IN THE SUPREME COURT OF IOWA

No. 16–0624

Filed January 26, 2018

FIRST AMERICAN BANK and **C.J. LAND, L.L.C.,**

Appellees,

vs.

FOBIAN FARMS, INC.; HOOVER HIGHWAY BUSINESS PARK, INC.; and **GATEWAY, LTD.,**

Appellants.

On review from the Iowa Court of Appeals.

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

Defendants seek further review of court of appeals decision affirming district court's ruling on remand imposing sanctions under Iowa Rule of Civil Procedure 1.413. **DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED AS MODIFIED, WRIT SUSTAINED, AND CASE REMANDED.**

Gregg A. Geerdes, Iowa City, for appellants.

Mark A. Roberts, Lynn W. Hartman, and Dawn M. Gibson of Simmons Perrine Moyer Bergman P.L.C., Cedar Rapids, for appellees.

WATERMAN, Justice.

In this case, we must determine whether the district court abused its discretion by awarding attorney fees and expenses of $145,427 as a sanction for frivolous court filings in violation of Iowa Rule of Civil Procedure 1.413. The court of appeals affirmed the sanction award after the district court made more specific factual findings on remand following that appellate court's first decision affirming in part the rulings in a quiet-title action. The sanctioned parties took unfair advantage of a scrivener's error platting a commercial development. The opposing parties largely prevailed in protracted litigation to reform the title documents and incurred substantial legal fees opposing frivolous claims and defenses asserted by the sanctioned parties. The prior proceedings resolved the underlying boundary disputes and established that the sanctioned parties violated rule 1.413. All parties agree at this late stage that a sanction in *some* amount is warranted; we granted the sanctioned parties' application for further review to decide whether the amount awarded was excessive. All parties request that our court determine the final amount of the sanction rather than remanding the case to the district court for a third determination and possible new appeal.

For the reasons explained below, we hold the district court abused its discretion by awarding attorney fees beyond those caused by the violations of rule 1.413 or necessary to deter similar misconduct and by relying on a letter the sanctioned party's president sent to our court after we denied further review of the first appellate decision. We determine that the appropriate sanction is $30,000. We vacate the decision of the court of appeals and modify the district court's sanction award accordingly.

I. Background Facts and Proceedings.

The underlying quiet-title litigation involves a real estate development in Johnson County known as the Gateway Commercial Condominiums. Jerry L. Eyman was president of Gateway, Ltd. (Gateway), the developer. In the original 1999 plat, two units were oriented in an east–west configuration, with unit 2A west of unit 2B. The 1999 plat was amended in 2007 to provide for a north–south configuration of building 2. While the units in all other buildings in the development were aligned alphabetically from north to south, the units of building 2 through a scrivener's error were mistakenly aligned with unit 2A south of unit 2B.

Carl Fobian, president of Fobian Farms, Inc., saw an opportunity. Left uncorrected, the scrivener's error could and did lead to the construction of a building on a site subject to Fobian's mortgage. Fobian had previously extended loans to Eyman and Gateway secured by a mortgage on unsold buildings. Fobian recorded the mortgage on May 16, 2007. Fobian's mortgage was junior to two previously recorded mortgages held by Hills Bank and Trust Company (Hills Bank). In June 2008, Eyman asked Fobian to sign a partial release so C.J. Land, L.L.C. could buy a unit. When Carl Fobian signed the partial release on June 17, 2008, he knew C.J. Land intended to purchase the site to build a restaurant. The partial release, which released unit 2B from the second mortgage, referenced the 1999 plat—not the 2007 plat.

Later that month, C.J. Land recorded a warranty deed from Gateway. First American Bank financed the purchase. C.J. Land specifically negotiated for the southern lot for highway access, yet the deed stated it was for unit 2B, which was identified as the north lot in the 2007 plat. The deed, however, referenced the legal description from

the 1999 plat, which showed 2B as the east unit. Both C.J. Land and Eyman believed C.J. Land purchased the south unit of building 2. C.J. Land hired Eyman as the general contractor to build the restaurant there. The restaurant was built one foot over the property line, and a meat smoker and air conditioning units were placed over the line. The restaurant, which cost approximately $1.1 million to construct, was substantially completed by July 31, 2009.

Gateway defaulted on the mortgages secured by the unsold units in the development. Hills Bank commenced a foreclosure action, naming Fobian Farms as a defendant due to its junior mortgage. Fobian Farms purchased the bank's interest and prosecuted the foreclosure action. On July 6, 2010, Fobian Farms through a credit bid purchased the sheriff's deed to the unsold property in the development. The sheriff's deed referenced the 1999 plat without referring to the 2007 plat.

On July 20, Fobian Farms and C.J. Land entered into a lease agreement allowing C.J. Land to use an unsold lot for overflow parking. In return, C.J. Land agreed to maintain and insure the parking lot. Carl Fobian kept quiet about the scrivener's error or his plan to claim ownership of the restaurant site.

One week later, Fobian Farms' attorney sent C.J. Land's attorney a letter stating that Fobian Farms owned the south lot on which the restaurant was built. This was the first time C.J. Land learned of the dispute. Eyman later testified he became aware of the scrivener's error—in which units 2A and 2B were "flipped"—only when Carl Fobian told him in late July.

On July 30, the land surveyors who had prepared and filed the 2007 plat filed an affidavit acknowledging the scrivener's error, explaining, "[T]he north unit of building 2 should be 2A not 2B; the south

unit of building 2 should be 2B not 2A." After the correction of the scrivener's error, First American Bank contacted Fobian Farms to resolve the title defect, but Fobian Farms refused to cooperate.

The next year, Fobian Farms sued the surveyors for disparagement or slander of title challenging the corrective affidavit the surveyors had filed. In September 2011, the surveyors responded to the lawsuit by filing an "explanatory and corrective surveyors' affidavit" to "withdraw, negate, and void the [original] Affidavit . . . and return the Unit numbering to the state in which it existed prior to execution and recording of that Affidavit." Based on the surveyors' capitulation, Fobian Farms dismissed its lawsuit against them.

On March 7, 2012, First American Bank and C.J. Land filed this civil action to quiet title and reform the mortgage and deeds, naming as defendants Fobian Farms; Hoover Highway Business Park, Inc. (Hoover);[1] Gateway and Gateway Properties, Ltd.; Gateway Commercial Condominium Owners Association; Jerry Eyman; and Jan Eyman. Fobian Farms filed a counterclaim against C.J. Land alleging interference with a prospective business advantage by building upon land it did not own. Fobian Farms also filed a cross-claim against Jerry Eyman asserting negligent misrepresentation, a cross-claim against Gateway Commercial Condominiums Owners Association alleging interference with a prospective business advantage, and a third-party claim against Hills Bank alleging negligent misrepresentation. C.J. Land and Hills Bank filed motions for summary judgment and for sanctions against the defendants. On January 24, 2013, the district court granted summary

[1]Hoover Highway Business Park, Inc. is the successor in interest to Fobian Farms and is owned or controlled by Carl Fobian. We refer to these parties collectively as Fobian Farms.

judgment dismissing Fobian Farms' counterclaim against C.J. Land and the third-party claim against Hills Bank.

A three-day bench trial commenced on February 5 on the remaining claims. Eyman testified that he intended to sell the south unit to C.J. Land and believed he had done so because he did not realize the amended plat incorrectly labeled unit 2B as the north unit. C.J. Land's president similarly testified that he intended to purchase the south unit and had "no doubt" he had done so when he purchased unit 2B. Eyman also testified that Fobian approached him in June 2011 with Fobian's strategy for obtaining the building on the restaurant site. Fobian indicated that he would forgive a large part of Eyman's debt if Eyman cooperated, but Eyman refused.

Fobian's attorney, James Keele, testified that he and Carl Fobian discovered C.J. Land had built the restaurant before Fobian Farms purchased the mortgages from Hills Bank and completed the sheriff's sale. Keele also testified that he did not inspect the property, explaining that neither he nor Fobian were concerned that someone else had an ownership interest in the property. Fobian testified that he saw C.J. Land constructing the restaurant on the wrong site but said nothing because "[i]t was not [his] business. If they wanted to improve [his] equity, that was none of [his] business."[2] When asked if he would "ever

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[2]Under cross-examination, Fobian elaborated,

> Q. Okay. And after that, you gave that partial release and you had that meeting with Mr. Eyman, you saw the restaurant being built, correct? A. After that I saw them building a restaurant there, yes.
>
> Q. Okay. And you – you live not too far from the restaurant site, correct? A. I'm a ways away and I'm a full-time farmer. It was not my business. If they wanted to improve my equity, that was none of my business. I had not released 2A.

have taken the place of the first mortgag[ee] if that building wasn't on [his] land," Fobian replied, "Absolutely not."

In a posttrial brief filed in March, First American Bank and C.J. Land requested costs and attorney fees under Iowa Code sections 649.4 and 649.5, without citing Iowa Rule of Civil Procedure 1.413.

On August 28, the district court issued its ruling. The district court found that Eyman had credibly testified about his intention to sell the south unit of building 2, that the surveyors had inadvertently switched the numbering of building 2A and 2B on the 2007 plat, and that Eyman and C.J. Land were unaware of the scrivener's error at the time of the sale. The court also specifically found the testimony of Fobian's attorney, Keele, not credible. The district court quieted title in favor of C.J. Land, subject to First American Bank's mortgage, and ordered reformation of related legal instruments. The district court awarded Fobian Farms $2101 in damages for encroachments by C.J. Land's building.

The district court ordered First American Bank and C.J. Land to "submit a written request specifying the amount of costs and attorney fees they seek in conjunction with the claims they have successfully stated in this matter." Motions to enlarge and amend were filed, and First American Bank and C.J. Land also filed an application for attorney

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> Q. Okay. So while this building was going on, you – you knew that it was being built and that it was being built on property that you had a mortgage on? A. Yes, but it was none of my business because I had the mortgage with Jerry Eyman and he had some of my money in that building.
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> Q. Did you ever go and talk to anyone at C.J. Land about the fact that they were trespassing on, you know, property that you had an interest in? A. It was not my property. It was Jerry – Jerry Eyman's property. I only had a security on it, the mortgage. I – It was not my business to do that.

fees and expenses, this time citing both Iowa Code section 649.5 and Iowa Rule of Civil Procedure 1.413. First American Bank and C.J. Land requested $135,917 in attorney fees, $7094.53 in expenses, and $2636.44 in expert expenses. This request was supported by affidavits and the law firm's billing records, which show those parties incurred approximately $21,000 in fees before Fobian Farms filed its answer, counterclaim, cross-claims, and third-party claim. The records also show they incurred approximately $11,300 in fees responding to Fobian Farms' counterclaim against C.J. Land and third-party claim against Hills Bank, which were dismissed by summary judgment on January 24, 2013.

In a February 11, 2014 ruling, the district court assessed attorney fees and expenses against Fobian Farms. While noting that Iowa Code section 649.5 limited the award of attorney fees to forty dollars,[3] the court concluded that Iowa Rule of Civil Procedure 1.413 provided another basis for awarding attorney fees as a sanction:

> The Court's Trial Ruling supports a finding that the actions taken by the Fobian Parties in defending against Plaintiffs' claim and in filing their own claims were frivolous and used for an improper purpose. It is clear to the Court . . . 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

[3]In 2017, the legislature amended section 649.5 to remove that limitation on an award of attorney fees. 2017 Iowa Acts ch. 147, § 1 (codified at Iowa Code § 649.5 (2018)). That amendment became effective on July 1, 2017. *See* Iowa Code § 3.7(1) (2017); *see also* 2017 Iowa Acts ch. 147, § 1 (codified at Iowa Code § 649.5 (2018)) (not specifying its effective date). The parties agree that the amendment is inapplicable to this case, so we do not address it.

> 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. As applied to the Fobian Defendants, Rule 1.413 provides a basis for recovery of attorney fees by Plaintiff under these facts.

The district court determined that all fees requested by the plaintiffs were reasonable and concluded the plaintiffs were entitled to $135,696 in attorney fees, $7095 in expenses, and $2636 in expert expenses for a total sanction of $145,427. The court set off taxes owed by C.J. Land to Fobian Farms of $36,643, for a net award of $108,784. Fobian Farms appealed, and we transferred the case to the court of appeals.

On appeal, Fobian Farms argued the district court erred in assessing any sanctions and, alternatively, that any sanctions "should have been assessed against Fobian Farms' trial counsel only." First American Bank and C.J. Land, however, argued that sanctions were properly assessed against the Fobian parties.

In its June 10, 2015 decision, the court of appeals affirmed the district court's reformation ruling quieting title and its award in favor of Fobian Farms for encroachment. The court of appeals quoted the district court's finding that

> [t]he 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 [sought] 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.

The court of appeals also affirmed the district court's determination that Fobian Farms violated rule 1.413(1), noting that "Fobian bullied the

surveyors [who had corrected the scrivener's error] with litigation until they recanted their affidavit" and "asked Eyman to help him with his improper plan of claiming ownership of the restaurant" in exchange for a reduction in Eyman's outstanding debt, while attempting to "make someone pay" for the scrivener's error. But the court of appeals concluded the district court failed to make specific findings to support the amount of the sanctions or its allocation.[4] The court of appeals explained that

> [s]ome time would have been expended on this suit notwithstanding the actions of Fobian, and there is no explanation of how much approximated time was expended by the plaintiffs' counsel to address any unwarranted claim or pretrial proceedings, or any needless extension of the time in trial.

Accordingly, the court of appeals remanded the case "to the district court to make the required specific findings and reconsider the amount of sanctions awarded."

Fobian Farms filed an application for further review on four issues, including

> [w]hether 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.

We denied further review on July 31, 2015.

In August, Carl Fobian sent a letter to our court, purportedly to request advice on "where to turn for real justice and a rapid conclusion." His letter stated,

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[4]The court of appeals noted that the district court failed to address the sanctioned parties' ability to pay or the minimum needed to deter and failed to allocate the sanctions among the parties.

> 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.
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> . . . .
>
> 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 stating we owned property when we were only mortgage owners at that time and that we were obtaining "free property" that our money had financed and was our security on this mortgaged property. He simply did not understand real estate law and our attorney had his mind elsewhere on his own troubles.
>
> . . . .
>
> 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.

C.J. Land and First American Bank filed a motion to strike the filing of the letter. On December 18, we granted the motion to strike and directed the clerk to issue procedendo.

On January 15, 2016, the district court directed the parties to submit briefs addressing the issues of the minimum sanction needed to deter and Fobian Farms' ability to pay the award previously ordered. In March, the district court entered its ruling on remand, which reinstated

the full amount of the sanctions originally awarded before the first appeal. This ruling relied in part on Carl Fobian's letter to our court to justify the amount awarded. Fobian Farms timely appealed the ruling on remand, and we again transferred the case to the court of appeals, which treated the appeal as a writ of certiorari, found no abuse of discretion, and annulled the writ. Fobian Farms applied for further review, which we granted.

II. Standard of Review.

We treat this appeal as a petition for writ of certiorari. *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."); *see* Iowa R. App. P. 6.108. "We review a district court's order imposing sanctions under our rules of civil procedure for an abuse of discretion." *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012). A district court abuses its discretion when it "exercises its discretion on grounds or for reasons clearly untenable or to an extent clearly unreasonable." *Id.* (quoting *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993)). "An erroneous application of the law is clearly untenable." *Id.*

III. Analysis.

We must decide whether the district court abused its discretion under rule 1.413(1) by awarding the sanction of attorney fees and litigation expenses totaling $145,427 and by relying on Carl Fobian's letter to our court. Because we determine the district court abused its

discretion, we set aside its award and proceed to determine the appropriate amount.[5]

We begin with the text of rule 1.413, which provides,

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. . . . If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, *shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee*. The signature of a party shall impose a similar obligation on such party.

Iowa R. Civ. P. 1.413(1) (emphasis added). "The rule is intended to discourage *parties and counsel* from filing frivolous suits and otherwise deter misuse of pleadings, motions, or other papers." *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 273 (Iowa 2009) (emphasis added). Although most sanctions are awarded against lawyers, rule 1.413 expressly permits the court to sanction a represented party instead of or in

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[5]We ordinarily would remand a case for the district court to recalculate the amount of the sanction after reversing the district court's initial sanction award under rule 1.413(1). *See, e.g.*, *Everly*, 774 N.W.2d at 495 (remanding with instructions to recalculate amount of sanction). But we have the authority to modify a sanction award to determine the final amount. *See, e.g.*, *Breitbach v. Christenson*, 541 N.W.2d 840, 846 (Iowa 1995) (reversing district court order that denied sanction award under former Iowa Rule of Civil Procedure 80(a), holding sanctions were required, and setting the amount of each party's award based on attorney fees incurred responding to meritless lawsuit); *cf. Ezzone v. Riccardi,* 525 N.W.2d 388, 398–99 (Iowa 1994) (remitting punitive damage awards). In this case, the district court has twice landed on the same amount for the sanction. We elect to accept the parties' joint invitation to determine the final amount of the sanction in our decision and thereby end this protracted litigation.

addition to the lawyer who signed the pleading. *See* Iowa R. Civ. P. 1.413(1); *Breitbach v. Christenson*, 541 N.W.2d 840, 845 (Iowa 1995) (noting the rule "is aimed at attorney conduct but may sanction client conduct as well"); *State ex rel. Iowa Dep't of Human Servs. v. Duckert*, 465 N.W.2d 871, 873 (Iowa 1991) (stating that "[a] represented party also bears responsibility for sanctions under the rule"). Indeed, a monetary sanction imposed on a represented party sends a message that can assist lawyers counseling other clients to refrain from filing improper or frivolous pleadings. "Sanctions are meant to avoid the general cost to the judicial system in terms of wasted time and money." *Barnhill*, 765 N.W.2d at 273. "[B]ecause rule 1.413 is based on Federal Rule of Civil Procedure 11, we look to federal decisions applying [R]ule 11 for guidance." *Id.*[6]

"The primary purpose of sanctions under rule 1.413(1) is deterrence, not compensation." *Rowedder*, 814 N.W.2d at 589. Compensation for the opposing party, however, is a secondary purpose of rule 1.413(1). *See id.* at 592 ("Perhaps the most important secondary purpose is partial compensation of the victims."); *Barnhill*, 765 N.W.2d at 277, 279 (noting the district court "balanced the twin purposes of compensation and deterrence set forth in our case law" and concluding that "a $25,000 sanction is appropriate both to deter Barnhill (and other attorneys) from similar conduct in the future and to partly compensate [the victim] for expenses incurred"). Iowa follows the American Rule, under which "the losing litigant does not normally pay the victor's attorney's fees." *Rowedder*, 814 N.W.2d at 589. "Therefore, any sanction

[6]We have noted differences between the text of Federal Rule 11 and Iowa rule 1.413. See *Rowedder*, 814 N.W.2d at 591; *Weigel v. Weigel*, 467 N.W.2d 277, 282 (Iowa 1991) (comparing former rule 80(a) to Rule 11).

or shifting of fees and costs . . . need not reflect actual expenditures." *Id.* (quoting *United States ex rel. Evergreen Pipeline Constr. Co. v. Merritt Meridian Constr. Corp.*, 95 F.3d 153, 171 (2d Cir. 1996)).

Yet another goal of rule 1.413 "is to maintain a high degree of professionalism in the practice of law." *Barnhill*, 765 N.W.2d at 273. Sanctions can be imposed against attorneys or represented parties, or both. *See Weigel v. Weigel*, 467 N.W.2d 277, 282 (Iowa 1991) (noting that sanctions may be imposed on "a party who intentionally misleads an attorney or who knows for other reasons that the action is improper" but declining to sanction the party under the facts of the case).

Awarding sanctions motivates the victims of frivolous pleadings "to invest the time and money necessary to pursue legitimate sanction claims." *Rowedder*, 814 N.W.2d at 592. As we explained,

> [i]f injured parties do not expect even to recoup the cost of their additional sanction filings, some may not be willing or financially able to file motions for sanctions. This would not only compound the personal injustice that they have already suffered, but it could undermine the integrity of our judicial system by diminishing the deterrent effect of sanctions.

Id.

It has already been established in the first decision of the court of appeals that the district court acted within its discretion by ruling Fobian Farms violated rule 1.413 and is subject to sanctions as a represented party. That determination is law of the case binding on the subsequent proceedings and appeal. *See Lee v. State*, 874 N.W.2d 631, 646 (Iowa 2016) ("It is a familiar legal principle that an appellate decision becomes the law of the case and is controlling on both the trial court and on any further appeals in the same case." (quoting *United Fire & Cas. Co. v. Iowa Dist. Ct.*, 612 N.W.2d 101, 103 (Iowa 2000)). Accordingly, it is too late in this case to argue sanctions could only be awarded against the

lawyer. The fighting issue on this appeal concerns the *amount* of the sanction.

A. Whether the District Court's Sanction Award Is Excessive. The district court twice awarded sanctions in the same amount of $145,427 based on the appellees' total attorney fees and litigation expenses. That amount is excessive for several reasons: (1) the amount is greater than needed to deter similar misconduct, (2) the award includes fees incurred before Fobian Farms filed its frivolous pleadings as well as additional fees incurred resolving nonfrivolous claims, and (3) the district court improperly based its sanction in part on Carl Fobian's letter to our court.

We reiterate the factors for which the district court is to make specific findings to determine the appropriate sanction under rule 1.413: "(1) the reasonableness of the opposing party's attorney's fees; (2) the minimum to deter; (3) the [sanctioned party's] ability to pay; and (4) factors related to the severity of the. . . violation." *Rowedder*, 814 N.W.2d at 590 (quoting *Barnhill*, 765 N.W.2d at 277). We encourage district courts to consider additional factors identified by the American Bar Association. *Id.*[7]

[7]These factors include (1) the good or bad faith of the offending party; (2) the degree of willfulness, vindictiveness, negligence, or frivolousness involved in the offense; (3) the offending party's knowledge, experience, and expertise; (4) the offending party's prior history of sanctionable conduct; (5) the reasonableness and necessity of the out-of-pocket expenses the offended party incurred as a result of the misconduct; (6) the nature and extent of prejudice suffered by the offended party as a result of the misconduct, not including out-of-pocket expenses; (7) the relative culpability of the client and his or her counsel, and the impact an inquiry into their relative culpability would have on their privileged relationship; (8) the risk of chilling the specific type of litigation involved; (9) the impact the sanction would have on the offending party, including the offending party's ability to pay a monetary sanction; (10) the impact the sanction would have on the offended party,

The district court applied the four *Rowedder* factors. First, the court found the "hourly rates and fees charged by the Plaintiffs' attorneys are reasonable in light of their experience and quality of the work product they have developed on behalf of their clients." We agree with that finding. But the district court "conclude[d] all of the fees sought by [the] Plaintiff[s] are reasonable" and awarded the entire amount of fees and expenses incurred in the litigation, $145,427. The district court made no effort to determine what fees were caused by the sanctioned filings, despite being prompted to do so in the first decision of the court of appeals.

Second, the district court found the amount needed to deter Fobian Farms was the full amount of the fees and expenses, $145,427. We disagree, for the reasons explained below. Third, the district court found Fobian Farms has the ability to pay the sanction, noting it was able to buy out the Hills Bank interest in the property for $525,000 and posted an appeal bond of $119,663, which is 110% of the net judgment of $108,784 after the set-off for real estate taxes. The district court noted Fobian Farms put on no evidence to establish an inability to pay.

> included the offended party's need for compensation; (11) the relative magnitude of the sanction necessary to achieve the sanction's goals; (12) any burdens on the court system attributable to the misconduct, including the consumption of judicial time, incurrence of juror fees, and other court costs; (13) the degree to which the offended party attempted to mitigate any prejudice he or she suffered; (14) the degree to which the offended party's behavior caused the expenses for which recovery is sought; (15) the extent to which the offending party persisted in advancing a position while on notice that the position was not well grounded in fact, warranted by existing law, or warranted by a good faith argument for the extension, modification, or reversal of existing law; and (16) the time of, and the circumstances surrounding, any voluntary withdrawal of a pleading, motion, or other paper.

Rowedder, 814 N.W.2d at 590 n.2 (citing *Barnhill*, 765 N.W.2d at 276–77; ABA Section of Litigation, *Standards and Guidelines for Practice Under Rule 11 of the Federal Rules of Civil Procedure* (1988), *reprinted in* 121 F.R.D. 101, 125–26 (1988)).

See Rowedder, 814 N.W.2d at 591 (concluding the sanctioned party has the burden to prove an inability to pay). We conclude Fobian Farms has the ability to pay the modified sanction. Fourth, the district court found the severity of the misconduct warranted the sanction imposed. The court of appeals affirmed. We agree the misconduct warranted a significant sanction, but not the full amount awarded.

Rowedder is instructive, making clear the *minimum* amount needed to deter is more significant in determining the proper sanction than the victims' attorney fees. Kristin Rowedder, in her capacity as conservator, sued multiple defendants for fraud, conspiracy, professional negligence, and breach of fiduciary duty. 814 N.W.2d at 587. The claims ultimately found sanctionable were dismissed by summary judgment. *Id.* at 588. The defendants spent "$63,926 defending the frivolous claims through appeal." *Id.* at 593 (Waterman, J., concurring in part and dissenting in part). The district court imposed a sanction of $1000 against Rowedder's attorney. *Id.* at 588 (majority opinion). The defendants who had sought a larger sanction appealed, and we transferred the case to the court of appeals, which affirmed the $1000 sanction. *Id.* at 588–89.

On further review, we affirmed the $1000 sanction, relying on the district court's specific finding that was the minimum amount needed to deter future misconduct. *Id.* at 591. We quoted the district court's finding that "the stigma attached to the mere imposition of sanctions" is a significant deterrent to a lawyer. *Id.* Here, the represented parties were sanctioned, not their lawyer. But we emphasized that deterrence—

not compensation—is the primary goal of sanctions under rule 1.413. *Id.*[8] We address that factor first.

1. *The sanction award exceeds the minimum needed to deter.* One reason the award of $145,427 is excessive here is that, in our view, it greatly exceeds the minimum amount needed to deter similar misconduct. *See id.*; *see also Barnhill*, 765 N.W.2d at 277 (affirming $25,000 sanction when victims' attorney fees were $148,596); *cf. Blaylock v. Wells Fargo Bank, N.A.*, Civ. No. 12–693 ADM/LIB, 2012 WL 2529197, at *8–9 (D. Minn. June 29, 2012) (concluding $75,000 was the minimum amount necessary to deter the attorney's "egregious conduct" that included filing "baseless quiet title claims and meritless slander of title arguments" when attorney previously had been sanctioned on those grounds in other cases).

Because the parties to this appeal agree that our court should determine the appropriate sanction rather than remanding the case for a third calculation by the trial judge, we will decide the amount in this opinion, as we did in *Breitbach*, 541 N.W.2d at 846. *See Kirk Capital Corp. v. Bailey*, 16 F.3d 1485, 1490–91 (8th Cir. 1994) ("[I]n reviewing the reasonableness of the monetary sanctions imposed in this case [we] bring to the consideration of such issues our own knowledge about the dynamics of the practice of law . . . . Rather than remand the case we will determine the 'appropriate' monetary sanction."). We give careful consideration to the $145,427 sanction awarded by the trial judge who personally observed the parties' testimony and presided over this

[8]The dissent would have increased that amount to at least $10,000. *Rowedder*, 814 N.W.2d at 595 (Waterman, J., concurring in part and dissenting in part). The dissent acknowledged that "[s]tigma will accompany every judicial finding sanctioning an attorney, and any court-ordered sanction would be an anathema to most Iowa lawyers." *Id.* at 594.

protracted litigation and to the decision of our court of appeals affirming that award.

"There exists no mathematical formula for calibrating sanctions to the optimal sum that will preserve a deterrent effect while imposing no more a burden on the parties or attorneys than is necessary." *Lamboy-Ortiz v. Ortiz-Vélez*, 630 F.3d 228, 248 (1st Cir. 2010). The United States Court of Appeals for the First Circuit, noting Rule 11's focus on deterrence, relied on these factors identified in the advisory committee's comments to Rule 11:

> Whether the improper conduct was willful, or negligent; whether it was part of a pattern of activity, or an isolated event; . . . whether the person has engaged in similar conduct in other litigation; whether it was intended to injure; what effect it had on the litigation process in time or expense; whether the responsible person is trained in the law; what amount, given the financial resources of the responsible person, is needed to deter that person from repetition in the same case; [and] what amount is needed to deter similar activity by other litigants.

Id. (quoting Fed. R. Civ. P. 11 advisory committee's note to 1993 amendment); *see also Rowedder*, 814 N.W.2d at 590 n.2 (quoting the ABA factors). After applying the relevant factors to this record, we conclude that $145,427 far exceeds the minimum amount to deter similar misconduct.

The misconduct in this case was willful and not a mere isolated event. The misconduct involved a pattern of activity causing protracted litigation spanning from 2011 to 2018 and included a series of court filings that violated rule 1.413.[9] The trial judge found the misconduct was intentional, stating,

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[9]Fobian Farms fired the first shots in court, suing the surveyors in 2011 to force the retraction of the affidavit correcting the scrivener's error. The quiet-title action was filed March 7, 2012, and was not finally resolved on the merits until the mid-June 2015

> [T]he 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.

The court of appeals in the second appeal, without analysis, affirmed the $145,427 award as within the trial court's discretion. We disagree.

It is true Carl Fobian bullied the surveyors into recanting their correction of the scrivener's error, which necessitated this quiet-title action. But there is no indication Fobian has engaged in misconduct in other cases. The Fobian defendants did not appeal the summary judgment ruling that dismissed the frivolous claims. Fobian won some relief on the encroachment claim.

Carl Fobian is not a lawyer, but he is a sophisticated real estate developer who was represented by lawyers, which cuts both ways. Fobian himself hatched the scheme to take unfair advantage of the

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decision of the court of appeals. The multiple court filings that violated rule 1.413 include Fobian Farms' (1) answer, counterclaim against C.J. Land, cross-claim against Eyman, cross-claim against Gateway Commercial Condominiums Owners Association, and third-party cross-claim against Hills Bank and Trust Company; (2) resistance to Gateway Commercial Condominiums Owners Association's motion to dismiss the cross-claim and request for additional time to file brief and memorandum; (3) resistance to C.J. Land's motion to dismiss the counterclaim; (4) resistance to Hills Bank's motion to dismiss the cross-claim; (5) brief in support of resistance to Hills Bank's motion to dismiss; (6) brief in support of resistance to C.J. Land's motion to dismiss; (7) brief in support of resistance to Gateway Condominiums Owners Association's motion to dismiss; (8) resistance to C.J. Land's motion for summary judgment; (9) resistance to Hills Bank's motion for summary judgment; and 10) disputed facts and memorandum of authorities in support of its resistance to Hills Bank's motion for summary judgment. Fobian Farms' claims against C.J. Land and Hills Bank were dismissed by the January 24, 2013 summary judgment ruling. Although Fobian Farms did not appeal that summary judgment, it subsequently repleaded its frivolous defenses and denials to the quiet-title claims in its answer to the second amended petition and in its trial brief. And it appealed the quiet-title ruling, further delaying final resolution of the merits. It has taken several additional years to resolve the sanction claims. All told, this litigation has extended from 2011 to 2018.

scrivener's error. In affirming the district court ruling that Fobian violated rule 1.413, the court of appeals in the first appeal noted the district court's findings Carl Fobian personally bullied the surveyors into recanting their corrective affidavit and sought to entice Eyman to "help him with his improper plan of claiming ownership of the restaurant." On remand, the district court reiterated those findings and others quoted by the court of appeals that Fobian "chose to pursue improper claims."[10] These findings affirmed by the court of appeals permit an award of sanctions against the represented party personally, in the discretion of the district court. *See Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1474 (2d Cir. 1988), *rev'd in part sub nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 110 S. Ct. 456 (1989); *see also Byrne v. Nezhat*, 261 F.3d 1075, 1106 (11th Cir. 2001) ("Although typically levied against an attorney, a court is authorized to issue Rule 11 sanctions against a party even though the party is neither an attorney nor the signor of the pleadings."), *abrogated on other grounds by Bridge v. Phoenix Bond & Indem. Co.*, 553 U.S. 639, 128 S. Ct. 2131 (2008); *Souran v. Travelers Ins.*, 982 F.2d 1497, 1508 n.14 (11th Cir. 1993) ("Even though it is the attorney whose signature violates the rule, it may be appropriate under the circumstances of the case to impose a sanction

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[10]The court of appeals had quoted the district court's finding

> 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.

on the client." (quoting Fed. R. Civ. P. 11 advisory committee's note to the 1983 amendment)).

Federal courts disagree on the scienter required to impose sanctions on a represented party. The *Calloway* court concluded that

> a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose.

854 F.2d at 1474. *But see Bus. Guides, Inc. v. Chromatic Commc'ns Enters., Inc.*, 892 F.2d 802, 809–12 (9th Cir. 1989) (rejecting *Calloway*'s subjective standard and instead applying objective standard for represented party to affirm ruling that the party violated Rule 11). The court of appeals determined in the first appeal that Fobian had the requisite personal knowledge. Nevertheless, Fobian went forward represented by counsel whom the trial court did not sanction.[11] We calibrate our sanction to deter other lawyers and represented parties. We decline to vacate the entire sanction award merely because Fobian had a lawyer whom the district court declined to sanction.[12] As noted,

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[11]First American Bank and C.J. Land requested sanctions under rule 1.413 against "Defendants" but never specifically requested sanctions against the attorneys representing Fobian Farms. We have not been asked to consider whether sanctions should have been awarded against Fobian Farms' trial counsel, who are not the counsel presently representing Fobian Farms on appeal.

[12]Other courts have imposed Rule 11 sanctions upon a represented party without imposing sanctions on that party's lawyer. *See, e.g.*, *Indep. Fire Ins. v. Lea*, 979 F.2d 377, 378–79 (5th Cir. 1992) (affirming sanctions against one of the parties without any sanction against counsel, but vacating sanctions on two other parties who lacked "direct personal involvement in the management of the litigation and/or the decisions that resulted in the actions which the court finds improper under Rule 11"); *Devine v. Wal-Mart Stores, Inc.*, 52 F. Supp. 2d 741, 745–46 (S.D. Miss. 1999) (sanctioning a represented individual who brought a lawsuit in bad faith but declining to impose a sanction against his attorney); *In re Kilgore*, 253 B.R. 179, 188–90 (D.S.C. 2000) (sanctioning the represented party without sanctioning the party's lawyer, in part because no party "directed the request for sanctions against" the attorney); *Project Creation, Inc. v. Neal*, No. M1999–01272–COA–R3–CV, 2001 WL 950175, at *10 (Tenn.

Fobian Farms' liability for sanctions in some amount is law of the case. *See Lee*, 874 N.W.2d at 646 ("[T]he views expressed by a reviewing court in an opinion, right or wrong, are binding throughout further progress of the case." (quoting *State v. Ragland,* 812 N.W.2d 654, 658 (Iowa 2012))).

The 2017 statutory amendment to Iowa Code section 649.5 permitting attorney's fees awards reduces the need for rule 1.413 sanctions to deter misconduct in future quiet title actions. *See* Iowa Code § 649.5 (2018) (setting forth the procedure for requesting a quitclaim deed and providing that "the court may assess . . . a reasonable attorney fee for the requesting party's attorney" if the person holding an apparent adverse interest fails to comply with the request). At the time of the trial court proceedings in this case, section 649.5 limited attorney's fees to a maximum of forty dollars.[13] The parties do not rely on section 649.5.

Of course, rule 1.413 applies in civil cases generally, not just quiet-title actions. The amount of the sanction should be sufficient to motivate the victims of frivolous filings to enforce the rule. *See Rowedder*, 814 N.W.2d at 592. Yet we are mindful that large monetary sanctions may discourage advocacy and lead to additional rounds of

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Ct. App. Aug. 21, 2001) ("[W]hen the party is 'responsible for the violation,' then sanctions against the party alone are appropriate."); *see also* 5A Charles Alan Wright, Arthur R. Miller, & A. Benjamin Spencer, *Federal Practice and Procedure* § 1336.2, at 658–60 n.1 (3d ed. 2004 & Supp. 2017) (noting that "the district court's discretion under Federal Rule 11 includes the power to impose sanctions on the client alone" and collecting cases in which courts did so).

[13]*See* Iowa Code § 649.5 (2014) ("[T]he court may, in its discretion, if the plaintiff succeeds, assess . . . an attorney fee for plaintiff's attorney, not exceeding twenty-five dollars if there is but a single tract not exceeding forty acres in extent, or a single lot in a city, involved, and forty dollars, if but a single tract exceeding forty acres and not more than eighty acres."), *amended by* 2017 Iowa Acts ch. 147, § 1.

litigation to recover attorney's fees. *See Cooter & Gell v. Hartmarx Corp.*, 496 U.S 384, 393, 110 S. Ct. 2447, 2454 (1990) (recognizing Rule 11's "central goal of deterrence" but noting "concerns that it will spawn satellite litigation and chill vigorous advocacy"); Mark S. Cady, *Curbing Litigation Abuse and Misuse: A Judicial Approach*, 36 Drake L. Rev. 483, 505 (1987) ("One fear that has been raised over the expanding use of rule 11 as a combatant of frivolous lawsuits is that the resulting claims for sanctions would evolve into protracted and costly satellite litigation.").

In *Runfola & Associates, Inc. v. Spectrum Reporting II, Inc.*, the Sixth Circuit determined that a sanction of approximately $30,000 against *both* the represented party and counsel was appropriate and not too low to deter when the opposing party's attorney's fees exceeded $100,000. 88 F.3d 368, 371–72, 375–76 (6th Cir. 1996). On balance, we conclude that $30,000 is the minimum amount needed to deter similar misconduct.

2. *Part of the attorney's fees were not caused by the violations of rule 1.413.* Another reason the $145,427 sanction is unreasonably excessive is because that sum includes substantial fees that were not caused by the sanctionable filings. Rule 1.413 provides that a sanction "may include an order to pay the other party or parties the amount of the reasonable expenses *incurred because of the filing*." Iowa R. Civ. P. 1.413(1) (emphasis added). This codifies a "but for" causation requirement, limiting a fee-based sanction to the fees that would have been avoided but for the improper filings. *See Everly*, 774 N.W.2d at 495 (holding the district court abused its discretion by imposing a sanction that included fees expended before the sanctionable filings); *see also Bodenhamer Bldg. Corp. v. Architectural Research Corp.*, 989 F.2d 213, 218 (6th Cir. 1993) ("[B]efore an award of attorneys' fees may be made

under [Rule 11], it must be shown that the fees were incurred because of the filing of an improper pleading."); *In re Kunstler*, 914 F.2d 505, 523 (4th Cir. 1990) ("Only attorney time which is in response to that which has been sanctioned should be evaluated."). As the United States Supreme Court recently explained,

> The court's fundamental job is to determine whether a given legal fee—say, for taking a deposition or drafting a motion—would or would not have been incurred in the absence of the sanctioned conduct. The award is then the sum total of the fees that, except for the misbehavior, would not have accrued.

Goodyear Tire & Rubber Co. v. Haeger, 581 U.S. ____, ____, 137 S. Ct. 1178, 1187 (2017). "But as [the Court] stressed in *Fox* [*v. Vice*], trial courts undertaking that task 'need not, and indeed should not, become green-eyeshade accountants' (or whatever the contemporary equivalent is)." *Id.* (quoting *Fox v. Vice*, 563 U.S. 826, 838, 131 S. Ct. 2205, 2216 (2011)).[14]

The district court disregarded rule 1.413's causation requirement by awarding the entire amount of the attorney fees and litigation expenses incurred by First American Bank and C.J. Land. For example, the district court failed to deduct $21,088 those parties incurred before Fobian Farms filed its sanctionable claims. *See Everly*, 774 N.W.2d at 495. Moreover, the billing records specifically identify only $11,300 incurred in response to Fobian Farms' frivolous counterclaim against C.J. Land and the third-party claim against Hills Bank that were

[14]The *Haeger* Court reviewed a sanction imposed under the district court's inherent power, rather than under Federal Rule of Civil Procedure 11. *See Haeger*, 581 U.S. at ___, 137 S. Ct. at 1184–85. But its discussion of the but-for causation requirement is apt here.

dismissed on summary judgment early in the litigation.[15] We acknowledge that much of the additional fees are attributable to frivolous defenses and positions taken in Fobian Farms' answer and subsequent filings. Fobian Farms, however, prevailed on some claims. The district court ordered C.J. Land to reimburse Hoover (the successor in interest to Fobian Farms) for taxes Fobian Farms paid and also awarded relief for encroachment.[16] We cannot conclude that *all* of Fobian Farms' defenses were asserted for an improper purpose. *Cf. Breitbach*, 541 N.W.2d at 845–46 (assessing sanction against plaintiff and his lawyer of all attorney fees incurred by defendants in a "totally meritless" lawsuit).

First American Bank and C.J. Land nevertheless argue the full sanction of $145,427 should be affirmed because Fobian Farms' entire course of conduct was improper. *See Mathias v. Glandon*, 448 N.W.2d 443, 447 (Iowa 1989) ("[W]e recognize that in most cases there will be a series of filings. They may indicate a pattern of conduct."). Protracted quiet-title litigation was necessary because Fobian Farms bullied the surveyors into retracting their affidavit correcting their scrivener's error in the 2007 plat. The *Haeger* Court noted that "[i]n exceptional cases . . . a trial court [may] shift all of a party's fees, from either the start or some midpoint of a suit, in one fell swoop." *Haeger*, 581 U.S. at ____, 137 S. Ct. at 1187. The Court described a previous case in which it approved such an award "because literally everything the defendant did—'his

[15]Our effort to allocate fees attributable to the sanctioned misconduct was hindered by "block billing" records that described multiple tasks without itemizing the time spent on each. "Where the documentation of hours is inadequate, the district court may reduce the award accordingly." *Hensley* v. *Eckerhart*, 461 U.S. 424, 433, 103 S. Ct. 1933, 1939 (1983).

[16]The court of appeals modified "the district court's ruling to grant an easement for the 1.3 foot strip for so long as the current restaurant building exists rather than what appears to be a forced sale of the strip."

entire course of conduct' throughout, and indeed preceding, the litigation—was 'part of a sordid scheme' to defeat a valid claim." *Id.* at ____, 137 S. Ct. at 1187–88 (quoting *Chambers v. NASCO, Inc.*, 501 U.S. 32, 51, 57, 111 S. Ct. 2123, 2136, 2139 (1991) (brackets omitted)). The *Haeger* Court explained that in such cases, shifting all the fees still meets the applicable test of whether the fees would have been incurred but for the misconduct. *Id.* at ___, 137 S. Ct. at 1188. We decline to apply that "exceptional case" exception in this case for two reasons. First, unlike in *Chambers*, the frivolous pleading rule (here, rule 1.413) is the sole basis for the award.[17] Second, Fobian Farms prevailed on its encroachment claim and, as noted, $30,000 is the minimum needed to deter.

B. Whether the District Court Erred by Relying on Carl Fobian's Letter. The district court considered Carl Fobian's letter to our court when weighing the severity of the sanctioned misconduct in its postremand ruling. The parties dispute whether this consideration was proper. The letter was not sent by an attorney, but rather by a disappointed litigant who vented his frustration after we denied further review of the first appeal. The appellate rules do not allow a motion to reconsider the denial of an application for further review. We granted the appellees' motion to strike the letter. On remand, the district court referred to this letter as further proof Carl Fobian "views himself as being above the law and outside of the applicability of well-founded legal principles."

[17]The *Chambers* Court relied on the inherent power of federal courts to impose sanctions including attorney's fees. *Chambers,* 501 U.S. at 50–51, 111 S. Ct. at 2136.

Citizens have a First Amendment right to criticize court decisions. *See Brown v. Iowa Dist. Ct.*, 158 N.W.2d 744, 747 (Iowa 1968) (collecting cases and concluding a letter of criticism was not punishable in contempt proceeding), *overruled on other grounds by Phillips v. Iowa Dist. Ct.*, 380 N.W.2d 706, 707–09 (Iowa 1986); *cf. Iowa Supreme Ct. Att'y Disciplinary Bd. v. Attorney Doe No. 792,* 878 N.W.2d 189, 194–96 (Iowa 2016) (reviewing First Amendment protection for an attorney's ex parte email criticizing the presiding judge after an adverse ruling). We conclude the letter to our court from a nonlawyer, Carl Fobian, should not have been factored into the district court's revised sanctions decision on remand.

IV. Disposition.

For these reasons, we vacate the second decision of the court of appeals and modify the district court's sanction award against Fobian Farms by reducing it to $30,000. We sustain the writ of certiorari and remand the case for entry of a modified judgment in that amount against Carl Fobian, Fobian Farms, Inc., and Hoover Highway Business Park, Inc., jointly and severally.

DECISION OF COURT OF APPEALS VACATED; DISTRICT COURT JUDGMENT AFFIRMED AS MODIFIED, WRIT SUSTAINED, AND CASE REMANDED.

All justices concur except Wiggins and Appel, JJ., who dissent.

WIGGINS, Justice (dissenting).

I dissent. To understand my reasons for dissenting, it is important to examine the procedural background of this case.

The litigation began March 7, 2012. The district court decided the merits of the case on August 28, 2013. Thus, the litigation took a little less than eighteen months. I do not find this time period to be an inordinate amount of time. What triggered the additional years of litigation was the party's fight over attorney fees and sanctions.

First American Bank and C.J. Land requested fees under Iowa Code sections 649.4 and 649.5. Section 649.4 provides, "If the defendant appears and disclaims all right and title adverse to the plaintiff, the defendant shall recover the defendant's costs. In all other cases the costs shall be in the discretion of the court." Iowa Code § 649.4 (2014). Section 649.5 states,

> If a party, twenty days or more before bringing suit to quiet a title to real estate, requests of the person holding an apparent adverse interest or right therein the execution of a quitclaim deed thereto, and also tenders to the person one dollar and twenty-five cents to cover the expense of the execution and delivery of the deed, and if the person refuses or neglects to comply, the filing of a disclaimer of interest or right shall not avoid the costs in an action afterwards brought, and the court may, in its discretion, if the plaintiff succeeds, assess, in addition to the ordinary costs of court, an attorney fee for plaintiff's attorney, not exceeding twenty-five dollars if there is but a single tract not exceeding forty acres in extent, or a single lot in a city, involved, and forty dollars, if but a single tract exceeding forty acres and not more than eighty acres. In cases in which two or more tracts are included that may not be embraced in one description, or single tracts covering more than eighty acres, or two or more city lots, a reasonable fee may be assessed, not exceeding, proportionately, those provided for in this section.

Id. § 649.5.

In its August 28 ruling, the court gave First American Bank and C.J. Land thirty days to submit a written request for fees and expenses. First American Bank and C.J. Land filed their application for fees and expenses on September 26. Here, for the first time, they asked the court to award fees and expenses under Iowa Rule of Civil Procedure 1.413. The reason for their award request under this rule is the limit on fees under Iowa Code section 649.5.[18] Rule 1.413 states in relevant part,

> Counsel's signature to every motion, pleading, or other paper shall be deemed a certificate that: counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation. If a motion, pleading, or other paper is not signed, it shall be stricken unless it is signed promptly after the omission is called to the attention of the pleader or movant. If a motion, pleading, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay the other party or parties the amount of the reasonable expenses incurred because of the filing of the motion, pleading, or other paper, including a reasonable attorney fee. The signature of a party shall impose a similar obligation on such party.

Iowa R. Civ. P. 1.413.

In its February 11, 2014 ruling, the court made the following finding on First American Bank and C.J. Land's application for fees and expenses:

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[18]In 2017, the legislature amended section 649.5 to remove the attorney fee limitation and allow the court to award reasonable attorney fees. 2017 Iowa Acts ch. 147, § 1 (codified at Iowa Code § 649.5 (2018)). The legislature's amendment appears to be in response to this case.

> The Court's Trial Ruling supports a finding that the actions taken by the Fobian Parties in defending against Plaintiffs' claim and in filing their own claims were frivolous and used for an improper purpose. 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. As applied to the Fobian Defendants, Rule 1.413 provides a basis for recovery of attorney fees by Plaintiff[s] under these facts.

The court ended up awarding fees of $135,696.50, expenses of $7094.53, and expert expenses of $2636.44 to First American Bank and C.J. Land against the Fobian parties. The court offset the award by $36,643 for taxes owed by C.J. Land to the Fobian parties.

The Fobian parties appealed. We transferred the case to the court of appeals. Regarding the sanctions issue, the court of appeals agreed the evidence supported that the Fobian parties made claims for an "improper purpose" and these claims were not "well grounded in fact." However, the court of appeals found the district court abused its discretion by failing to make required specific findings regarding the amount of the sanctions. Specifically, the court of appeals stated the district court failed to differentiate the time spent on the suit notwithstanding the Fobian parties' actions and the time expended by the plaintiffs' counsel to address any improper claims or participate in pretrial proceedings. Thus, the court of appeals remanded the case to the district court to make the required specific findings and award an

appropriate amount of sanctions consistent with those findings. The Fobian parties asked for further review, which we denied.[19]

In August, Carl Fobian, without the aid of counsel, wrote a letter to our court asking us to review the case and claiming the Fobian parties did not receive justice in the district court or the court of appeals. Our rules do not allow a party to "file a petition for rehearing from an order denying an application for further review." Iowa R. App. P. 6.1205(1). On First American Bank and C.J. Land's motion to strike, we struck the letter and directed the clerk to issue procedendo. The district court directed the parties to submit briefs addressing the issues of the minimum to deter and the Fobian parties' ability to pay the award previously ordered.

On remand, the district court made the following findings,

> A sanction of all of the fees and expenses described in the Court's February [11], 2014 Ruling clearly is the minimum necessary to deter the type of misconduct engaged in by the Fobian Defendants. The Fobian Defendants, led by Mr. Fobian himself, have continued to question and challenge valid court orders that have resolved the property dispute among the parties, and have, throughout this litigation, made improper assertions and claims that have wasted the time and resources of the parties and of this Court. There is little doubt that the type of conduct engaged in by the Fobian Defendants is the type of conduct that warrants severe sanctions. 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

[19]The Fobian parties never signed a pleading. Rule 1.413, by it terms, allows a court to sanction a person who signs a filing. *See* Iowa R. Civ. Proc. 1.413. However, the Fobian parties did not raise this issue; thus, the findings of sanctions against the Fobian parties become the law of this case. *See State v. Ragland*, 812 N.W.2d 654, 658 (Iowa 2012).

> Mr. Fobian and entities on whose behalf he acts will continue to engage in such behavior in attempts to pursue financial gain. The Iowa Court of Appeals itself described Mr. Fobian's behavior as bullying, and noted that it was Mr. Fobian's intent to try to "make someone pay" as a result of the mistake that led to the filing of this action. . . . The second factor from *Rowedder* has been satisfied.
>
> The Court next considers the Fobian Defendants' ability to pay. The Court is convinced that the Fobian Defendants have the ability to pay the sanctions amount previously awarded by the Court. As Plaintiffs point out, Mr. Fobian testified at trial that he was able to bid $525,000 to purchase the Hills Bank interest in the property. . . . It is also the Court's recollection that Mr. Fobian testified at trial as to other substantial real estate purchases he has made. Further, the Fobian Defendants were able to post a bond in the amount of $119,662.92, which is 110% of the judgment amount of $108,784.47. The Fobian Defendants have shown no specific facts as to what portion of their investment in the Gateway project they will lose, or how their general description of a decline in Iowa's agricultural economy has affected them. While the Court has collectively referred to Fobian Farms, Hoover Highway Business Park, Inc. and Gateway, Ltd. as the Fobian Defendants and has assessed the sanctions against all three entities, the Court notes that the Fobian Defendants have made no attempt to distinguish one entity from the other, and the Court is convinced that Mr. Fobian is the driving force behind the decisions made by all three entities. The Fobian Defendants have the ability to pay the full sanctions amount, and the third *Rowedder* factor has been satisfied.

It also reaffirmed its prior ruling on the sanctions.

The Fobian parties appealed, and we transferred the case to the court of appeals. The court of appeals treated the appeal as a writ of certiorari, found the district court did not abuse its discretion in imposing the sanctions, and annulled the writ. The Fobian parties asked for further review, which we granted.

I agree with the majority that the standard of review is for an abuse of discretion. "An abuse of discretion occurs 'when the district court exercises its discretion on grounds or for reasons clearly untenable

or to an extent clearly unreasonable.'" *Rowedder v. Anderson*, 814 N.W.2d 585, 589 (Iowa 2012) (quoting *Schettler v. Iowa Dist. Ct.*, 509 N.W.2d 459, 464 (Iowa 1993)). "An erroneous application of the law is clearly untenable." *Id.*

What the majority, court of appeals, and the district court ignore is that this case involves sanctions against a party, not an attorney. The law they cite to fashion a sanction is the law used to measure the performance of an attorney. I cannot agree with the majority's legal analysis regarding the minimum to deter the Fobian parties' conduct in the future. What we have to decide is the minimum to deter a party, not an attorney.

The first problem I have with the district court ruling and the court of appeals decision is that they rely heavily on the letter written to us asking us to review the denial of the first further review. Although the language was strong, we see attorneys using the same language in their applications urging us to review decisions of the court of appeals. Had an attorney made this request, would we sanction the attorney? No. Moreover, if Fobian wrote a letter to the editor voicing the same concerns, would we hold him in contempt of court? No.

The majority does not persuade me either. The basis of its decision seems to be rooted in punishment, not deterrence. The majority is punishing the Fobian parties for their position taken in this action. The record is devoid of any evidence that the Fobian parties were involved in any prior lawsuits that the court deemed frivolous or filed for an improper purpose. The record is also devoid of any evidence the Fobian parties will be involved in any lawsuits in the future that the court will deem frivolous or filed for an improper purpose. So what is the court deterring?

The majority forgets that an attorney, not a pro se, filed this lawsuit. Our rule requires that

> counsel has read the motion, pleading, or other paper; that to the best of counsel's knowledge, information, and belief, formed after reasonable inquiry, it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law; and that it is not interposed for any improper purpose, such as to harass or cause an unnecessary delay or needless increase in the cost of litigation.

Iowa R. Civ. P. 1.413.[20]

Our rules of professional conduct require the following:

> A lawyer shall not bring or defend a proceeding, or assert or controvert an issue therein, unless there is a basis in law and fact for doing so that is not frivolous, which includes a good faith argument for an extension, modification, or reversal of existing law. A lawyer for the defendant in a criminal proceeding, or the respondent in a proceeding that could result in incarceration, may nevertheless so defend the proceeding as to require that every element of the case be established.

Iowa R. of Prof'l Conduct 32:3.1.

A lawyer vetted the Fobian parties' claims. A lawyer brought the claims after he vetted them. The majority used the sanction law applicable to attorneys, who received legal training, not the law applicable to clients. I have been unable to find any Iowa cases sanctioning clients without sanctioning their attorney.

For the sake of guidance, we look to federal decisions applying Federal Rule of Civil Procedure 11 when interpreting rule 1.413 because

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[20]I recognize rule 1.413 allows courts to sanction the represented parties. However, as I discuss below in my dissent, this makes sense if the represented parties do know that filing the lawsuit is wrongful. *See Calloway v. Marvel Entm't Grp.*, 854 F.2d 1452, 1475 (2d Cir. 1988), *rev'd in part sub nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 110 S. Ct. 456 (1989).

rule 1.413 has its basis in Rule 11. *Barnhill v. Iowa Dist. Ct.*, 765 N.W.2d 267, 273 (Iowa 2009). One federal case summarizes when the court may sanction a client. It states,

> We believe that a party represented by an attorney should not be sanctioned for papers signed by the attorney unless the party had actual knowledge that filing the paper constituted wrongful conduct, *e.g.*, the paper made false statements or was filed for an improper purpose. The Advisory Committee stated that allocation of sanctions among attorneys and their clients was a matter of judicial "discretion" and that sanctions should be imposed on a party where appropriate under the circumstances. As guidance, the Committee cited *Browning Debenture Holders Committee v. DASA Corp.*, 560 F.2d 1078 (2d Cir.1977), a case holding that a represented party should not be held liable for wrongful conduct by attorneys unless the party was personally aware of or responsible for the conduct.
>
> We believe that where a represented party either did not knowingly authorize or participate in the filing of a paper that violated Rule 11, sanctions against that party are not appropriate. We further believe that when a party has participated in the filing of a paper signed by the attorney or has signed a paper himself but did not realize that such participation or signing was wrongful, then sanctions against the party are also not appropriate. In each of these cases, the attorney, because of professional standards, is held to know of the wrongfulness of the conduct and, because of professional responsibility, should act to prevent it. *Where the attorney fails to advise an unwary client of the wrongfulness of such conduct, the burden of sanctions should fall entirely upon the attorney.*

Calloway v. Marvel Entm't Grp., 854 F.2d 1452, 1474–75 (2d Cir. 1988), *rev'd in part sub nom. Pavelic & LeFlore v. Marvel Entm't Grp.*, 493 U.S. 120, 110 S. Ct. 456 (1989) (emphasis added) (citation omitted).

Another court stated the law a little differently. It admonished that the attorney under scrutiny, as an officer of the court, "has a legal and ethical obligation to dissuade his clients from pursuing specious claims." *Slane v. Rio Grande Water Conservation Dist.*, 115 F.R.D. 61, 63 (D. Colo.

1987). The court further stated the attorney's belief and reliance on his clients' statements and representation were no excuse because the attorney "needs facts on which to ground knowledge, information[,] or belief." *Id.* (quoting *Coburn Optical Indus., Inc. v. Cilco, Inc.*, 610 F. Supp. 656, 659 (M.D.N.C. 1985)). In fact, "[i]f all the attorney has is his client's assurance that facts exist or do not exist, when a reasonable inquiry would reveal otherwise, he has not satisfied his obligation." *Id.* (quoting *Coburn Optical Indus., Inc.*, 610 F. Supp. at 659). The court stated it would not "hold laymen responsible for fees, when it is apparent that competent counsel would have advised them that their claims are without merit." *Id.*

There is no evidence that the Fobian parties' attorney told them their claims were frivolous or filed for an improper purpose. There is no showing that the Fobian parties had actual knowledge that filing the lawsuit constituted wrongful conduct. If anything, the record reveals an attorney who failed to comply with rule 1.413.[21]

So what is the majority's sanction deterring? *Nothing*. The Fobian parties are not going to file an action pro se. If they do file a future action, an attorney who is obligated to comply with rule 1.413 will probably file it. I am not arguing over whether the court of appeals in its first decision was correct in determining whether the Fobian parties should be sanctioned. The crux of my dissent is that imposing sanctions against the Fobian parties has no purpose because such sanctions would not deter similar misconduct by them. Again, nothing in the record shows the Fobian parties had actual knowledge that the lawsuit was

[21]In 2015, we suspended the license of the attorney representing the Fobian parties for conduct unrelated to this action. *See Iowa Supreme Ct. Att'y Disciplinary Bd. v. Blessum*, 861 N.W.2d 575, 595 (Iowa 2015).

frivolous or filed for an improper purpose. Imposing sanctions would also not deter other represented parties in the future. Courts should hold attorneys, not their clients, accountable for filing frivolous lawsuits. The only exception to this general rule is where clients have knowledge of their attorneys' wrongdoing.

What I see happening in this case is the majority unnecessarily punishing the Fobian parties for pursuing claims their attorney thought were not frivolous or filed for an improper purpose. I also see the majority shifting the fees and expenses of this case above the limits set by section 649.5 rather than sanctioning a suspended attorney. Most importantly, I see the majority chilling the rights of citizens from filing actions through their attorneys for fear that their attorneys may have failed to inform them that the actions are improper under rule 1.413.

For these reasons, no amount of money will deter the Fobian parties' future actions because there is nothing to deter. Thus, I would not award any sanctions or only a nominal amount under this record.

Appel, J., joins this dissent.