

IN THE IOWA SUPREME COURT

NO. 16-0624

FIRST AMERICAN BANK AND C.J. LAND, L.L.C.,
Appellees,

V.

FOBIAN FARMS, INC.; HOOVER HIGHWAY BUSINESS PARK, INC.;
AND GATEWAY, LTD.,
Appellants.

DATE OF FILING OF COURT OF APPEALS DECISION:
JANUARY 11, 2017

APPELLEES' RESISTANCE TO APPELLANTS'
APPLICATION FOR FURTHER REVIEW

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STATEMENT OF THE ISSUES PRESENTED
FOR FURTHER REVIEW

I. BECAUSE FOBIAN’S APPLICATION DOES NOT PRESENT ONE OF THE RARE INSTANCES IN WHICH FURTHER REVIEW SHOULD BE GRANTED, THIS COURT SHOULD RENDER JUDGMENT AGAINST FOBIAN FARMS ON THE APPEAL BOND

Iowa R. App. P. 6.1103(b)

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Iowa R. Civ. P. 1.413

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State v. McCright, 569 N.W.2d 605 (Iowa 1997)

State v. Eames, 565 N.W.2d 323 (Iowa 1997)

STATEMENT OF THE CASE

This is the second appeal regarding a quiet title action brought by Plaintiffs/Appellees C.J. Land, L.L.C. (“CJ Land”) as owner and First American Bank (“FAB”) as lender (collectively “Plaintiffs”) regarding property where CJ Land built a restaurant near West Branch, Iowa. Plaintiffs’ claims are adverse to Defendant Hoover Highway Business Park, Inc., as successor in interest to Defendant Fobian Farms, Inc. (collectively Defendants or “Fobian Farms”).¹

Following a bench trial before Judge Ian K. Thornhill on February 5-7, 2013, the district court quieted title in favor of CJ Land, subject to FAB’s mortgage, ordered reformation of various related legal instruments, awarded Defendants damages for certain encroachments by CJ Land’s building and assessed attorney fees and expenses against Fobian Farms to sanction its conduct. Fobian Farms’ motion to expand or modify the ruling was denied. August 28, 2013 Ruling. In the first appeal, Fobian Farms appealed the equitable remedy and the assessment of sanctions.

¹ Both Defendants are owned or controlled by Carl Fobian (“Fobian”), who is President of Fobian Farms. Fobian Farms deeded its interest in the property in question to Hoover Highway Business Park, Inc.

On June 10, 2015, the Court of Appeals affirmed the district court's ruling regarding reformation, modified the district court's ruling to grant an easement, and most importantly for the purposes of this resistance, determined the district court did not abuse its discretion in assessing sanctions. *First American Bank v. Fobian Farms, Inc.*, 868 N.W.2d 201, 2015 WL 3613379 (Iowa Ct. App. June 10, 2015) (tabled) ("First Appeal Ruling").

The Court of Appeals remanded to the district court to make specific findings regarding the amount of sanctions. On June 25, 2015, Fobian Farms filed an Application for Further Review ("First Application for Further Review") with this Court as to four issues including, "Whether a titleholder who is in the business of selling real estate should be subject to sanctions under Iowa Rule of Civil Procedure 1.413 if he asserts a counterclaim for interference with prospective business advantage against a nontitleholder who has constructed a building and otherwise encroached on the counterclaimant's real property." On July 31, 2015 the Iowa Supreme Court denied further review. Order Denying Further Review ("First Order Denying Further Review").

On August 21, 2015, Mr. Fobian filed a letter with the Iowa Supreme Court containing a number of accusations against the district court, Court of Appeals, and Iowa Supreme Court couched as “issues”:

I have three separate issues concerning Johnson County, the State, and our court operation or lack of it. This concerns an action we should never have been allowed to be named in as “defendants”. We have lost in a bench court, an appeals court rubber-stamped it, and the Supreme Court has denied the review of the case or suggests any solution. We expected a decision on legal terms we did not get and asked it to be reviewed on this basis by the Supreme Court. They have refused.

Can a determination by a lower court be allowed to stand on totally false facts, easily disapproved by available recorded data, then the Supreme Court denying it to be heard? Can a surveyed document, since recorded, approved by all seven offices in the county, after being requested and presented by the then owner and developer of same when thus recorded, then being used and accepted as security on a properly recorded mortgage be ignored and disposed of by a judge? I can’t believe it can. The judge used false facts of record...

Can a court get by with, as it seems to me, assisting a person in creating a scam, using a shell-game, replacing, moving, removing, and selling recorded mortgaged property, not released, encroaching, ruining the value there of?

Is this America? We positively did nothing wrong, yet we now face the loss of money we borrowed, loaned out, lawyer fees, receiving no damage awarded for a ruined lot, a life destroyed all with the assistance of the court.

Mr. Fobian’s August 21, 2015 letter (emphasis in original).

On September 11, 2015, Plaintiffs filed a motion to dismiss or strike the August 21, 2015 filing. On December 18, 2015, the Iowa Supreme Court granted Plaintiffs' motion to strike and directed the clerk to issue *procedendo* immediately.

On January 15, 2016, the district court entered an Order directing the parties to submit briefs addressing the issues of the minimum sanction necessary to deter and of Fobian Farms' ability to pay the award previously ordered by this Court. On March 30, 2016, the district court entered its Ruling on Remand ("Ruling on Remand") with the requested factual findings supporting an award of sanctions and gave the parties an opportunity to brief their positions as to bond distribution. On April 11, 2016, Fobian Farms filed its Notice of Appeal ("Notice of Second Appeal").

The Court of Appeals treated the appeal as a petition for writ of certiorari. January 11, 2017 Ruling ("Second Appeal Ruling"), p. 2, n. 4 (citing *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009) ("The proper means to review a district court's order imposing sanctions is by writ of certiorari.")). Finding no abuse of discretion, the court annulled the writ without further opinion. *Id.* at pp. 2-3.

On January 30, 2017, Fobian filed an Application for Further Review (“Second Application for Further Review”) with this Court. As set forth herein and previously, this Court should deny further review.

Plaintiffs state that the facts as detailed in the June 10, 2015 opinion of the Court of Appeals are accurate.

ARGUMENT

I. BECAUSE FOBIAN’S APPLICATION DOES NOT PRESENT ONE OF THE RARE INSTANCES IN WHICH FURTHER REVIEW SHOULD BE GRANTED, THIS COURT SHOULD RENDER JUDGMENT AGAINST FOBIAN FARMS ON THE APPEAL BOND

A grant of further review is a matter of judicial discretion and is not granted in normal circumstances. Iowa R. App. P. 6.1103(b). The types of cases considered for review include those where: (1) The court of appeals has entered a decision in conflict with a decision of this court or the court of appeals on an important matter; (2) The court of appeals has decided a substantial question of constitutional law or an important question of law that has not been, but should be, settled by the supreme court; (3) The court of appeals has decided a case where there is an important question of changing legal principles; or (4) The case presents an issue of broad public

importance that the supreme court should ultimately determine. *Id.* None of these circumstances apply to the issues set forth by Fobian in its Application.

“Relief through certiorari is strictly limited to questions of jurisdiction or illegality of the challenged acts.” *Barnhill v. Iowa Dist. Court for Polk Cty.*, 765 N.W.2d 267, 272 (Iowa 2009), as corrected (May 14, 2009) (quoting *French v. Iowa Dist. Ct.*, 546 N.W.2d 911, 913 (Iowa 1996)). In the present case, the Court of Appeals properly applied an abuse of discretion standard. Second Appeal Ruling, p. 2 (citing *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 492 (Iowa 2009) (“A district court’s order imposing sanctions under our rules of civil procedure is reviewable for an abuse of discretion.”); *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993); *Weigel v. Weigel*, 467 N.W.2d 277, 280 (Iowa 1991)).

Reversal of such an award is warranted “only when the court rests its discretionary ruling on grounds that are clearly unreasonable or untenable.” See *Gabelmann v. NFO, Inc.*, 606 N.W.2d 339, 342 (Iowa 2000). Where supported by substantial evidence, the district court’s findings of fact are binding upon appeal. *Barnhill*, 765 N.W.2d at 272 (citing *Zimmermann v. Iowa Dist. Ct.*, 480 N.W.2d 70, 74 (Iowa 1992)). On remand, the district court addressed the minimum amount to deter and the parties’ ability to pay,

as specifically ordered by the Court of Appeals. See Ruling on Remand, p. 2.

The Court of Appeals found no abuse of discretion, holding:

On remand, the district court entered an order directing the parties to submit briefs on the remaining issues. After the parties submitted their briefs, the court wrote a thorough opinion identifying and addressing the issues. The court showed it exercised its discretion by considering all the necessary factors. The reasons for its conclusions are not untenable and are not clearly unreasonable. We find no erroneous applications of law. Accordingly, we find the district court did not abuse its discretion. We annul the writ without further opinion.

Second Appeal Ruling, pp. 2-3.

Concurrently with this Resistance, Plaintiffs have filed a motion for entry of judgment pursuant to Iowa Rule of Appellate Procedure 6.603, which provides:

If an appellate court affirms the judgment appealed from, it may, on motion of the appellee, render judgment against the appellant and the sureties on the appeal bond for the amount of the judgment, with damages and costs; or it may remand the cause to the district court for the determination of such damages and costs and entry of judgment on the bond.

See also Stolar v. Turner, 29 N.W.2d 417, 418 (Iowa 1947) (Supreme Court may enter judgment on appeal bond or remand for same). As set forth in greater detail below, Fobian Farms presents no issues appropriate for a grant of further review by this Court. Plaintiffs respectfully request that this Court deny further review and enter judgment on the appeal bond.

II. THE COURT OF APPEALS PROPERLY FOUND NO ABUSE OF DISCRETION AND THUS PROPERLY ANNULLED THE WRIT

In its Application, Fobian claims: (1) the trial court and Court of Appeals' decisions are "contrary to the plain language of Iowa Rule of Civil Procedure 1.413;" (2) that the assessment of sanctions was contrary to *Weigel v. Weigel*, 467 NW2d 277, 282 (Iowa 1991); and (3) that "the determination that Defendants' post trial critical letter supports sanctions violates Fobians' right of freedom of speech under The First Amendment of the United States Constitution and Article I, section 7 of the Iowa Constitution and is contrary to the decision of *Brown v. District Court of Webster County*, 158 NW2d 744, 747 (Iowa 1968)." Application, pp. 1-2.

As set forth herein, this Court should deny further review and enter judgment on the appeal bond.

A. The District Court Assessed An Appropriate Sanction On Remand Consistent with the Dictates of Iowa Rule of Civil Procedure 1.413.

Fobian contends that the trial court abused its discretion "by assessing the Fobian Defendants the entire amount of Plaintiffs' legal expenses as a sanction under Iowa Rule of Civil Procedure 1.413 even though most of these expenses were not incurred as a result of properly sanctionable conduct." Application, p. 6.

As noted by the Court of Appeals and the district court, Rule 1.413 contains three independent duties: the reading, inquiry, and purpose elements. *First Am. Bank*, 2015 WL 3613379 at *10 (citing *Barnhill*, 765 N.W.2d at 273) (internal citation omitted). “Each duty is independent of the others, and a breach of one duty is a violation of the rule.” *Id.* The purpose of sanctions based on the “improper purpose” clause is to “eliminate tactics that divert attention from the relevant issues, waste time, and serve to trivialize the adjudicatory process.” *Barnhill*, 765 N.W.2d at 273 (citing *Hearity v. Iowa Dist. Court for Fayette Cty.*, 440 N.W.2d 860, 866 (Iowa 1989) (quoting Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 489-507 (1986-87))).

Fobian Farms again inaccurately attempts to narrow its sanctionable conduct to simply that of raising a frivolous counterclaim and denies that it acted in bad faith:

Fobian was the defendant in this action and did not commence the same. The only claim that it made against C.J. Land was an interference with business advantage counterclaim which was dismissed by summary judgement and thereafter not pursued.

The trial court nevertheless concluded that the entirety of Plaintiff's expenses should be assessed against Fobian because it found Fobian's entire defense to be in bad faith. It specifically concluded that Fobian was "trying to get a free restaurant." (Remand Decision, Addendum Page xxxi) This finding, however is not supported by substantial evidence because it is

undisputed that Fobian spent \$525,000 to acquire the Hills Bank mortgage which it eventually foreclosed in order to acquire its claim to the property. (Transcript Page 614-616; App. Page 271-272; Ex. 13 and 38; App. Page 229 and 239).

Second Application for Further Review, p. 6.

The district court, as affirmed by the Court of Appeals and denied further review by the Iowa Supreme Court, held otherwise.

1. This Court has already denied review as to whether Fobian Farms' conduct was sanctionable.

Fobian's repeated assertion that the trial court imposed, and the Court of Appeals affirmed the imposition of, sanctions contrary to Rule 1.413 have been previously addressed by the district court and the Court of Appeals at length. The Court of Appeals emphasized the following findings from the district court's ruling on attorney fees regarding Fobian Farms' bringing of frivolous claims as well as its frivolous defense:

It is clear to the Court, especially considering the testimony of Mr. Fobian and Attorney Keele, that the actions of the Fobian Parties *in defending against Plaintiff's claims and asserting [sic] Fobian Parties' [sic] claims were of the type that Rule 1.413 was intended to address.* Based on the Court's assessment of the testimony offered at trial, there is a high likelihood that the Fobian Defendants saw the mistake in the property descriptions as an opportunity to get a free restaurant. Rather than work with the Plaintiffs to rectify the mistake before this litigation was filed, the Fobian Defendants instead chose to pursue improper claims that delayed this process and wasted the resources and times of the parties, and required the

use of extensive resources by the Court to resolve the issues presented by this action.

First Am. Bank, 2015 WL 3613379 at * 11 (emphasis added).

The Court of Appeals further affirmed as sanctionable Mr. Fobian's conduct, stating as follows:

In support of sanctions, we note after the mistake was discovered, Eyman asked the surveyors to correct the scrivener's error and they complied by filing an affidavit correcting the mistake, but Fobian bullied the surveyors with litigation until they recanted their affidavit. Additionally, Fobian asked Eyman to help him with his improper plan of claiming ownership of the restaurant and offered to reduce Eyman's outstanding debt if he did so. Fobian then tried to "make someone pay" by the initiation of his claims after this action was initiated.

Id.

The Court of Appeals found no error in the district court's determination that Fobian Farms' claims and defenses were made for improper purpose and were not well grounded in fact. *First Am. Bank*, 2015 WL 3613379 at *11. The district court was well within its discretion to assess sanctions for bringing frivolous claims and/or frivolous defenses. *See Cohen v. Iowa Dist. Court for Des Moines Cty.*, 508 N.W.2d 78, 82 (Iowa Ct. App. 1993) ("It can be said that in its 'objective sense' a claim or defense is frivolous if the proponents can present no rational argument based upon evidence or law in support of that claim or defense.") (citations omitted).

After consideration of the same argument put forth by Fobian Farms in its second appeal, the Court of Appeals found “no erroneous applications of law.” Second Appeal Ruling, p. 2. This Court previously denied further review on this issue and thus the district court’s determination stands as the final decision. *State v. Effler*, 769 N.W.2d 880, 883 (Iowa 2009) (“If the supreme court does not grant further review, the court of appeals decision is final.”) (citing Iowa Code § 602.5106(2)). Fobian Farms’ arguments on this point thus exceeded the scope of review on its second appeal. *See* First Order Denying Further Review. This Court should again deny further review.

2. The Court of Appeals correctly determined that the district court properly exercised its discretion by considering all the necessary factors.

Fobian Farms again points to *Weigel v. Weigel*, 467 N.W.2d 277, 282 (Iowa 1991) for its allegation that the district court abused its discretion by considering “the subjective intent” of Fobian Farms when it awarded sanctions. Application, p. 6. Fobian Farms raised this argument in its prior Application for Further Review. First Application for Further Review, p. 21. This Court denied further review. First Order Denying Further Review.

Fobian Farms' argument ignores the detailed findings by the district court. In its Ruling on Remand, the district court addressed all four *Rowedder* factors. *Rowedder v. Anderson*, 814 N.W.2d 585, 590 (Iowa 2012) (“(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the ability to pay; and (4) factors related to the severity of the ... violation.”) (citations omitted). The Court of Appeals determined that the district court considered “all the necessary factors” and “[t]he reasons for its conclusions are not untenable and are not clearly unreasonable.” Second Appeal Ruling, p. 2.

Reasonableness of Plaintiff's Attorney Fees. On remand, the district court reiterated its previous findings.

The Court has reviewed the Non-Redacted Attorney Fees submitted by Plaintiff on November 13, 2013, in support of the Application. The Court concludes all of the fees sought by Plaintiff are reasonable. This was a contentious matter that Plaintiffs made every effort to resolve before bringing this action. The Fobian Parties went on to file numerous claims of their own. A number of parties were required to be brought into this case. The hourly rates and fees charged by Plaintiffs' attorneys are reasonable in light of their experience and quality of the work product they have developed on behalf of their clients. Therefore, Plaintiffs are entitled to attorney fees in the amount of \$135,696.50, plus expenses in the amount of \$7,094.53, and expert expenses in the amount of \$2,636.44.

The Court will deduct from the total of these amounts the fee for taxes owed by C.J. Land to the Fobian Parties, which is \$36,643.00.

Ruling on Remand, p. 4.

The district court determined the first *Rowedder* factor was satisfied as there was “nothing in the record that persuades or requires the Court to alter its findings as to the reasonableness of Plaintiffs’ attorney’s fees.”

Ruling on Remand, p. 5.

Minimum to Deter. Fobian Farms claims the district court abused its discretion in the amount of sanctions awarded. Application, pp. 6-8. None of the cases upon which Fobian Farms relies contradict the Court of Appeals determination that the district court properly exercised its discretion. As detailed herein, the district court addressed all of the *Rowedder* factors.

Fobian Farms cites to *Everly v. Knoxville Cmty. Sch. Dist.*, 774 N.W.2d 488, 495 (Iowa 2009). *Everly* addressed whether and when a supplier was improperly named in a certiorari action. The Iowa Supreme Court determined sanctions were appropriate, but for a different time period than held by the district court, and remanded for specific findings as to the four factors. In the present case, the Court of Appeals considered the district court’s specific findings and found no abuse of discretion.

Fobian Farms next cites *Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 989 F.2d 213, 215 (6th Cir. 1993). Application, p. 7. In *Bodenhamer Bldg. Corp.*, the Sixth Circuit Court of Appeals case affirmed a damage award on appeal and then remanded for factual findings. The trial court reinstated the original award without making the required findings. On the second appeal before it, the Sixth Circuit again remanded for the required findings. In the present case, however, the Court of Appeals reviewed and evaluated the factual findings ordered on remand.

Fobian Farms next cites to *In re Kunstler*, 914 F.2d 505, 512 (4th Cir. 1990), also unhelpful. In that case, the Fourth Circuit Court of Appeals affirmed the district court's imposition of Rule 11 sanctions but, as with the present case, remanded for specific findings under the same four factors as to the appropriate amount.

Last, Fobian Farms cites to Justice Cady's law review article. Application, p. 7 (citing Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 506 (1986-87)). No parenthetical is provided and it is unclear upon review of the cited page as to how the article assists or furthers Fobian Farms' argument.

Turning to the second *Rowedder* factor regarding minimum to deter, the district court began with reiterating and adopting findings and conclusions made in its February 10, 2014 Ruling:

It is clear to the Court, especially considering the testimony of Mr. Fobian and Attorney Keele, that the actions of the Fobian Parties in defending against Plaintiffs' claims and asserting the Fobian Parties' own claims were of the type that Rule 1.413 was intended to address. Based on the Court's assessment of the testimony offered at trial, there is a high likelihood that the Fobian Defendants saw the mistake in the property descriptions as an opportunity to get a free restaurant. Rather than work with Plaintiffs to rectify the mistake before this litigation was filed, the Fobian Defendants instead chose to pursue improper claims that delayed this process and wasted the resources and time of the parties, and required the use of extensive resources by the Court to resolve the issues presented by this action.

Ruling on Remand, p. 5 (citing February 10, 2014 Ruling, p. 5).

The district court next outlined the conduct recognized by the Court of Appeals as inequitable:

The Fobian Parties either knew that C.J. Land began constructing the restaurant on a parcel owned by Fobian Parties and said nothing, or later discovered the mistake and seek what would amount to a free restaurant. It is undisputed that Mr. Fobian saw the restaurant construction and made no objection during the construction. At best, Mr. Fobian's conduct could be characterized as inequitable and unfair, and his failure to act at

the time the restaurant was being constructed estops him and his business entities from complaining about any resulting encroachment.

Ruling on Remand, p. 5 (citing *First Am. Bank*, 2015 WL 3613379 at *4).

The Court of Appeals further held that “Fobian Farms maintains it was its intent to take advantage of the mistake to its financial gain.” *Id.* at *8.

The Court of Appeals also described Mr. Fobian’s behavior as follows:

In support of sanctions, we note after the mistake was discovered, Eyman asked the surveyors to correct the scrivener's error and they complied by filing an affidavit correcting the mistake, **but Fobian bullied the surveyors with litigation until they recanted their affidavit.** Additionally, Fobian asked Eyman to help him with his improper plan of claiming ownership of the restaurant and offered to reduce Eyman's outstanding debt if he did so. **Fobian then tried to “make someone pay” by the initiation of his claims after this action was initiated.**

Ruling on Remand, p. 5 (citing *First Am. Bank*, 2015 WL 3613379 at *11)

(emphasis added by the district court).

Regarding the amount of sanctions assessed, the district court properly found that Fobian Farms’ claims were founded, from the very beginning, on what it knew to be a mistake. Each pleading Fobian Farms filed was, therefore, not filed in a good faith belief that the matters contained therein

were true. The Iowa Supreme Court has examined the imposition of sanctions involving such a pattern of conduct:

Although the rule and statute focus upon the event of signing, we recognize that in most cases there will be a series of filings. They may indicate a pattern of conduct. The provisions of our rule and statute would apply to each paper signed and would require that each filing reflect a reasonable inquiry. Other sanctions are available to address abusive tactics not related to the signing of pleadings, motions, and other papers.

Mathias v. Glandon, 448 N.W.2d 443, 447 (Iowa 1989) (citations omitted); *see also Thomas v. Capital Sec. Servs., Inc.*, 836 F.2d 866, 875 (5th Cir. 1988) (“In any event, Rule 11 applies to each and every paper signed during the course of the proceedings and requires that each filing reflect a reasonable inquiry.”).

Fobian Farms continues to assert that its actions were not in bad faith, claiming that it was not seeking a “free restaurant” because “it is undisputed that Fobian spent \$525,000 to acquire the Hills Bank mortgage which it eventually foreclosed in order to acquire its claim to the property.” Application, p. 6. It appears that Fobian is stating that it wasn’t a “free restaurant” because it spent money to take advantage of the parties’ mistake.

Fobian Farms’ sanction, however, is the product of its persistence in pursuing claims known to be false. Mr. Fobian knew from the time he first asserted a claim to the restaurant site until the time he testified in court that

his claims were asserted for an improper purpose and not grounded on the facts. Fobian Farms persisted in the pursuit of a manufactured defense to the quiet title action contrary to the facts known to Fobian Farms and obvious to the court.

The full amount of sanctions awarded is a product of the district court's reasonable conclusion that Fobian Farms' scheme to obtain a free restaurant was frivolous from the beginning. The Court of Appeals properly annulled Fobian Farms' writ, finding the district court's reasoning not untenable and not clearly unreasonable. Second Appeal Ruling, p. 2. This Court should find the same, deny further review, and enter judgment on the appeal bond.

Ability to Pay. After review of the parties' briefing, the district court was "convinced that the Fobian Defendants have the ability to pay the sanctions amount previously awarded by the Court." Ruling on Remand, p. 6. Fobian Farms' does not contest this finding in its Application.

Severity of the Violation. While not required on remand, the district court referenced its discussion of the second *Rowedder* factor, determining that "[b]ased on said discussion, the fourth Rowedder factor has been satisfied."

Fobian Farms claims that Mr. Fobian's August 21, 2015 letter was improperly considered. Application, pp. 8-10. However, this was simply *one of the factors considered* by the district court when it made specific findings as to the minimum to deter and the severity of the violations.

It is clear to the Court, particularly in light of the August 21, 2015 letter that Mr. Fobian wrote to the Iowa Supreme Court, that Mr. Fobian (acting for the Fobian Defendants) views himself as being above the law and outside of the applicability of well-founded legal principles. If severe sanctions are not imposed on the Fobian Defendants, the Court has no doubt Mr. Fobian and entities on whose behalf he acts will continue to engage in such behavior in attempts to pursue financial gain.

Ruling on Remand, p. 6.

Mr. Fobian's letter delayed *procedendo* and Plaintiffs were forced to file a motion to strike before *procedendo* issued. Motion to Strike; Order granting Motion to Strike.

In its Application, Fobian Farms puts forth arguments not raised in the district court regarding Mr. Fobian's letter. Specifically, Fobian Farms alleges that the district court's consideration of the letter violated Mr. Fobian's First Amendment rights and his rights under Article I, Section 7 of the Iowa Constitution. Application, pp. 9-10. Although the letter was referenced by Plaintiff and the district court, Fobian Farms never asserted the Court could not rely upon it in assessing sanctions in its briefing on

remand. *See* Defendants’ Brief Regarding Sanctions Issue. Nor did Fobian seek a ruling from the district court by virtue of a motion under Iowa Rule of Civil Procedure 1.904(2). As such, any argument that its First Amendment rights were violated, has not been preserved for appeal.

Even if the issue had been preserved for appeal, the cases Fobian Farms relies upon do not support its position. For example, Fobian inexplicably cites to *Bertrand v. Mullin*, 846 N.W.2d 884, 892-893 (Iowa 2014). *Bertrand* is not on point, having addressed “whether a political campaign advertisement aired on television constituted actionable defamation.” *Id.* Fobian Farms represents that Mr. Fobian’s letter “is a citizen's expression of his opinion to a governmental authority” and thus “it was an abuse of discretion to conclude that it justifies a sanction.” Application, p. 9 (citing *Schettler v. Iowa Dist. Court for Carroll Cty.*, 509 N.W.2d 459, 464 (Iowa 1993)). *Schettler* addressed whether the district court properly denied sanctions in a contentious divorce proceeding. *Schettler* makes no mention of a citizen’s expression of his opinion to a governmental authority.

Fobian Farms next cites to *Brown v. District Court of Webster County*, 158 N.W. 2d 744, 747 (Iowa 1968) for the proposition that “the Iowa Supreme Court has specifically ruled that a letter by a non-attorney

litigant criticizing the court process or outcome is neither improper nor reason to punish a litigant.” Application, p. 9. *Brown*, however, considered the defendant’s writ of certiorari as to whether “constructive” contempt of court was properly assessed. The court modified the defendant’s punishment to exclude jail time and imposed a fine. The Iowa Supreme Court overruled its holding in *Brown* (and similar cases): “We hold that no person may be punished for contempt unless the allegedly contumacious actions have been established by proof beyond a reasonable doubt. Prior decisions holding to the contrary are thus no longer controlling.” *Phillips v. Iowa Dist. Court for Johnson Cty.*, 380 N.W.2d 706, 709 (Iowa 1986). *Phillips* also does not instruct as to district court’s discretion as to the imposition of sanctions, rather it addressed a finding of contempt of court which “was by its very nature and effect the equivalent of a criminal proceeding exacting punishment.” *Id.*

In short, Fobian Farms’ arguments are misleading and untimely. Mr. Fobian’s letter was sent after this Court first denied further review. Fobian Farms raised no constitutional issue in response to Plaintiff’s motion to strike Mr. Fobian’s letter. Fobian Farms raised no constitutional issue in its briefing on remand. Fobian Farms first raised these issues on appeal and thus failed to preserve error. *State v. McCright*, 569 N.W.2d 605, 607 (Iowa

1997) (“Issues not raised before the district court, including constitutional issues, cannot be raised for the first time on appeal.”); *State v. Eames*, 565 N.W.2d 323, 326 (Iowa 1997) (holding that an issue must be presented to and ruled upon by the district court before it can be asserted on appeal).

Contrary to Fobian Farms’ continued assertions that the district court improperly considered Mr. Fobian’s letter, the Iowa Supreme Court treated it as a pleading.

This matter comes before the court upon a letter filed by Carl Fobian and a motion to strike the letter filed by the appellees. Upon due consideration, the court determines it will take no action on the letter filed on August 21, 2015 by Carl Fobian and the motion to strike is granted. The clerk shall issue procedendo immediately.

Order granting Motion to Strike.

The district court thus properly considered Mr. Fobian’s letter in the context of the second and fourth *Rowedder* factors. As set forth in the district court’s original ruling and supplemented on remand, substantial evidence supported the district court’s findings regarding *objective* misconduct. As such, an award of fees against Fobian Farms under Rule 1.413 was warranted. In consideration of the totality of Fobian Farms’ sanctionable conduct, the district court assessed an appropriate amount of fees. The Court of Appeals found the district court’s reasoning for its

conclusions not untenable and not clearly unreasonable. Second Appeal Ruling, p. 2. This Court should similarly so find, deny further review, and enter judgment on the appeal bond.

CONCLUSION

WHEREFORE, Plaintiffs/Appellees respectfully request that this Court deny further review and render judgment. Plaintiffs further request that all fees and costs associated with this appeal, including reasonable appellate attorneys' fees, be taxed to Defendants.

REQUEST FOR ORAL ARGUMENT

Plaintiffs/Appellees respectfully request to be heard in oral argument.

Respectfully submitted,

/s/ Mark A. Roberts

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CERTIFICATE OF ELECTRONIC FILING AND SERVICE

I certify that, on February 9, 2017 I electronically filed the foregoing with the Clerk of Court using the Iowa Electronic Document Management System, which will send notification of electronic filing to the following opposing counsel. Per Iowa Rule 16.317(1)(a)(2), this constitutes service of the document for the purposes of the Iowa Court Rules.

Gregg Geerdes

/s/ Mark A. Roberts

Mark A. Roberts

CERTIFICATE OF COMPLIANCE WITH TYPE REQUIREMENTS

This brief complies with the limitation on the volume of type set forth in Iowa R. App. P. 6.903(1)(g)(1). It contains 5,301 words, excluding parts of the brief exempted by Iowa R. App. P. 6.903(1)(g)(1).

This brief complies with the type-face requirements of Iowa R. App. P. 6.903(1)(e) and the type-style requirements of Iowa R. App. P. 6.903(1)(f). It has been prepared in a proportionally spaced typeface, using Microsoft Word 2010 in 14-point Times New Roman.

/s/ Mark A. Roberts

Mark A. Roberts

February 9, 2017

Date