IN THE
SUPREME COURT OF IOWA

No. 19-1598
Johnson County No. CVCV080344

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STATE OF IOWA,
Appellant,

v.

JASON BESLER
Appellee.

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ON APPEAL FROM THE IOWA DISTRICT COURT
IN AND FOR POLK COUNTY
HONORABLE ROBERT HANSON, DISTRICT COURT JUDGE

BRIEF FOR APPELLANT

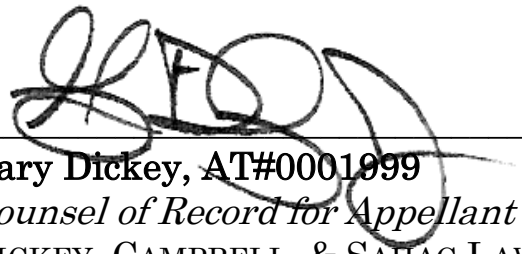
Gary Dickey
Counsel of Record
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

PROOF OF SERVICE & CERTIFICATE OF FILING

On May 1, 2020, I served this brief on all other parties by EDMS to their respective counsel:

Emily Willits
Assistant Attorney General
Iowa Department of Justice
1305 E. Walnut Street
Des Moines, Iowa 50319

I further certify that I did file this brief with the Clerk of the Iowa Supreme Court by EDMS on May 1, 2020.



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com

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ROUTING STATEMENT

The question presented is whether Gary Dickey, Jr. may bring a Petition for Writ of Quo Warranto pursuant to Iowa Rule of Civil Procedure 1.1302(2) to challenge the Governor's purported appointment of Jason Besler to be a district court judge. Because this case presents a substantial question of first impression and an urgent issue of broad public importance requiring a prompt determination, retention by the Iowa Supreme Court is necessary. Iowa R. App. P. 6.1101(2)(c),(d).

STATEMENT OF THE CASE

This case arises from Gary Dickey, Jr.'s attempt to seek a judicial determination whether Governor Kim Reynolds' purported appointment of Jason Besler as a district court judge was timely under article V, section 15 of the Iowa Constitution. To that end, he filed an application on behalf of the State of Iowa pursuant to Iowa Rule of Civ. P. 1.1302(2) for leave to file a petition for writ of quo warranto in the Iowa District Court for Johnson County. Besler resisted the application on the basis that Dickey lacked standing.

On April 23, 2019, the district court entered an order denying Dickey's application. Rather than simply addressing the procedural requirements of Rule 1.1302(2), the court denied Dickey's application on the basis that it substantively lacked merit as a matter of law:

> The court agrees with and adopts defendant's argument and rules that, as a matter of law, defendant's appointment was effective as of the time the Governor decided to appoint him which was on or before June 21, 2018, when she verbally communicated her decision to her Chief of Staff and therefore was within the 30-day time period required by the Iowa Constitution, notwithstanding the fact that defendant was not

> actually informed of his appointment nor was his appointment memorialized in any writing within said 30-day time period.

(App. at 24). Because this ruling was manifestly incorrect, Dickey timely filed a notice of appeal. (App. at 41).

STATEMENT OF THE FACTS

District Court Vacancy

In April of 2018, Chief Judge Patrick Grady announced there would be a district court vacancy in the Sixth Judicial District due to the retirement of Judge Marsha Bergan. (App. at 47-50). On May 22, 2018, the District 6 Judicial Nominating Commission submitted the names of Jason Besler and Ellen Ramsey-Kacena to Governor Kim Reynolds to fill the vacancy. (App. at 7, 54). Under article V, section 15 of the Iowa Constitution, Governor Reynolds had until June 21, 2018, to select among the nominees otherwise the power to make the appointment transferred to the chief justice. Iowa Const. art. V, § 15. Governor Reynolds, however, did not notify the nominating commission, Chief Judge Grady, Chief Justice Cady, or either nominee of the appointment within the thirty-day deadline. (App. at 7). A subsequent open records

request revealed no contemporaneous records memorializing the appointment. (App. at 7); Bleeding Heartland, *Exclusive: How Kim Reynolds got away with violating Iowa's Constitution*.[1] Indeed, all publicly available information suggested that Governor Reynolds failed to make the appointment within thirty days. (App. at 6). On June 25, 2018, Governor Reynolds and Secretary of State Paul Pate did sign a judicial commission certificate for Jason Besler to fill the district court vacancy. (App. at 7). Implicitly acknowledging the tardiness of the appointment, Governor Reynolds *backdated the certificate* to June 21, 2018. (App. at 7).

Application for Petition for a Writ of Quo Warranto

Concerned about the untimeliness of Governor Reynolds' purported appointment, Gary Dickey sent a letter to the Johnson County Attorney, Janet Lyness, requesting that she pursue a civil action in the nature of quo warranto against Besler pursuant to Iowa Rule of Civil Procedure 1.1301. (App. at 7, 43-45). Lyness

[1] Available at https://www.bleedingheartland.com/2018/09/12/exclusive-how-kim-reynolds-got-away-withviolating-iowas-constitution/ (last accessed 02/21/2020).

notified Dickey in writing that she would not file the requested petition. (App. at 7, 46). Thereafter, Dickey contacted a senior official within the Iowa Department of Justice and requested that the attorney general file a civil action in the nature of quo warranto against Besler. (App. at 7). The attorney general also declined Dickey's request. (App. at 7).

On November 1, 2018, Dickey filed an application in the Iowa District Court for Johnson County for leave to file a petition for a writ of quo warranto. (App. at 6-9).[2] Besler resisted the application on the basis that the appointment was timely as a matter of law. (App. at 18). Besler also asserted that Dickey lacked standing. (App. at 13).

On February 18, 2019, the district court heard oral argument on the application. (App. at 23). On April 23, 2019, the court entered a ruling denying Dickey's application. (App. at 23-25). The court "adopt[ed] defendant's argument" and held "as a

[2] Contemporaneously with the application, Dickey filed a motion to transfer venue outside of the Sixth Judicial District where Besler had assumed duties as a district court judge. (App. at 10-11). On November 26, 2018, Acting Chief Justice David Wiggins entered an order transferring the case to the Fifth Judicial District. (App. at 22).

matter of law, defendant's appointment was effective as of the time the Governor decided to appoint him which was on or before June 21, 2018, when she verbally communicated her decision to her Chief of Staff." (App. at 23-24).

Dickey timely filed a motion to reconsider, amend, and enlarge the court's ruling pursuant to Iowa Rule of Civil Procedure 1.904(2). (App. at 26-30). Specifically, Dickey contended that the court erred by prematurely considering the substantive legal issues before he had even been allowed to file a petition. (App. at 27). He also requested the court enlarge its ruling to address the standing issue so that it could be preserved for appeal. (App. at 29). The court denied the motion in its entirety. (App. at 38). Dickey timely filed a notice of appeal. (App. at 41).

ARGUMENT

I THE DISTRICT COURT ERRED IN DENYING DICKEY'S APPLICATION FOR LEAVE TO FILE A PETITION FOR WRIT OF QUO WARRANTO AFTER HE SATISFIED ALL THE REQUIREMENTS OF RULE 1.1302

Preservation of Error

The issue of whether the district court erred in denying Dickey's application has been preserved by virtue of his application and motion to reconsider. (App. at 6-9, 26-30).

Standard of Review

The standard of review on the denial of an application for leave to file a quo warranto action is unclear. Ordinarily, appellate review of a motion to dismiss is for correction of errors at law. *Iowa Tel. Ass'n v. City of Hawarden*, 589 N.W.2d 245, 250 (Iowa 1999). Here, the court did not dismiss Dickey's petition. Indeed, the district court denied Dickey leave to file a petition in the first instance.

More importantly, a quo warranto action is expressly "triable by equitable proceedings." Iowa R. Civ. P. 1.1301. And, "[r]eview in equity cases shall be de novo. Iowa R. App. P. 6.907. Because the district court decided the substantive merits of the

case as a matter of law—*even before a petition was filed*—review should be de novo. (App. at 24). Additionally, in reaching the merits of the case, the district court necessarily decided a constitutional question, which further warrants de novo review. *State v. Gaskins*, 866 N.W.2d 1, 5 (Iowa 2015).

Analysis

A. Applicable legal principles

Article V, section 15 of the Iowa Constitution provides:

> Vacancies in the supreme court and district court shall be filled by appointment by the governor from lists of nominees submitted by the appropriate judicial nominating commission. Three nominees shall be submitted for each supreme court vacancy, and two nominees shall be submitted for each district court vacancy. If the governor fails for thirty days to make the appointment, it shall be made from such nominees by the chief justice of the supreme court.

Iowa Const. art. V, § 15. By its plain terms, article V, section 15 vests the governor with use-it-or-lose-it appointment authority for judicial vacancies. That is, the governor has thirty days to appoint one of the nominees designated by the nominating commission. If a vacancy is not filled within thirty days, the appointment authority devolves to the chief justice. In other

words, the governor forever forfeits the authority to fill a judicial vacancy if she does not act within thirty days.

"Generally speaking, title to office can only be tested by proceedings in the nature of quo warranto." *Clark v. Murtagh*, 218 Iowa 71, 74, 254 N.W. 54, 55 (1934) ("quo warranto is a civil action by ordinary proceedings and is the only remedy available to determine the right to a public office"). Iowa Rules of Civil Procedure 1.1301 through 1.1307 govern quo warranto actions and provide in relevant part:

> Rule 1.1301 For what causes. A civil action in the nature of quo warranto, triable by equitable proceedings, may be brought in the name of the state against any defendant who is any of the following:
>
> 1.1301(1) Unlawfully holding or exercising any public office or franchise in Iowa, or an office in any Iowa corporation.
>
> * * *
>
> Rule 1.1302 By whom brought.
> 1.1302(1) The county attorney of the county where the action lies has discretion to bring the action, but must do so when directed by the governor, general assembly or the supreme or district court, unless the county attorney may be a defendant, in which event the attorney general may, and shall when so directed, bring the action.

1.1302(2) If on demand of any citizen of the state, the county attorney fails to bring the action, the attorney general may do so, or such citizen may apply to the court where the action lies for leave to bring it. On leave so granted, and after filing bond for costs in an amount fixed by the court, with sureties approved by the clerk, the citizen may bring the action and prosecute it to completion.

* * *

Rule 1.1304 Petition. The petition shall state the grounds on which the action is brought, and if it involves an office, franchise or right claimed by others than the defendant, it shall name them; and they may be made parties.

Rule 1.1305 Judgment.

1.1305(1) The judgment shall determine all rights and claims of all parties respecting the matters involved, and shall include any provision necessary to enforce their rights as so determined, or to accomplish the objects of the decision.

1.1305(2) The judgment shall also determine which party, if any, is entitled to hold any office in controversy.

1.1305(3) If a party is unlawfully holding or exercising any office, franchise or privilege, or if a corporation has violated the law by which it exists or been guilty of any act or omission which amounts to a surrender or forfeiture of its privileges, the judgment shall remove the party from office or franchise, or forfeit the privilege, and for bid the party to exercise or use any such office, franchise or privilege.

Iowa Rs. Civ. P. 1.1301-.1305. Under the rules, an action to test the right to an office may be brought "for and on behalf of the state" or "by a private person in his relation to the state." *State ex. rel. Adams v. Murray*, 217 Iowa 1091, 1096, 252 N.W. 556, 558 (1934). "Two essential elements" are necessary to commence an action of quo warranto. *Id.* at 1096-97, 252 N.W. at 558. First, the county attorney must refuse to maintain the action. *Id.* Second, the district court must grant a private person leave to bring maintain an action. *Id.*

B. Dickey satisfied the prerequisites under Rule 1.1302 to bring a quo warranto action as a private citizen

The question presented to the district court was whether Dickey satisfied the conditions set forth in Rule 1.1302(2) to permit leave to file a quo warranto action. It is undisputed that he did. For starters, there is no dispute that Dickey was a "citizen of the state." Iowa R. Civ. P. 1.1302(2). Likewise, there is no dispute that he made a formal demand in writing to the Johnson County Attorney to bring a quo warranto action against Bessler, and she refused. (App. at 7. 43-46). Thereafter, Dickey received confirmation that the attorney general would not file a quo

warranto action against Besler. (App. at 7). Because Dickey satisfied all the prerequisites under Rule 1.1302(2), that should have been the end of the matter, and his application should have been granted. Accordingly, the district court committed clear error in denying Dickey's application for leave to file a petition for a writ of quo warranto.

II THE DISTRICT COURT ERRED IN DECIDING THE LEGAL MERITS OF THE CONTROVERSY AS A MATTER OF LAW BEFORE ALLOWING DICKEY LEAVE TO FILE A PETITION FOR A WRIT OF QUO WARRANTO

Preservation of Error

The issue of whether the district court erred in denying Dickey's application has been preserved by virtue of his application and motion to reconsider. (App. at 6-9, 26-30).

Standard of Review

The standard of review is de novo. Iowa R. App. P. 6.907 ("Review in equity cases shall be de novo").

A. The district court's determination of the legal merits without any adversarial development of the factual record was premature

The central flaw in the decision below is that the court decided an issue that was not before it. Rather than simply ruling

on the limited question of whether Dickey should be granted leave to file a petition, the district court adjudicated the legal merits of the case as a matter of law. As far as diligent research can reveal, no Iowa court has ever dismissed an action as a matter of law on substantive grounds *before a party has even filed the petition*.

An application for leave to file a quo warranto action is simply a preliminary step that provides the district court the opportunity to ensure that the private party has given the county attorney the first bite at the apple. It is not a vehicle through which to adjudicate the merits:

> The granting of leave does no more than designate the relator as a person who may lawfully call the defendants into court for the trial of a disputed question of law or fact according to the ordinary course of procedure. *It adjudicates nothing against the defendants.*

State ex rel. Fullerton v. Des Moines City Ry. Co., 135 Iowa 694, 715, 109 N.W. 867, 875 (1906) (emphasis added). Indeed, in this case, Dickey had not yet been allowed to engage in discovery or provided any other opportunity to develop the record. Because, the district court lost sight of these basic principles of procedure governing quo warranto actions, reversal is required.

B. The district court erred by deciding the legal merits as a matter of law at the pre-filing stage

The district court's ruling fails for another reason. In ruling as a matter of law, the district court expressly assumed "[t]he essential facts [were] not disputed." (App. at 23). That assumption is incorrect. Specifically, Dickey does not accept at face value the claim that Governor Reynolds communicated her appointment to her chief of staff in a manner that satisfies the requirements of article V, section 15 of the Iowa Constitution.[3] Nor does he accept that the failure to communicate her appointment was attributable to oversight.

The court below compounds the error by faulting Dickey for not offering any supporting affidavits or requesting "defendant's affiant appear at the hearing so that he could be cross-examined." (App. at 23). Similarly, the Court criticized Dickey for failing to "cite any binding legal authority supporting" his claim that Besler

[3] It is doubtful that the Governor makes an appointment under article V, section 15 simply by communicating her intent to her chief of staff. *See* (App. at 7, 61) ("In practice, the chief justice has always considered a judicial appointment was made when it was communicated to the nominee").

is holding office unlawfully.[4] (App. at 23). The reason Dickey did not call witnesses or exhaustively brief the legal merits is obvious—the issue was not before the court in the context of the application for leave to file a quo warranto action. He can hardly be faulted for failing to show his cards before the hand was even dealt.

In essence, the district court required Dickey to survive summary judgment as a condition to filing his petition. That puts the proverbial cart before the horse. Moreover, there is no procedure under the Iowa Rules of Civil Procedure to allow the district court to issue summary judgment sua sponte. *Zech v. Klemme*, 2011 Iowa App. LEXIS 477 at *15 (Iowa Ct. App. June 29, 2011) (observing that no provision appears in our state rules of civil procedure to allow a court to grant summary judgment on grounds not raised by a party). Even if such procedure did exist, Dickey should have been afforded the "opportunity to make

[4] The district court's observation overlooks the fact that Dickey did cite the text of article V, section 15 of the Iowa Constitution with which Governor Reynolds failed to comply. Not only is the Iowa Constitution *binding,* it is the "supreme law of the land. *McNabb v. Osmundson*, 315 N.W.2d 9, 13 (Iowa 1982).

discovery prior to a hearing and ruling on a motion for summary judgment." *Bitner v. Ottumwa Community Sch. Dist.*, 549 N.W.2d 295, 302 (Iowa 1996). Accordingly, the district court's ruling should be reversed on this ground as well.

III. DICKEY, AS RELATOR FOR THE STATE OF IOWA, HAS STANDING TO BRING THIS QUO WARRANTO ACTION AGAINST BESLER

Preservation of Error

The issue of whether the district court erred in denying Dickey's application has been preserved by virtue of his application and motion to reconsider. *See Meier v. Senecaut*, 641 N.W.2d 532, 537 (Iowa 2002) (observing that post-judgment motion to enlarge preserves error for appeal) (App. at 6-9, 26-30).

Standard of Review

Standing is reviewed for correction of error in the court's application of legal principles. *City of Dubuque v. Iowa Trust*, 519 N.W.2d 786, 789 (Iowa 1994).

A. Rule 1.1302 expressly grants Dickey standing to bring a quo warranto action on behalf of the State of Iowa by virtue of his citizenship

In his resistance to Dickey's application, Besler asserts that Dickey failed to allege "facts to establish he has standing to bring this action on behalf of the state." (App. at 6). The assertion is a little unfair considering that Dickey had not even filed a petition on behalf of the State of Iowa. In any event, the argument overlooks that a quo warranto action is "brought in the name of the state." Iowa R. Civ. P. 1.1301. Dickey merely serves as the prosecutor because the Johnson County Attorney and Iowa Attorney General have declined to bring the action. *Id.* 1.1302(3) ("the citizen may bring the action and prosecute it to completion"). In this regard, the real party at interest is the State of Iowa; not Dickey. It is no different than a county attorney who prosecutes civil and criminal matters in the name of the State of Iowa. *See* Iowa Code § 331.756(1), (2), (5).[5]

[5] If Besler's standing argument is correct, then neither the county attorney, nor the attorney general, could bring a quo warranto action on behalf of the State of Iowa against an officeholder unless he or she had been personally injuriously affected. That is nonsensical.

Even if Dickey is the real party at interest, the quo warranto rule expressly confers "any citizen of the state" with the right to bring a "civil action in the nature of quo warranto." Iowa Rs. Civ. P. 1.1301, 1.1302(2).[6] The plain language of the rule imposes no additional requirement to confer standing. The historical development of the quo warranto cause of action supports this view. As explained in the *Fullerton* decision, quo warranto was previously a statutory cause of action. *Fullerton*, 135 Iowa at 703, 109 N.W. at 871. Notably, the statute provided that "any citizen of the State *having an interest in the question* may apply to the court in which the action is commenced for leave to" proceedings in the nature of quo warranto." *Id.* (citing Iowa Code section 4316)(emphasis added). When the court transferred the quo

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[6] The Iowa Constitution does not contain a case-or-controversy requirement. *Alons v. Iowa Dist. Ct.*, 698 N.W.2d 858, 869 (Iowa 2009). Nonetheless, as a "self-imposed rule of restraint," the Iowa Supreme Court follows the federal doctrine on standing. *Godfrey v. State*, 752 N.W.2d 413, 424 (Iowa 2008). Under federal law, an express grant of standing eliminates the prudential concerns on a court's exercise of jurisdiction. *Raines v. Byrd*, 521 U.S. 811, 820 n.3 (1997). As matter of simple linguistics, it would be odd for the Iowa Supreme Court, by rule, to confer standing to bring a quo warranto action expressly upon "*any citizen* of the state" only to turn around and say a particular citizen does not have standing to bring a quo warranto action.

warranto procedure to the Iowa Rules of Civil Procedure, however, it removed the requirement that the relator have "an interest in the question." *State v. Winneshiek Co-op. Burial Ass'n*, 234 Iowa 1196, 1197-98, 15 N.W.2d 367, 368 (Iowa 1944) (citing Iowa R. Civ. P. 300). Indeed, the position that Besler took in the court below—that Dickey must show some personal interest in the outcome of the litigation—is the dissenting position in *Winneshiek Co-op Burial Ass'n*. *Id.* at 1216, 15 N.W.2d at 377 (Bliss, J., dissenting) ("if it may be said that Rule 300(b) is valid and enforceable, then the term 'any citizen of the state' should be held to mean a citizen 'having an interest in the question involved'").

The Iowa Supreme Court's decision in *Adams*, illustrates this point. In *Adams*, the relator demanded that the county attorney of Harrison County file an action to determine who had the right to hold the office of judge following the death of Honorable J.S. Dewell. *State ex rel. Adams*, 217 Iowa at 1091, 252 N.W.2d at 556. The only qualification identified that allowed Adams to bring the petition was that he "was a citizen of the state of Iowa and a resident of the Fifteenth judicial district." *Id.* The

Court specifically clarified that under the quo warranto statute, "any other citizen" also could have brought a quo warranto action to challenge Judge Dewell's successor. *Id.* 252 N.W. at 558 ("Had the said Roy E. Adams *or any other citizen* desired, under the statute in this state, he could have asked leave of court to have also commenced his action against Judge John P. Tinley Sr.") (emphasis added). From *Adams*, it follows a fortiori that Dickey has standing under Rule 1.1302 to bring his petition for quo warranto in this matter.

B. Dickey has standing as a practicing attorney in the Sixth Judicial District

Dickey also has standing by virtue of the fact that he is an attorney with litigation pending in the Sixth Judicial District. In this way, he is subject to the jurisdiction of Besler in a way that the general public is not. And, if Besler lacks constitutional authority as alleged in the application, then Dickey has suffered an injury different from a member of the public. In the very least, he is at risk of injury—at which point the issue becomes one of ripeness rather than standing.

C. Dickey has standing as a taxpayer

Lastly, Dickey has standing as a taxpayer. The "well-established rule" is that "a taxpayer may maintain an action in his own name to prevent unlawful acts by public officers which would 'increase the amount of taxes he is required to pay, or diminish a fund to which he has contributed.'" *Alons*, 698 N.W.2d at 865 (citing *Polk County v. District Court*, 133 Iowa 710, 715, 110 N.W. 1054, 1055 (1907))(emphasis added). Besler's salary as a district court judge comes from the general fund to which Dickey has contributed with his state income taxes. *See* Iowa Code § 602.1302. Thus, the appointment of Besler as a district court judge is enough to confer taxpayer standing because the payment of his salary has "diminished a fund to which [Dickey has] contributed." *Id.* at 864; *see also Hurd v. Odgaard*, 297 N.W.2d 355, 358 (Iowa 1980) (holding that the plaintiffs had standing to seek to compel repairs of the county courthouse as citizens and taxpayers of the county).

D. The public's interest in resolving the authority of Besler to serve as a district court judge is sufficient to excuse the standing requirement

Alternatively, the standing requirement should be excused because this case involves a question of great public importance and interest in our system of government. In the *Godfrey* decision, the Iowa Supreme Court recognized "a public-policy exception" to the standing requirement to "resolve certain questions of great public importance and interest in our system of government." *Godfrey*, 752 N.W.2d at 413. The exception applies when (1) "litigants are true adversaries;" (2) the "people most concerned with an issue are in fact the litigants to the issue;" and (3) "a real, concrete case exists to enable the court to feel, sense, and properly weigh the actual consequences of its decision." *Id.* All three considerations are present in this case. As a practicing attorney in the Sixth Judicial District, Dickey has as much concern as any potential party in resolving whether Besler is rightfully exercising constitutional authority as a district court judge. In addition, central issue in this litigation is sufficiently crystalized to allow the court to reach an informed decision. On

the whole, therefore, this case presents an issue of "great public importance" worthy of waiving the requirement of standing. *Id.* at 428.

CONCLUSION

The State of Iowa, through Gary Dickey, Jr., asks this Court to reverse the district court's decision and remand with appropriate instructions.

REQUEST FOR ORAL ARGUMENT

The State of Iowa, through Gary Dickey, Jr., requests to be heard in oral argument.

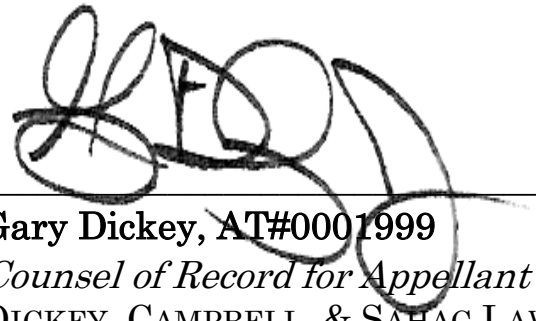
COST CERTIFICATE

I hereby certify that the costs of printing the Appellant's brief was $8.00, and that that amount has been paid in full by me.

CERTIFICATE OF COMPLIANCE

This brief complies with the typeface requirements and the type-volume limitation of Iowa R. App. P. 6.903(1)(*d*) and 6.903(1)(*g*)(1) or (2) because:

> [x] this brief has been prepared in a proportionally spaced typeface using Century in 14 point and contains 4,290 words, excluding the parts of the brief exempted by Iowa R. App. P. 6.903(1)(*g*)(1).



Gary Dickey, AT#0001999
Counsel of Record for Appellant
DICKEY, CAMPBELL, & SAHAG LAW FIRM, PLC
301 East Walnut St., Ste. 1
Des Moines, Iowa 50309
PHONE: (515) 288-5008 FAX: (515) 288-5010
EMAIL: gary@iowajustice.com