

IN THE SUPREME COURT OF IOWA  
SUPREME COURT NO. 16-0624  
JOHNSON COUNTY EQUITY NO. EQCV074310  
FIRST AMERICAN BANK AND C.J. LAND, L.L.C.,  
Plaintiffs/Appellees

VS.

FOBIAN FARMS, INC.; HOOVER HIGHWAY BUSINESS PARK, INC.;  
GATEWAY, LTD.; GATEWAY PROPERTIES, LTD.;  
Defendants/Appellants

GATEWAY COMMERCIAL CONDOMINIUMS OWNERS  
ASSOCIATION; JERRY L. EYMAN; AND JAN G. EYMAN,  
Defendants

FOBIAN FARMS, INC.,  
Cross-Claimant,

VS.

JERRY L. EYMAN; GATEWAY COMMERCIAL CONDOMINIUMS  
OWNERS ASSOCIATION,  
Cross-Claim Defendants.

Appeal from the Iowa District Court for Johnson County  
The Honorable Ian K. Thornhill, Judge

APPELLANTS' FINAL REPLY BRIEF  
AND  
REQUEST FOR ORAL ARGUMENT

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**PROOF OF SERVICE AND CERTIFICATE OF FILING**

I certify that on the 16 day of Sept., 2016, I electronically filed the foregoing with the Clerk of Court for the Supreme Court of Iowa. I certify that all participants in the case are registered electronic filing users and that service will be accomplished by the electronic filing.

  
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## REPLY ARGUMENT

### **I. REPLY POINT ONE: THE AMOUNT OF FOBIAN FARMS' SANCTION SHOULD BE LIMITED TO THE AMOUNT OF EXPENSES ASSOCIATED WITH THE FRIVOLOUS FILING.**

#### A. Standard of Review and Issue Preservation.

C.J. Land and First American Bank ("C.J. Land") acknowledge in their brief that error on the issue of what is the appropriate sanction amount has been preserved. (Appellee's Brief Page 9)

#### B. Argument.

C.J. Land argues that the entire course of Fobian Farms' defense was frivolous and therefore sanctionable. (Appellees' Brief P. 10-12) However, the Court of Appeals' initial opinion concluded otherwise and instructed the District Court on remand to consider that significant time would have been spent by C.J. Land on this case notwithstanding Fobian's claim. (Court of Appeals Dec. P. 24, App. P. 300)

Accordingly the District Court erred on remand when it shifted to Fobian Farms all of C.J. Land's and all of First American Bank's legal expenses as a sanction. Instead the Trial Court should have limited the sanction amount to the expenses related to the sanctionable interference claim. It was an abuse of discretion to assess fees which were not related to this sanctionable conduct.

Rowedder v. Anderson, 814 NW2d 585, 590 (Iowa 2012); Everly v. Knoxville Community School District, 774 NW2d 488, 495 (Iowa 2009). See, also Bodenhamer Bldg. Corp. v. Architectural Research Corp., 989 F.2d 213, 218 (6<sup>th</sup> Circ. 1993); In Re. Kunstler, 914 F.2d 505, 523 (4<sup>th</sup> Circ. 1990); Mark S. Cady, Curbing Litigation Abuse and Misuse: A Judicial Approach, 36 Drake L. Rev. 483, 506 (1986-87).

Despite being given a full opportunity on remand to provide the Trial Court with information about the amount of legal expenses attributable to the sanctionable interference claim C.J. Land failed to do so. As explained in Fobian Farms' initial brief, the Fobian claims were dismissed by summary judgment and were thereafter not appealed. Accordingly the amount of fees necessary to respond to the sanctionable claims could not have exceeded \$3,500.00.

The plain language of Rule 1.413 and Iowa law limits the sanctions amount to the expenses associated with the sanctionable filing. Rowedder, et.al. id.

Accordingly the Trial Court abused its discretion when it calculated the sanction amount to be the entirety of C.J. Land's legal expenses even though much of these expenses was unrelated to the sanctionable conduct.

**II. REPLY POINT TWO: THE COST-SHIFTING OF ALL LEGAL EXPENSES INCURRED BY FIRST AMERICAN BANK AND C.J. LAND IS CONTRARY TO THE AMERICAN RULE CONCERNING ATTORNEY FEES.**

A. Standard of Review and Issue Preservation.

C.J. Land and First American Bank acknowledge in their brief that error on the issue of what is the appropriate sanction amount has been preserved. (Appellee's Brief Page 9)

B. Argument.

The Iowa Supreme Court has recognized that Iowa remains committed to the American Rule regarding attorney fees despite the enactment of Rule 1.413. Rowedder, id.

In the present case the Trial Court shifted all of the expenses incurred by First American Bank and C.J. Land to Fobian. This was an abuse of discretion, as much of C.J. Land's expenses were unrelated to the sanctionable conduct. Indeed, the Court of Appeals' earlier decision instructed the Trial Court to reconsider its initial decision in light of this fact, an instruction which was not followed on remand. (Appeals Decision P. 23-24, App. P. 299-300)

Further First American Bank was never named in any of Fobian's claims. Therefore there was no need for it to respond to the Fobian claims and it did not do so. Why then should it be allowed to recover its legal expenses? Accordingly,



the award of any fees to First American Bank is an abuse of discretion. See, Rowedder, Everley, et.al., id.

When the Trial Court's decision is considered, it is clear that it was not just sanctioning the Fobian defendants but was instead shifting all of the successful litigants' expenses to the unsuccessful litigants. This was an abuse of discretion, as it is beyond the scope of Rule 1.413 and contrary to the Rowedder decision.

**III. REPLY POINT THREE: UNDER THE FACTS OF THIS CASE THE FOBIAN DEFENDANTS WERE ENTITLED TO DEFEND THEMSELVES.**

A. Standard of Review and Issue Preservation.

C.J. Land and First American Bank acknowledge in their brief that error on the issue of what is the appropriate sanction amount has been preserved. (Appellee's Brief Page 9)

B. Argument.

Appellees' argue that the entirety of Fobians' defense was sanctionable. (Appellees' Brief P. 16) However, this conclusion is not supported by substantial evidence, is untenable, and clearly unreasonable. It is therefore an abuse of discretion. Schettler v. Iowa District Court, 509 NW2d 459, 464 (Iowa 1993). Specifically, this dispute was primarily based on a disagreement over what was

said and intended in a verbal discussion between Carl Fobian and Jerry Eyman. Mr. Eyman's version of this discussion was that it concerned the sale of the southern-most of two lots. Mr. Fobian's version was that it concerned the northern lot. (Tr. P. 234-236, 605-611, 675-676, App. P. 255-256, 267-270, 276) Mr. Fobian's version of this discussion was supported by the current recorded plat map which showed that Lot 2B, the lot in question, was indeed the northerly lot. (Exhibits 3, 4, and 19, App. P. 138, 203, and 237) Under these facts Fobian had a colorable defense and it was an abuse of discretion to determine otherwise. Fobian Farms accepts that the District Court evaluated the competing versions of what occurred during this Fobian-Eyman discussion and concluded that Eyman's version was more credible. But that does not make Fobian's version frivolous. Because Fobian had his own testimony as evidence and because this testimony was consistent with the current public record Fobian's version was not frivolous. See, Cohen v. Iowa District Court for Des Moines County, 508 NW 2d 78, 82 (Iowa Ct. App. 1993) (noting that a claim is objectively frivolous only if it has no support in law or fact).

It is also undisputed, and the Court of Appeals so found, that Fobian purchased the mortgages which eventually led to his ownership claim from Hills Bank. These mortgages clearly encumbered Lot 2A, which according to public records was the south lot. Fobian Farms paid \$525,000.00 in cash for these

mortgages. (Tr. P. 614-616, App. P. 271-272; Exhibit 13 and 38, App. P. 229 and 239) Accordingly the conclusion of the District Court and the argument of Appellees that Fobian Farms was improperly motivated by a desire to get a free restaurant is not supported by the evidence. Fobian Farms instead paid a very substantial amount of money for these mortgages and reasonably made the decision to try and protect his investment and mortgage liens by defending against the claim filed by C.J. Land.

Further evidence of the reasonableness of Fobian's decision to defend is documented by the fact that damages were awarded to Fobian. And once the interference claim was dismissed it was not pursued. Although this interference claim was sanctionable, Fobian's decision to proceed to trial on the merits of C.J. Land's claims is not itself sanctionable. Kendall v. Lowther, 356 NW2d 181, 191 (Iowa 1984).

Finally, since the reformation remedy requested by Appellees is never a matter of entitlement but is instead always discretionary with the court, there was a further basis in law for the defense. Kufer v. Carson, 230 NW2d 500, 503 (Iowa 1979).

Under these circumstances Fobian's decision to seek a court resolution was reasonable and should not be sanctionable.

**IV. REPLY POINT FOUR: THE TRIAL COURT ON REMAND CONSIDERED INAPPROPRIATE FACTORS WHEN CALCULATING THE SANCTIONS AMOUNT.**

A. Standard of Review and Issue Preservation.

C.J. Land and First American Bank acknowledge in their brief that error on the issue of what is the appropriate sanction amount has been preserved.

(Appellee's Brief Page 9)

B. Argument.

Throughout its decision the Trial Court criticized what it found to be questionable motives and conduct of Fobian Farms. In their brief, Appellees also argue that Fobian Farms' conduct is justification for sanctions. (Appellees' Brief, P. 16)

This conduct occurred prior to trial. For example, the conduct which was found to be "bullying," and Fobian's decision to buy the Hills Bank's mortgages all occurred well prior to trial. This pretrial conduct had nothing to do with any court filing and therefore was outside the scope of Rule 1.413 and was not the proper subject of sanctions. See, Everley, *id.* Further, the Trial Court's scrutiny of Fobian's motivations and its conclusion that these motivations justified the sanction amount is also an abuse of discretion, as whether a filing is sanctionable is based on an objective standard and not on the subjective motivation for this filing. Weigel v. Weigel, 467 NW2d 277, 282 (Iowa 1991). As explained in

Reply Point Three there was a factual and a legal basis for Fobians' defense. Indeed, if there was no such support C.J. Land should and could have filed a Motion for Summary Judgment as to its own claims and not just as to the Fobian claims.

By considering these factors as being grounds for sanction the trial Court abused its discretion.

**V. REPLY POINT FIVE: THERE ARE NO GROUNDS TO AWARD ATTORNEY FEES ON APPEAL.**

A. Standard of Review and Issue Preservation.

C.J. Land and First American Bank acknowledge in their brief that error on the issue of what is the appropriate sanction amount has been preserved. (Appellee's Brief Page 9)

B. Argument.

Appellees request, apparently as part of the sanction amount, an award of appellate attorney fees. There is no statute, contract or rule which allows for an award of appellate attorney fees in this matter, nor do Appellees cite to any. Accordingly each party should pay their own appellate expenses. See, Foxley Cattle Company v. Midwest Soya International, Inc., 585 NW2d 231, 233 (Iowa 1998).

**CONCLUSION**

Fobian Farms continues to urge this appeals court to limit the sanction in this case to a portion of the approximate \$3,500.00 which was incurred in defending against the sanctionable interference claim in this matter. Fobian Farms believes that no more than \$1,000.00 would be an appropriate sanction amount.

**REQUEST FOR ORAL ARGUMENT**

Fobian Farms continues to request that it be heard at oral argument in this matter.

Respectfully Submitted,

BY:  \_\_\_\_\_

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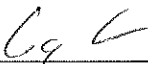
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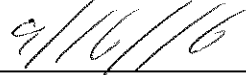
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