 1976) 8

Fennelly v. A-1 Machine & Tool Co.,
728 N.W.2d 163 (Iowa Sup. Ct. 2006)..... 8

Fennelly v. A-1 Machine & Tool Co.,
728 N.W.2d 181 (Iowa Sup. Ct. 2007)..... 8

Villareal v. United Fire & Cas. Co.,
873 N.W.2d 714 (Iowa Sup. Ct. 2016) 9

Statutes:

Iowa R. App. P. Rule 6.1101(3)(a)..... 5

Other Authorities:

Restatement (Second) of Judgments Sec. 16, at 145 (1982)..... 8

STATEMENT OF ISSUES PRESENTED FOR REVIEW

ARGUMENT I

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Fennelly v. A-1 Machine & Tool Co.,
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Other Authorities:

Restatement (Second) of Judgments Sec. 16, at 145 (1982)

ROUTING STATEMENT

Appellants believe this matter is an application of existing legal principles and therefore should be assigned to the Iowa Court of Appeals under Iowa R. App. P. Rule 6.1101(3)(a) because the outcome of this case will be determined by the actions of the Iowa Supreme Court as to whether they grant further review in **Carroll Airport Commission v. Danner, Carroll County No. EQCV039422; Supreme Court No. 17-1458.**

STATEMENT OF THE CASE

This is an appeal of a Petition for Judicial Review of a denial of a zoning variance by the Carroll County, Iowa, Board of Adjustment. Loren and Pan Danner had erected a grain leg that was not in compliance with height restrictions imposed by the Carroll City Airport, a/k/a Arthur Neu Airport. They secured a building permit for a grain leg from the Building Inspector Carl Wilburn. However, the building permit did not take into consideration the height limits imposed by the Airport and the leg height did violate certain vertical restrictions. After a nuisance action was filed by the Airport Commission (App. Pp. 9-10), the Danner's sought a variance. The variance was denied (App. P. 11) and the Danner's appealed by Petition for Judicial Review. (App. Pp. 5-8). Judicial review was denied and the Danner's appealed that ruling. (App. Pp. 28-30).

STATEMENT OF THE FACTS

This Statement of the Facts is taken from the District Court Ruling in **Carroll Airport Commission v. Danner, Carroll County No. EQCV039422; Supreme Court No. 17-1458.**

Pan Danner and Loren Danner farm east of the City of Carroll, Iowa, and within two miles of the Arthur Neu Airport. They have been in that location for approximately 50 years. (App. P. 14) In the summer of 2013, the Danners erected a grain leg. (App. P. 14) Prior to the construction, Loren Danner had gone to the Carroll County Zoning Administrator, Carl Wilburn. Mr. Wilburn granted the Danner's a building permit based upon an agricultural exemption from all zoning regulations. (App. P. 15). Wilburn later indicated he did not know that the grain leg would be subject to any airport zoning regulations. The grain leg in question serviced approximately five (5) grain bins located on the Danner property. Three of the bins belonged to the Danner's and two belonged to others. (App. Pp. 14-15). The grain leg is within 10,000 feet horizontally of the approach end of Runway 31, of the Arthur Neu Airport. The height of the grain is 126.47 feet agl (above ground level). The Airport protected air space starts at 1354 feet above mean sea level (msl). The grain leg penetrated such airspace to

the height of 1413.43 feet msl, so it was approximately 59 feet in violation. (App. P. 15).

The Danners contacted the Federal Aviation Administration (FAA) to secure a variance. The FAA investigated and determined that the grain leg did not constitute a hazard as long as it met certain lighting and paint conditions. (App. P. 16). The Airport Commission did not agree to this and filed their petition to abate a nuisance. (App. Pp. 9-10, 16).

In the nuisance abatement proceeding, the Danners argued for Federal Preemption. Judge Ostlund held that the matter was not foreclosed by Federal Preemption. The Danners appealed. Their appeal was routed to the Iowa Court of Appeals which denied their appeal. They have a pending Application for Further Review.

ARGUMENT I

UNDER PRINCIPLES OF RES JUDICATA, THE SUCCESS OF THIS APPEAL RISES AND FALLS WITH THE APPEAL IN THE INITIAL CASE. CONSEQUENTLY, DANNERS ASSERT THAT IF THE SUPREME COURT ACCEPTS FURTHER REVIEW IN CARROLL AIRPORT COMMISSION OPERATING THE ARTHUR N. NEU MUNICIPAL AIRPORT IS ACCEPTED AND REVERSED, THIS ACTION WOULD BE REVERSED AS WELL.

This case was decided by Judge Stoebe on the basis that the determination of **Carroll Airport Commission operating the Arthur N. Neu Municipal Airport v. Loren W. Danner and Pan Danner**, Iowa Supreme Court Application for Further Review; Carroll County No. EQCV039422; Supreme Court No. 17-1458, had previously decided

the same issues. Danners in this case do not dispute that the issues are the same but the Court of Appeals was in error in the above case and filed their Application for Further Review. See **Carroll Airport Commission v. Danners**, S. Ct. 17-1458.

In *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d. 181 (Iowa Sup. Ct. 2007), the Court was confronted with how the effect of a prior judgment applying a statute of limitations would apply to a later action. The Court held that a prior decision that the statute of limitations barred a tax collection matter would apply as well to a later action essentially doing the same thing. In a previous case, *Fennelly v. A-1 Machine & Tool Co.*, 728 N.W.2d. 163 (Iowa Sup. Ct. 2006), the Trial Court held that the claim of taxes was barred by the statute of limitations. The Supreme Court held otherwise. Because the second Fennelly claim was decided by the Trial Court to be governed by res judicata, the issue arose what would happen if the first case were appealed and reversed.

The Supreme Court applied Restatement (Second) of Judgments Sec. 16, at 145 (1982). The Court stated: "*A judgment that has been reversed on appeal is thereby deprived of all conclusive effect for purposes of both res judicata and collateral estoppel*" quoting *Amalgamated Cotton Garment & Allied Industries Fund v. JBC Co.*, 608 F. Supp. 158 (W. D. Pa. 1984). See also *B & B Asphalt Co., Inc. v. T.S. McShane Co., Inc.*, 242 N.W.2d 279 (Iowa

1976); *Villareal v. United Fire & Cas. Co.*, 873 N.W.2d 714 (Iowa Sup. Ct. 2016).

CONCLUSION

Appellants Danner believe the outcome in this case will be determined by the resolution of the Iowa Supreme Court in **Carroll Airport Commission v. Danner**, Carroll County No. EQCV039422, Supreme Court No. 17-1458. If the Supreme Court denies Further Review to Danners, that case will be res judicata as to this matter. If the Supreme Court grants Further Review and reverses the matter, this case as well will be reversed under principles of res judicata.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Steve Hamilton, hereby certify that on this same date, I served the attached "Proof Brief of Appellants" through the ECF/EDMS System on the following:

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CERTIFICATE OF COMPLIANCE

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)(1) or (2) because:

This brief has been prepared in a monospaced typeface using Courier New in 12 characters per inch and contains 108 number of lines of text, excluding the parts of the brief exempted by Iowa R.App.P.6.903(1)(g)(2).

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