

IN THE SUPREME COURT OF IOWA

**Supreme Court No. 19-0241
Kossuth County No. LACV027055**

WMG, L.C.,

Defendant-Appellant,

v.

NCJC, Inc.,

Plaintiff-Appellee.

APPEAL FROM THE IOWA DISTRICT COURT
FOR KOSSUTH COUNTY
THE HONORABLE CARL J. PETERSEN

**DEFENDANT-APPELLANT'S FINAL BRIEF AND
REQUEST FOR ORAL ARGUMENT**

Thomas W. Lipps
Peterson & Lipps
P. O. Box 575, 6 East State St.
Algona, Iowa 50511
tlipps@petelipp.com
(515) 295-9494 Telephone
(515) 295-9493 Facsimile
ATTORNEY FOR
DEFENDANT-APPELLANT
WMG, L.C.

TABLE OF CONTENTS

TABLE OF AUTHORITIES	4
STATEMENT OF ISSUES PRESENTED FOR REVIEW	6
ROUTING STATEMENT.....	10
STATEMENT OF THE CASE	10
A. Nature of the Case.....	10
B. Course of Proceedings.....	10
C. Trial.....	13
D. Post-Trial.....	13
STATEMENT OF FACTS	17
ARGUMENT.....	20
I. THE DISTRICT COURT CORRECTLY AWARDED WMG COSTS UNDER IOWA CODE § 677.10 BUT INCORRECTLY FAILED TO INCLUDE WMG’S POST-OFFER ATTORNEY FEES AS PART OF COSTS.....	20
A. Scope/Standard of Review and Preservation Of Error.....	20
B. The Trial Court Incorrectly Applied Iowa Code § 625.22 Which Mandates that WMG’s Post-Offer Attorney Fees Should Be Taxed as Costs Under Iowa Code § 677.10.....	21
II. THE DISTRICT COURT INCORRECTLY AWARDED POST-OFFER ATTORNEY FEES TO NCJC.....	26
A. Scope/Standard Of Review And Preservation Of Error.....	26
B. An Offer to Confess Made Under Iowa Code §§ 677.4 and 677.10 Permits Only One Winning Party and Because WMG Is the Winning Party, the Trial Court was Precluded from Awarding NCJC Any Post-Offer Attorney Fees.....	28
C. NCJC’S Post-Offer Attorney Fees Are Per Se Unreasonable.....	28

D. Iowa Code § 625.25 Precludes the Taxing of Any Attorney Fees in Favor of NCJC Because NCJC Did Not Provide WMG With A Reasonable Opportunity to Pay the Debt Before NCJC Filed Suit..... 30

III. BECAUSE THE DISTRICT COURT ERRED IN AWARDING POST-OFFER ATTORNEY FEES TO NCJC, THE CASE SHOULD BE REMANDED WITH DIRECTIONS FOR THE TRIAL COURT TO SEGREGATE NCJC’S PRE-OFFER FEES FROM POST-OFFER FEES SO EACH BE EVALUATED SEPARATELY. 32

 A. Scope/Standard Of Review And Preservation Of Error. 32

 B. The Trial Court Incorrectly Failed to Segregate NCJC’s Pre-Offer Fees From Post-Offer Fees..... 33

 C. WMG, Not NCJC, is the Pre-Offer Prevailing Party..... 33

IV. THE COURT FAILED TO AWARD WMG PRE-OFFER ATTORNEY FEES ON THOSE CLAIMS FOR WHICH WMG PREVAILED. 34

 A. Scope/Standard of Review And Preservation Of Error. 34

 B. The Trial Court Incorrectly Ruled That WMG Was Not The Prevailing Party On Those Claims Which WMG Successfully Defended .
 34

CONCLUSION..... 35

REQUEST FOR ORAL ARGUMENT 37

ATTORNEY’S COST CERTIFICATE 37

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMITATION, TYPEFACE AND TYPE-STYLE REQUIREMENTS 38

PROOF OF SERVICE AND CERTIFICATE OF FILING 40

TABLE OF AUTHORITIES

Cases

<i>Boyle v. Alum-Line</i> , 773 N.W.2d 829, 832-833 (Iowa 2009).....	
.....	6, 8, 9, 21, 29, 34
<i>Coker v. Abell-Howe Co.</i> , 491 N.W.2d 143, 153 (Iowa 1992)	6, 22, 25
<i>CSS2 Enterprise vs. Farmers Coop. Co.</i> , 2015 WL 4935834, 10 (Iowa App.)	
.....	6, 25
<i>Dutcher v. Randall Foods</i> , 546 N.W.2d 889, 897 (Iowa 1996)	8, 31
<i>Gabelmann v. NFO, Inc.</i> , 606 N.W.2d 339, 342, 344 (Iowa 2000)	6, 21
<i>Gosch v. Jeulfs</i> , 701 N.W.2d 90, 91 (Iowa 2005).....	6, 20
<i>Harris v. Olson</i> , 558 N.W.2d 408, 409 (Iowa 1997).....	6, 20
<i>Landals v. George A. Rolfes Co.</i> , 454 N.W.2d 891, 897 (Iowa 1990)	
.....	6, 8, 9, 20, 29, 34
<i>Rick v. Sprague</i> , 706 N.W.2d 717, 723 (Iowa 2005).....	6, 20
<i>Spiker v. Spiker</i> , 708 N.W.2d 347, 352 (Iowa 2006).....	6, 21
<i>Tri-State Agri Corp. v. Clasing</i> , 2001 WL 1658852 (Iowa App.).....	7, 25
<i>Weaver Construction Co. v. Heitland</i> , 348 N.W.2d 230, 232 (Iowa 1984)	
.....	7, 25

Statutes

Iowa Code § 625.22	
.....	7, 8, 9, 10, 15, 19, 20, 21, 22, 24, 25, 26, 27, 28, 35, 36
Iowa Code § 625.25	7, 8, 14, 15, 20, 27, 30, 31, 36

Iowa Code § 677.10
.....7, 8, 9, 10, 16, 19, 20, 21, 22, 23, 24, 25, 27, 28, 30, 33, 35

Iowa Code § 677.4 7, 8, 11, 19, 21, 28

Iowa Code § 677.7 7, 25

Iowa Code § 717A 7, 25

Iowa Code Chapter 677 7, 8, 13, 15, 21, 22, 25, 27

Rules

Iowa R. App. P. 6.1101(3)(a) 10

Iowa R. Civ. P. 1.904 7, 8, 9, 10, 13, 16, 21, 27, 32

STATEMENT OF ISSUES PRESENTED FOR REVIEW

I. WHETHER THE DISTRICT COURT ERRED BY FAILING TO INCLUDE POST-OFFER ATTORNEY FEES IN ITS AWARD OF COSTS TO WMG UNDER IOWA CODE §§ 677.10 AND 625.22.

Cases

Boyle v. Alum-Line, 773 N.W.2d 829, 832-833 (Iowa 2009)

Coker v. Abell-Howe Co., 491 N.W.2d 143, 153 (Iowa 1992)

CSS2 Enterprise vs. Farmers Coop. Co., 2015 WL 4935834, 10 (Iowa App.)

Gabelmann v. NFO, Inc., 606 N.W.2d 339, 342, 344 (Iowa 2000)

Gosch v. Jeulfs, 701 N.W.2d 90, 91 (Iowa 2005)

Harris v. Olson, 558 N.W.2d 408, 409 (Iowa 1997)

Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990)

Rick v. Sprague, 706 N.W.2d 717, 723 (Iowa 2005)

Spiker v. Spiker, 708 N.W.2d 347, 352 (Iowa 2006)

Tri-State Agri Corp. v. Clasing, 2001 WL 1658852 (Iowa App.)

Weaver Construction Co. v. Heitland, 348 N.W.2d 230, 232 (Iowa
1984)

Statutes

Iowa Code § 625.22

Iowa Code § 625.25

Iowa Code § 677.10

Iowa Code § 677.4

Iowa Code § 677.7

Iowa Code § 717A

Iowa Code Chapter 677

Rules

Iowa R. Civ. P. 1.904

II. WHETHER THE DISTRICT COURT ERRED IN AWARDING POST-OFFER ATTORNEY FEES TO NCJC WHEN NCJC RECOVERED LESS THAN THE WMG'S IOWA CODE CHAPTER 677 OFFER AND BECAUSE IOWA CODE § 625.25 PRECLUDES NCJC FROM RECOVERING ANY FEES.

Cases

Boyle v. Alum-Line, 773 N.W.2d 829, 832-833 (Iowa 2009)

Dutcher v. Randall Foods, 546 N.W.2d 889, 897 (Iowa 1996)

Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990)

Statutes

Iowa Code § 625.22

Iowa Code § 625.25

Iowa Code § 677.10

Iowa Code § 677.4

Iowa Code Chapter 677

Rules

Iowa R. Civ. P. 1.904

III. WHETHER THE DISTRICT COURT ERRED BY FAILING TO SEGREGATE NCJC'S PRE-OFFER ATTORNEY FEES FROM ITS POST-OFFER ATTORNEY FEES SO EACH COULD BE EVALUATED SEPARATELY.

Cases

Boyle v. Alum-Line, 773 N.W.2d 829 (Iowa 2009)

Landals v. George A. Rolfes Co., 454 N.W.2d 891, 897 (Iowa 1990)

Statutes

Iowa Code § 677.10

Rules

Iowa R. Civ. P. 1.904

IV. WHETHER THE DISTRICT COURT ERRED BY FAILING TO AWARD WMG ITS ATTORNEY FEES UNDER IOWA CODE § 625.22 ON THOSE CLAIMS FOR WHICH WMG PREVAILED.

Iowa Code § 625.22

ROUTING STATEMENT

This case should be transferred to the Court of Appeals as it involves the application of existing legal principles. Iowa R. App. P. 6.1101(3)(a).

STATEMENT OF THE CASE

A. Nature of the Case.

Defendant-Appellant WMG, L.C. (“WMG” or “Defendant”) appeals from a 11/29/18 District Court Order awarding NCJC, Inc. (“NCJC” or “Plaintiff”) attorney fees under Iowa Code § 625.22. WMG also appeals the Court’s failure to include WMG’s attorney fees as part of costs it awarded to WMG under Iowa Code § 677.10. WMG also appeals the Court’s 1/18/19 Order overruling WMG’s Iowa R. Civ. P. 1.904 Motion to Reconsider, Enlarge or Amend, filed 12/12/18.

B. Course of Proceedings.

On 3/31/17, NCJC filed its Petition requesting damages for breach of a written farm lease, seeking \$190,564.62 for nutrient reimbursements, amounts exceeding \$884,000.00 on other claims, as well as attorney fees.¹

¹ NCJC originally brought its input reimbursement claim in another lawsuit, *Afshar et al. v. Goche et al.*, but on 4/5/17, dismissed it. (10/10/17 Motion

(3/31/17 Petition; 12/12/18 Motion to Reconsider and Enlarge & Ex. A; Ex. 110; App. 10-14,279-290). On 5/5/17, WMG filed its First Amended Answer and Counter-Claim also seeking an award of attorney fees. (Answer; App. 20-26).

On 10/2/17, Larry Eide appeared and gave notice to the Court he was acting as a court appointed receiver for WMG. (Appearance of Receiver; App. 27).

On 11/1/17, WMG filed a Motion for Partial Summary Judgment, along with a Statement of Undisputed Material Facts, and Memorandum of Authorities in Support of Plaintiff's Motion for Partial Summary Judgment. (Motion PSJ; SOF; Memo; App. 45-56).

On 11/13/17, NCJC served discovery responses on WMG, reducing its nutrient reimbursement claim from \$190,564.62 to \$74,446.09. (11/13/17 Plaintiff's Notice of Serving Discovery; Ex. 102; App. 57)

On 11/17/17, WMG served Notice of Defendant's Intent to Offer to Confess Judgment Pursuant to Iowa Code § 677.4 and Request for Immediate Hearing in favor of Plaintiff "*in the total amount of \$75,000.00*

to Consolidate and Continue Receivership, ¶¶ 2-3 & Ex. A, pp. 2-3; App. 28-29,34-35)

on all monetary damage claims in this lawsuit, exclusive of interest, costs and attorney fees.” (Notice of Offer; App. 58).

On 11/30/17, NCJC’s refusal to accept the offer was confirmed by Stipulation. (Stipulation; App. 71-72).

On 12/5/17, the Court entered an Order Deeming Defendant’s \$75,000.00 Offer to Confess Refused.² (Order; App. 73-74).

On 11/20/17, NCJC filed its Resistance to Motion for Partial Summary Judgment, as well as its Objections and Response to Statement of Undisputed Facts in Support of its Resistance to Motion for Partial Summary Judgment, and Memorandum of Authorities in Support of its Resistance to Motion for Partial Summary Judgment. (Resistance, Objections and Response to SOF, Memo; App. 75-78).

On 2/28/18, the Court entered an Order granting WMG’s Motion for Partial Summary Judgment, dismissing all of NCJC’s claims, except for its \$74,446.09 reimbursement claim, which remained for trial. The Ruling did not address attorney fees. (2/28/18 Ruling; App. 79-90).

² Two subsequent pleadings corrected a caption error: a 12/21/17 Motion for Order Nunc Pro Tunc and a 12/22/18 Order Nunc Pro Tunc Correcting Caption in 2 Filings. (Motion for Order Nunc Pro Tunc and Order Nunc Pro Tunc Correcting Caption in 2 Filings; App. 75-78).

On 3/13/18, WMG filed a Iowa R. Civ. P. 1.904 Motion to Reconsider, Enlarge or Amend asking the Court to “address WMG’s fees and costs incurred over litigating the lease.” On 3/13/19, NCJC resisted and on 3/14/18, the Court entered an order deferring the issue of attorney fees until final disposition of the case.

C. Trial.

On 5/8/18, the case proceeded to trial and on 5/9/18, the jury awarded \$41,453.57 to NCJC on its reimbursement claim. (Jury Instructions and Verdict of the Jury; App. 94-103). The jury award to NCJC was less than the \$75,000.00 offer to confess that WMG had made to NCJC.

D. Post-Trial.

On 5/11/18, WMG filed a Motion to Tax Attorney Fees and Costs as a successful party under Iowa Code Chapter 677 and as a “prevailing” party. (Motion; App. 104-105).

On 5/14/18, NCJC filed Plaintiff’s Resistance to Defendant’s Motion to Tax Attorney Fees and Costs. (Resistance; App. 106-108).

On 5/17/18, NCJC filed Plaintiff’s Motion for Recovery of Attorney’s Fees and Costs and Attorney Affidavits Regarding Fees and Costs.

(Plaintiff's Motion for Attorney Fees and Costs, Baer Fee Affidavit, Graham Fee Affidavit; App. 115-153).

On 5/21/18, Defendant filed WMG's Resistance to NCJC's Application for Fees urging, among other defenses, that NCJC had not satisfied Iowa Code § 625.25 by providing WMG with "*information of and a reasonable opportunity to pay the debt before action was brought.*" (WMG Resistance, p. 1; App. 154-156).

On 5/22/18, the Court held a hearing on fees and the parties then submitted additional filings. (5/22/18 Transcript); (11/29/18 Ruling, p. 1; App. 265).

On 6/4/18, Plaintiff filed NCJC's Reply in Support of Its Motion for Recovery of Fees and Costs. (NCJC's Reply in Support of its Motion; App. 157-160).

On 6/4/18, WMG filed its Affidavit in Support of Attorney Fees with Exhibits A-G. (Affidavit, Ex. A-G; App. 161-239).

On 6/5/18, WMG filed its Memorandum Supporting its Resistance to NCJC's Motion for Fees. (WMG Memorandum in Resistance; App. 240-245).

On 6/13/18, NCJC filed Plaintiff's Brief in Response to WMG's Affidavit in Support of Attorney's Fees and Costs. (Plaintiff's Brief; App. 246-258).

On 6/19/18, Defendant filed WMG's Reply to "Plaintiff's Brief in Response to Affidavit in Support of WMG's Motion to Tax Attorney Fees and Costs." (WMG's Reply; App. 259-264).

On 11/29/18, the Court entered its Ruling on Post Jury Trial Motions, acknowledging that Iowa Code § 625.22 says that "*when judgment is recovered upon a written contract to pay an attorney fee, the court shall allow and tax as part of costs a reasonable attorney fee.*" (Ruling, pp. 1-2; App. 265-266). The Ruling also held that that WMG was a successful party under Iowa Code Chapter 677 and awarded WMG post-offer costs. (Ruling, pp. 7-8; App. 270-271). However, the Ruling did not allow and tax as part of costs WMG's post-offer attorney fees. *Id.* The Court's Ruling also acknowledged that WMG had urged that Iowa Code § 625.25 precluded NCJC from recovering any attorney fees because NCJC had failed to provide WMG with reasonable and accurate claim notice prior to suit. (Ruling, pp. 3, 7; App. 267, 271). However, the Court held that Iowa Code § 625.25 did "*not determine the issue of attorney fees in this case.*" (Ruling,

p. 7; App. 271). Then, the Court, after having already held that WMG was a successful party under Iowa Code § 677.10 who had been awarded costs, then held that NCJC was also a successful, “prevailing” party. (Ruling, pp. 8-13; App. 272-277. The Court then awarded NCJC attorney fees, including post-offer attorney fees. *Id.*

On 12/12/18, Defendant filed WMG’s 1.904 Motion to Reconsider, Enlarge or Amend the Court’s November 29, 2018, Ruling. (WMG 1.904 Motion; App. 279-290).

On 12/22/18, NCJC filed Plaintiff’s Resistance to WMG’s 1.904 Motion. (NCJC’s Resistance; App. 291-298).

On 1/18/19, the Court entered its Ruling denying Defendant’s 1.904 Motion to Reconsider and Enlarge. (Ruling; App. 299-301).

On 2/8/19, WMG filed its Notice of Appeal with both the District Court and the Iowa Supreme Court. (Notice of Appeal; App. 302-306). NCJC did not cross appeal.

STATEMENT OF FACTS

WMG is an Iowa limited liability company whose members were Michael Goche, Jeanne Goche-Horihan, Joseph Goche, and Renee Afshar. (3/31/17 Petition, ¶ 2; App. 10-14).³

Prior to 3/1/17, WMG leased 600 acres of farmland in Kossuth County, Iowa to NCJC. (4/30/18 Stipulation, App. 91-92). WMG terminated the lease on 3/1/17. *Id.* The written lease between the parties provided that if WMG terminated the lease, it would reimburse NCJC for certain unused nutrients that NCJC had applied. (Ex. 1, p. 3; App. 309). The lease also provides that “[i]f either party files suit to enforce any of the terms of this lease, the prevailing party shall be entitled to recover court costs and reasonable attorney fees.” (11/29/18 Ruling, p. 2; Ex. 1, ¶ 20; App. 266).

NCJC had previously brought the same nutrient reimbursement claim against WMG in another proceeding, seeking \$190,564.62.⁴

³ The Court in *Afshar et al. v. Goche et al.* appointed attorney Larry Eide, of Mason City, to act as receiver for WMG. (10/10/17 Motion to Consolidate, p. 2; App. 29). Controversy among the Goche siblings, WMG, and NCJC (a company owned by Joseph Goche) has resulted in three different lawsuits. (11/29/18 Ruling, p. 1; App. 265). See also a recent Court of Appeals decision, *Goche v. WMG, L.C.*; No. 18-0793, for a description of the parties and some family dynamics.

On 3/31/17, NCJC filed this lawsuit, and on 4/5/17 dismissed its reimbursement claims in the *Afshar* lawsuit. *Id.* (3/31/17 Petition; App. 10-14). In Count One, NCJC again sought recovery for nutrient reimbursements, and in Count Two, sought damages for the following claims:

- \$725,000 “if specific performance is not ordered”;
- \$49,595 for “increased cost of fill”;
- \$12,400 for seed that could not be used;
- \$97,446 lost income for lack of control of the leased properties.

(Petition; Ex. A attached to Motion to Enlarge and Reconsider; App. 10-14, 288-289).

From 01/9/17 until 11/13/17, NCJC presented its reimbursement claim as totaling \$190,564.62.⁵ On 11/13/17, NCJC served discovery responses reducing its reimbursement claim from \$190,564.62 to \$74,446.09. (11/13/17 Notice of Discovery Response; Ex. 102; App. 57).

Four days later, on 11/17/17, WMG served NCJC with Notice of

⁴ *Renee Afshar v. WMG, L.C. et al.*, in the Iowa District Court in and for Kossuth County, Case No. LACV026869. (10/10/17 Motion to Consolidate and Continue Receivership, ¶¶ 2-3 & Ex. A, pp. 2-3; App. 28, 34-35).

⁵ On 01/9/17, NCJC filed Ex. 110 as “Jt.Ex.2” in the prior *Afshar* lawsuit presenting its reimbursement claim as one totaling \$190,564.62.

Defendant's Offer to Confess Judgment Pursuant to Iowa Code § 677.4 in favor of Plaintiff "*in the total amount of \$75,000.00 on all monetary damage claims in this lawsuit, exclusive of interest, costs and attorney fees.*" (11/17/17 Notice of Defendant's Offer to Confess Judgment; App. 58). NCJC did not accept. (11/30/17 Stipulation; App. 71-72).

On 2/28/18, the Court granted WMG's Motion for Partial Summary Judgment, dismissing all of NCJC's claims, except for its reimbursement claim. (2/28/18 Ruling on Summary Judgment; App. 79-90)

On May 9, 2018, a jury verdict of \$41,453.57 was entered on NCJC's reimbursement claim, less than the \$75,000.00 offer that NCJC rejected. (5/09/18 Civil Jury Verdict, 5/15/18 Statement of Case and Judgment Entry; App. 102-103, 109, 114).

After trial, both parties asserted competing claims for attorney fees, as summarized in the Course of Proceeding above. On 11/29/18, although the Trial Court held that WMG was a successful party under Iowa Code § 677.10 and had awarded post-offer costs to WMG, it did not include WMG's post-offer attorney fees as part of costs under Iowa Code § 625.22. The Court then determined that NCJC was also a successful, "prevailing party" under the written contract, and awarded NCJC attorney fees,

including post-offer attorney fees. The Court, when calculating its award to NCJC, did not segregate NCJC's pre-offer attorney fees from its post-offer attorney fees, so each could be evaluated separately.

On 2/08/19, WMG filed its Notice of Appeal. (Notice of Appeal; App. 302-306). NCJC did not cross appeal.

ARGUMENT

I. THE DISTRICT COURT CORRECTLY AWARDED WMG COSTS UNDER IOWA CODE § 677.10 BUT INCORRECTLY FAILED TO INCLUDE WMG'S POST-OFFER ATTORNEY FEES AS PART OF COSTS.

A. Scope/Standard of Review and Preservation Of Error.

Review of the Trial Court's interpretation and application of Iowa Code §§ 677.10, 625.22, and 625.25 is for legal error. *Rick v. Sprague*, 706 N.W.2d 717, 723 (Iowa 2005); *Harris v. Olson*, 558 N.W.2d 408, 409 (Iowa 1997). If there is substantial evidence in the record to support the decision, the appellate court is bound by the trial court's fact-findings. *Gosch v. Jeulfs*, 701 N.W.2d 90, 91 (Iowa 2005). However, the reviewing court is not bound by the trial court's application of legal principles. *Id.* Review of a court's award of attorney fees is for an abuse of discretion. *Landals v. George A. Rolfes Co.*, 454 N.W.2d 891, 897 (Iowa 1990). "Reversal is warranted only when the court rests its discretionary ruling on grounds that

are clearly unreasonable or untenable." *Boyle v. Alum-Line*, 773 N.W.2d 829, 832 (Iowa 2009) quoting *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000). A misapplication or misinterpretation of a statute constitutes abuse of discretion. *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342, 344 (Iowa 2000).

WMG preserved error by filing its Motion to Tax Attorney Fees and Costs resisting NCJC's Motion for Recovery of Attorney Fees and Costs, by filing an Iowa R. Civ. P. 1.904 Motion to Reconsider, Enlarge or Amend the Court's November 29, 2018 Ruling, and by timely filing its Notice of Appeal.

NCJC did not cross appeal. Accordingly, the Trial Court's decision that WMG was the successful party under Iowa Code Chapter 677 is res judicata. *Spiker v. Spiker*, 708 N.W.2d 347, 352 (Iowa 2006).

B. The Trial Court Incorrectly Applied Iowa Code § 625.22 Which Mandates that WMG's Post-Offer Attorney Fees Should Be Taxed as Costs Under Iowa Code § 677.10.

Iowa Code Chapter 677 provides defendants with a mechanism to control litigation expenses by offering to confess judgment under Iowa Code § 677.4. Iowa Code Chapter 677 is designed to encourage settlement, and

discourage unnecessary and costly litigation, and should be construed liberally to serve those purposes. *Coker v. Abell-Howe Co.*, 491 N.W.2d 143, 153 (Iowa 1992). Iowa Code § 677.10 provides: “*If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay defendant’s cost from the time of the offer.*” Accordingly, Iowa Code § 677.10 establishes who is the winning or successful party. Indeed, NCJC itself did not dispute and did not appeal the ruling that WMG was the successful party under Iowa Code Chapter 677: “*NCJC does not dispute that WMG is entitled to ‘costs WMG incurred after the offer.’*” (Plaintiffs Resistance to Defendant’s Motion to Tax Costs, pp. 1-2; App. 106-107). WMG, under any reasonable interpretation of Iowa Code § 677.10 as well as by application of res judicata, is the winning, successful and prevailing party for the post-offer period.

This case also involves a lease containing an agreement to pay attorney fees and is governed by Iowa Code § 625.22, which provides: “*When judgment is recovered upon a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as a part of the costs, a reasonable attorney fee to be determined by the court.*” Because Iowa Code § 625.22 provides that attorney fees are taxed as “*part*

of the costs,” this means attorney fees are “costs.”

Although the Trial Court correctly awarded WMG costs, the Trial Court incorrectly calculated its award to WMG by failing to include WMG’s post-offer attorney fees as costs. (11/29/18 Ruling, pp. 7-8; App. 271-272). Also, the Trial Court incorrectly awarded NCJC post-offer attorney fees. (11/29/18 Ruling, pp. 8-13; App. 272-277).

Although Iowa Code § 677.10, as a matter of law, makes WMG the winning party entitling WMG to costs, the Trial Court incorrectly held that NCJC was the “prevailing party”:

WMG, LC, asserts public policy reasons to find that WMG, LC, is the prevailing party in this case based primarily on the offer to confess judgment in an amount in excess or approximately the same amount that the plaintiff ultimately requested from the jury. However, the court concludes that this argument, although reasonable and makes some common sense in the overall picture, is not the rule of law binding on this court. This public policy or common-sense approach may be applicable in the sections below in regards to the reasonableness of the fee; however, it does not direct who is the **prevailing party**. NCJC, Inc., is clearly the **prevailing party** based upon the fact that a jury did award a significant sum arising out of their claim for reimbursement. Therefore, the court answers issue 1 by setting forth that NCJC, Inc., is the **prevailing party**.

(11/29/18 Ruling, p. 6; App. 270).

Iowa Code § 677.10 trumps any common law or contractual “prevailing party” analysis. WMG is the successful party, not NCJC.

Despite the Trial Court’s incorrect prevailing party analysis, its Ruling does contain several correct findings of fact and conclusions of law, as follows:

- that the Iowa Code § 677.10 “Offer Date” was 11/17/17. (11/29/18 Ruling, p. 2; App. 266);

- that WMG met the requirements of Iowa Code § 677.10 and because NCJC recovered a verdict for less than WMG’s offer, the Court properly awarded WMG “costs.” (11/29/18 Ruling pp. 2, 7-8, 13; App. 266, 271-272, 277);

- that *“the parties agree to the applicable Iowa Code to the litigation in this proceeding. Iowa Code § 625.22 says in part, ‘when judgment is recovered on a written contract containing an agreement to pay an attorney fee, the court shall allow and tax as part of costs a reasonable attorney fee to be determined by the court.’”* (11/29/18 Ruling pp. 1-2; App. 265-266);

- that a written contract exists between the parties containing an agreement to pay fees. (11/29/18 Ruling p. 2; App.

266).

When an Iowa Code Chapter 677 offer to confess is combined with a statute that orders the inclusion of attorney's fees as part of costs, then such attorney fees must be awarded as part of Iowa Code § 677.10 costs. *CSS2 Enterprise vs. Farmers Coop. Co.*, 2015 WL 4935834, 10 (Iowa App.)⁶ In *CSS2 Enterprises*, Iowa Code § 717A authorized an award of attorney fees as part of costs in a tort action for crop damage. Like *CSS2 Enterprises*, the *NCJC vs. WMG* case also contains a statute requiring taxation of costs, namely Iowa Code § 625.22.

Because of Iowa Code § 625.22, this case is distinguished from *Weaver Construction Co. v. Heitland*, 348 N.W.2d 230, 232 (Iowa 1984) and *Coker v. Abell-Howe Co.*, 491 N.W.2d 143 (Iowa 1992).⁷ In *Weaver* and *Coker*, there was no statute or agreement to award fees as costs.⁸ Here, because by statute, attorney fees are part of costs, WMG's post-offer attorney fees

⁶ *CSS2 Enterprises* does not discuss the concept of "prevailing party" at all because, in that case, the Iowa Code § 677.7 offer was accepted.

⁷ *Weaver* held that Iowa Code § 677.10 standing alone without another statute does not include attorney fees as part of costs. *Weaver*, 348 N.W.2d at 232.

⁸ There is another attorney fee case, *Tri-State Agri Corp. v. Clasing*, 2001 WL 1658852 (Iowa App.), that involves a statute awarding attorney fees, but it is distinguishable because the statute in that case does not tax attorney fees as costs.

should be included as part of costs. Similarly, NCJC cannot recover post-offer attorney fees because such attorney fees, by statute – Iowa Code § 625.22 - are a component of costs. The Court should reverse the Ruling, remand it and direct the Trial Court to tax as costs all of WMG’s post-offer attorney fees, and deny NCJC all post-offer costs, including its attorney fees, because attorney fees are costs.

Specifically, WMG’s post-offer fees, totaling \$30,883.95, as shown on WMG’s 6/4/18 Affidavit and appellate fees attorney fees, should be awarded by this Court, or on remand. (6/04/18 Affidavit; App. 163).

II. THE DISTRICT COURT INCORRECTLY AWARDED POST-OFFER ATTORNEY FEES TO NCJC.

A. Scope/Standard Of Review And Preservation Of Error.

Review of the Trial Court’s decision is for abuse of discretion. WMG repeats Division I(A) regarding Standard of Review and Preservation of Error. WMG preserved error by filing a Resistance to NCJC’s Application for Attorney Fees and further preserved error by filing WMG’s Memorandum in Support of Its Resistance to NCJC’s Motion to Tax Attorney Fees and Costs. (5/21/18 Resistance to NCJC’s Application for Attorney Fees; 6/5/18 WMG’s Memorandum in Support of Its Resistance to

NCJC's Motion to Tax Attorney Fees and Costs, App. 154-156, 240-245). WMG preserved error by arguing that NCJC did not satisfy the conditions imposed by Iowa Code § 625.25 because NCJC failed to show that *"defendant had information of and a reasonable opportunity to pay the debt before the action was brought."* (5/21/18 Resistance to NCJC's Application for Attorney Fees, p. 1; App. 154-156). WMG preserved error by further arguing NCJC fees were unreasonable under Iowa Code § 625.22. *Id.* WMG preserved error by specifically addressing post-offer fees by arguing that NCJC *"could have avoided all fees after November 17, 2017, if it had accepted WMG's offer to confess judgment"* made under Iowa Code Chapter 677. (5/21/18 Resistance to NCJC's Application for Attorney Fees, p. 2; App. 155). WMG preserved error by again arguing that all of NCJC's post-offer fees, being *"everything after November 20, 2017,"* should be denied. (6/5/18 WMG's Memorandum in Support of Its Resistance to NCJC's Motion to Tax Attorney Fees and Cost; p. 2; App. 241).

WMG again preserved error in its Iowa R. Civ. P. 1.904 Motion to Reconsider by arguing that *"Iowa Code Section 677.10 prohibits the court from awarding NCJC any post-offer costs, which includes attorney fees."* (12/12/18 WMG's Motion to Reconsider, p. 3; App. 281).

B. An Offer to Confess Made Under Iowa Code §§ 677.4 and 677.10 Permits Only One Winning Party and Because WMG Is the Winning Party, the Trial Court was Precluded from Awarding NCJC Any Post-Offer Attorney Fees.

There cannot be two “winning” parties under Iowa Code § 677.10. The Court’s Ruling, after correctly awarding WMG post-offer costs under § 677.10, then incorrectly declares NCJC, likewise, a “winner” and awards NCJC post-offer attorney fees. (11/29/18 Ruling, pp. 6 & 8-13; App. 270, 272-277)

Iowa Code § 677.10 provides: *“If the plaintiff fails to obtain judgment for more than was offered by the defendant, the plaintiff cannot recover costs, but shall pay defendant’s cost from the time of the offer.”* Iowa Code § 625.22 (emphasis supplied). This prohibits the Court from awarding NCJC any post-offer costs. Because attorney fees are part of costs and taxed as costs, attorney fees are costs. The Trial Court’s Ruling awarding fees to NCJC should be reversed.

C. NCJC’S Post-Offer Attorney Fees Are Per Se Unreasonable.

Although Iowa Code § 677.10 applies to bar NCJC from recovering any post-offer attorney fees without regard to whether its fees are reasonable, any post-offer attorney fees sought by NCJC post-offer are *per*

se, unreasonable. NCJC could have avoided all fees after 11/17/17 had NCJC simply accepted WMG's offer to confess judgment. *"The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case."* *Boyle v. Alum-Line*, 773 N.W.2d 829, 833 (Iowa 2009), quoting *Landals*, 454 N.W.2d at 897.

Factors to be considered by the court in determining reasonable attorney fees include:

[T]he time necessarily spent, the nature and extent of the service, the amount involved, the difficulty of handling and importance of the issues, the responsibility assumed and results obtained, the standing and experience of the attorney in the profession, and the customary charges for similar service.

Boyle v. Alum-Line, 773 N.W.2d at 832-833 (quoting *Landals*, 454 N.W.2d at 897).

The Trial Court's Ruling, awarding NCJC post-offer fees, errs by providing no factual basis explaining how any of NCJC's post-offer attorney fees could be reasonable, in light of WMG's \$75,000.00 offer to confess judgment and the Court's award of post-offer costs to WMG.

The Trial Court's Ruling, awarding post-offer attorney fees to NCJC as costs, eviscerates the intended purpose of Iowa Code § 677.10 and improperly overshadows the Court's own award of post-offer costs to WMG. The Court should reverse the Trial Court's ruling awarding to NCJC post-offer costs, including attorney fees, and direct such other relief as is just and equitable.

D. Iowa Code § 625.25 Precludes the Taxing of Any Attorney Fees in Favor of NCJC Because NCJC Did Not Provide WMG With A Reasonable Opportunity to Pay the Debt Before NCJC Filed Suit.

Iowa Code § 625.25 provides: *“No such attorney fee shall be taxed . . . unless it shall be made to appear that such defendant had information of and a reasonable opportunity to pay the debt before action was brought.”*

NCJC, as a condition of recovering any attorney fees, was required to provide WMG with accurate information about its reimbursements claim before filing its lawsuit, not after. NCJC, rather than waiting until it had its facts right, went ahead filing yet a second lawsuit, again presenting an inflated, \$190,564.62 claim, up until 11/13/17.⁹ On 11/17/17, only four days

⁹ NCJC also pursued its \$190,564 claim in a prior lawsuit, filing Ex. 110 on 1/9/17 in *Afshar*. (10/17/17 Motion to Consolidate and Continue Receivership, ¶¶ 2-3, App. 28; Ex. 110; App. 319)

after NCJC finally provided WMG some reasonable documentation and had reduced its claim to \$74,446.09, WMG promptly offered to pay it. NCJC could not expect that WMG, who operates through a fiduciary, to pay an unsupported, inflated \$190,564.62 claim. As a matter of law, NCJC did not provide WMG with a pre-suit reasonable basis to pay this claim.

Detailed findings of fact regarding the factors evaluated by the court must accompany an attorney fee award. *Dutcher v. Randall Foods*, 546 N.W.2d 889, 897 (Iowa 1996). Although the Trial Court held that “Iowa Code § 625.25 will not determine the issue of attorney fees”, the Ruling provides no factual basis in the record to support this conclusion. The Trial Court erred in holding that NCJC provided WMG with a reasonable opportunity to pay its \$41,453.57 claim pre-suit.

The Trial Court’s Ruling awarding NCJC pre-offer attorney fees should be reversed because NCJC did not provide WMG with a reasonable opportunity to pay its \$41,453.57 claim pre-suit.

III. BECAUSE THE DISTRICT COURT ERRED IN AWARDING POST-OFFER ATTORNEY FEES TO NCJC, THE CASE SHOULD BE REMANDED WITH DIRECTIONS FOR THE TRIAL COURT TO SEGREGATE NCJC'S PRE-OFFER FEES FROM POST-OFFER FEES SO EACH BE EVALUATED SEPARATELY.

A. Scope/Standard Of Review And Preservation Of Error.

Review of the Trial Court's decision is for abuse of discretion. Appellant WMG repeats Divisions I(A) and I(B) regarding Standard of Review and Preservation of Error. As indicated in Division I(B), WMG preserved error by arguing that regardless of whether their fees were pre-offer or post-offer, the Court should not award NCJC any fees. (Resistance to NCJC's Application for Attorney Fees, p. 2; App. 155). WMG further preserved error on its specific complaint about awarding any post-offer fees to NCJC by isolating NCJC's post-offer fee claim and arguing that "*everything after November 20, 2017*" should be denied. (6/5/18 WMG's Memorandum in Support of Its Resistance to NCJC's Motion to Tax Attorney Fees and Cost; p. 2; App. 241).

After the Trial Court entered its 11/29/18 Ruling awarding NCJC fees, WMG again preserved error by filing its 1.904 Motion to Reconsider, Enlarge or Amend by again arguing that no fees should be awarded to NCJC, but that if any fees were to be awarded, the Court should make

specific findings of fact indicating which of NCJC's fees were pre-offer and which fees were post-offer, because Iowa Code § 677.10 requires post-offer fees to be denied in total. (12/12/18 WMG's Motion to Reconsider, pp. 4-5; App.282-283).

B. The Trial Court Incorrectly Failed to Segregate NCJC's Pre-Offer Fees From Post-Offer Fees.

The Trial Court's Ruling awarding \$55,000 to NCJC in attorney fees makes no distinction between NCJC's pre-offer fees, and post-offer fees. Because the Trial Court incorrectly awarded NCJC post-offer fees, the case should be reversed and remanded, with directions to segregate NCJC's pre-offer from its post-offer attorney fees, so each can be evaluated separately. After the NCJC's post-offer attorney fees are segregated, for the above reasons, the Court should deny them in total.

C. WMG, Not NCJC, is the Pre-Offer Prevailing Party.

After segregating pre-offer fees from post-offer fees, the Court should examine only pre-offer facts in determining who is the "prevailing party". There is no dispute that for the pre-offer period, WMG successfully defended five claims exceeding \$884,000.00 and reduced NCJC's \$190,564.62 reimbursement claim to \$74,446.09. (Ex. 102; 12/12/18

Motion to Enlarge & Reconsider & Ex. A; App. 316-318, 288-289). *"The district court must look at the whole picture and, using independent judgment with the benefit of hindsight, decide on a total fee appropriate for handling the complete case."* *Boyle v. Alum-Line*, 773 N.W.2d 829 (Iowa 2009) quoting *Landals*, 454 N.W.2d at 897. When looking at only the pre-offer facts and using "hindsight," WMG is the only party that can legitimately be considered as "prevailing."

The Trial Court's Ruling awarding NCJC pre-offer attorney fees should be reversed because WMG, not NCJC, is the "prevailing party."

IV. THE COURT FAILED TO AWARD WMG PRE-OFFER ATTORNEY FEES ON THOSE CLAIMS FOR WHICH WMG PREVAILED.

A. Scope/Standard of Review And Preservation Of Error.

Review of the Trial Court's decision is for abuse of discretion. Appellant WMG otherwise repeats Divisions I(A) – I(C) above regarding Standard of Review and Preservation of Error.

B. The Trial Court Incorrectly Ruled That WMG Was Not The Prevailing Party On Those Claims Which WMG Successfully Defended.

The Trial Court incorrectly failed to hold that WMG was the

prevailing party on those claims it successfully defended. WMG prevailed on those claims that the Trial Court dismissed by summary judgment on 2/28/18. (2/28/18 Ruling; 12/12/18 1.904 Motion, Ex. A; App. 79-89, 288-289).

The Court should reverse the Trial Court's decision, and remand the case with directions holding that WMG was the prevailing party under the lease and Iowa Code § 625.22 on those claims the Court dismissed by summary judgment. The Court should remand this case to the Trial Court for entry of the sum of \$9,423.67 for pre-offer attorney fees to WMG, on those claims which it successfully defended. (WMG's 6/4/18 Affidavit; App. 162).

CONCLUSION

The Trial Court incorrectly failed to include WMG's attorney fees as part of the post-offer court costs awarded to WMG under Iowa Code § 677.10. Further, the Trial Court incorrectly awarded NCJC post-offer attorney fees. Also, the Court failed to segregate NCJC's pre-offer attorney fees from NCJC's post-offer attorney fees so each could be evaluated separately. Further, the Trial Court incorrectly held that NCJC was the pre-offer prevailing party. Further, the Court incorrectly held that NCJC

satisfied the Iowa Code § 625.25 condition of providing WMG with a reasonable opportunity to pay NCJC's \$41,453.57 reimbursement claim prior to NCJC filing suit. Finally, the Trial Court failed to rule that WMG was the prevailing party on those claims that WMG successfully defended, and incorrectly failed to award WMG attorney fees.

The Court should:

- reverse the Trial Court's decision failing to award WMG post-offer attorney fees as part of costs, and remand the case to the Trial Court with directions to award post-offer attorney fees to WMG;
- reverse the Trial Court's Order awarding NCJC any post-offer fees;
- reverse the Trial Court's decision awarding NCJC fees and direct the Trial Court to segregate NCJC's pre-offer fees from post-offer fees so each can be evaluated separately;
- reverse the Trial Court's decision holding that NCJC was a pre-offer prevailing party;
- reverse the Trial Court's decision that Iowa Code § 625.22 does not control NCJC's fee request and hold that as a

matter of law that NCJC did not provide WMG with a reasonable opportunity to pay pre-suit;

- reverse the Trial Court's decision failing to hold that WMG was the prevailing party on those claims WMG successfully defended, and remand the case for a determination of an award of fees to WMG;

- order such other relief as the court deems just and equitable.

REQUEST FOR ORAL ARGUMENT

Appellant WMG respectfully requests to be heard in oral argument on this matter.

ATTORNEY'S COST CERTIFICATE

There was no cost for printing this document as it was electronically filed with the Iowa Judicial System Electronic Document Management System.

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

1. This Brief complies with the type-volume limitation of Iowa R. App. P. 6.903(1)(g)(1) or (2) because:

this Brief contains 5,281 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1) or

this brief uses a monospaced typeface and contains [state the number of] lines of text, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(2).

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 2007 in 14 font size and Times New Roman type style, or

this Brief has been prepared in a monospaced typeface using [state name and version of word processing program] with [state number of characters per inch and name of type style].

Dated: June 10, 2019.

RESPECTFULLY SUBMITTED,

PETERSON & LIPPS



By: _____

THOMAS W. LIPPS

6 East State Street, P.O. Box 575

Algona, IA 50511

Telephone: (515) 295-9494

Fax: (515) 295-9493

Email: tlipps@petelipp.com

ATTORNEYS FOR DEFENDANT-
APPELLANT

PROOF OF SERVICE AND CERTIFICATE OF FILING

I certify that on June 10, 2019, I electronically filed the foregoing document with the Clerk of the Supreme Court of Iowa using the Iowa Judicial System Electronic Document Management System, which will send notification of such filing to the counsel below:

Philip J. Kaplan
90 South Seventh Street, Suite 3600
Minneapolis, MN 55402
pkaplan@anthonyostlund.com
ATTORNEYS FOR
PLAINTIFF-APPELLEE

Wesley T. Graham
317 Sixth Avenue, Suite 900
Des Moines, IA 50309
wtgraham@duncangreenlaw.com
ATTORNEY FOR PLAINTIFF-
APPELLEE

PETERSON & LIPPS



By: _____

THOMAS W. LIPPS
6 East State Street, P.O. Box 575
Algona, IA 50511
Telephone: (515) 295-9494
Fax: (515) 295-9493
Email: tlipps@petelipp.com
ATTORNEY FOR DEFENDANT-
APPELLANT

Original filed w/ EDMS
Copies to Counsel by EDMS.

P:\CLIENT\Lipps, Tom-Cases\WMG\WMG's FINAL Brief 6-10-19.doc